No. 124213

IN THE
SUPREME COURT OF ILLINOIS

SHAWNA JOHNSON,	)	On Appeal from the Circuit Court for
	)	the Second Judicial Circuit, Wabash
Petitioner-Appellee,	)	County, Illinois
	)	
v.	)	No. 13 MR 15
	)	
ILLINOIS STATE POLICE,	)	The Honorable
	)	LARRY D. DUNN,
Respondent-Appellant.	)	Judge Presiding.

BRIEF AND APPENDIX OF RESPONDENT-APPELLANT

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NATURE OF THE CASE

Under Illinois's Firearm Owners Identification ("FOID") Act ("Act"), 430 ILCS 65/1 *et seq.* (2016), the Illinois State Police ("ISP") acts on applications for, issues, and revokes FOID cards. On June 24, 2012, ISP revoked Shawna Johnson's FOID card under section 8(n) of the Act, 430 ILCS 65/8(n) (eff. Jan. 1, 2012), because she was convicted of a misdemeanor crime of domestic violence ("MCDV"), and thus prohibited under the Federal Gun Control Act, 18 U.S.C. § 922(g)(9) ("section 922(g)(9)"), from possessing firearms due to her conviction for battery in 2001 for hitting her then-husband.

In August 2013, Johnson, proceeding *pro se*, petitioned the circuit court for relief from ISP's initial decision to revoke her FOID card under section 10 of the Act ("section 10 petition"). *See* 430 ILCS 65/10 (eff. July 9, 2013). After obtaining counsel and twice amending her complaint, Johnson asserted that section 922(g)(9), 430 ILCS 65/8(n), 10(b), and (c)(4) (2016), and 20 Ill. Admin. Code § 1230.20, were unconstitutional as applied to her under the Second and Fourteenth Amendments to the United States Constitution.

Ultimately, the circuit court concluded that those statutory and regulatory provisions violated Johnson's rights under the Second and Fourteenth Amendments as applied to her. It then ordered ISP's Director to issue her a FOID card. ISP appealed directly to this Court pursuant to Illinois Supreme Court Rule 302(a).

ISSUES PRESENTED FOR REVIEW

1. Whether the United States Attorney General is a necessary party in this litigation, and, if so, whether this Court should refrain from deciding the merits of this case unless and until the United States Attorney General is added as a party.

2. Whether section 922(g)(9), and the provisions of the Act and Illinois Administrative Code that rely on it, were constitutional under the Second Amendment as applied to Johnson, who is prohibited from possessing firearms and a FOID card because of an MCDV conviction.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal under Illinois Supreme Court Rule 302(a). The circuit court entered a final judgment on October 9, 2018, concluding that section 922(g)(9), 430 ILCS 65/8(n), 10(b), and (c)(4), and 20 Ill. Admin. Code § 1230.20[1] were unconstitutional as applied to Johnson under the Second and Fourteenth Amendments, and ordered ISP's Director to reissue or reinstate her FOID card. C522-23 (A90-91).[2] ISP filed a notice of appeal directly with this Court on November 1, 2018, C529-56 (A65-92), which was timely under Illinois Supreme Court Rule 303(a) because it was within 30 days of the entry of the circuit court's judgment. Thereafter, this Court retained jurisdiction and ordered the circuit court to make and record findings in compliance with Illinois Supreme Court Rule 18 by December 19, 2018. SUP C6 (A95). On that day, the circuit court certified

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[1] Between the time of ISP's initial FOID Card revocation and this direct appeal, section 922(g)(9), sections 8(n), 10(b) and (c)(4) of the Act, and section 1230.20 of Title 20 of the Illinois Administrative Code have not changed in substance.

[2] The record on appeal contains one common law volume cited as "C__," one volume of supplement to the common law record cited as "SUP C__," and one volume of supplement to the exhibits cited as "SUP E___." The four transcribed hearings should have been separately compiled as a report of proceedings, *see* Ill. Sup. Ct. R. 323, but appear as part of the common law record, C585-912, as follows: November 7, 2013, C585-639; September 2, 2014, C640-707; November 4, 2015, C709-33; and January 20, 2016, C734-912. The appendix to this brief is cited as "A_."

that it already had made findings in compliance with Illinois Supreme Court Rule 18. (A96-7).

STATUTES INVOLVED

Relevant portions of the Federal Gun Control Act, the Act, and the Illinois Administrative Code are included in the appendix to this brief. A106-10.

STATEMENT OF FACTS

Legal Background

The Act mandates that an Illinois resident have a FOID card to possess a firearm in Illinois, and dictates the requirements for obtaining a FOID card. 430 ILCS 65/2(a)(1), 4 (2016). Section 1230.20 of Title 20 of the Illinois Administrative Code further explains the application procedures for obtaining a FOID card. 20 Ill. Admin. Code § 1230.20. It requires ISP "as part of the application process, [to] ask any questions necessary to determine eligibility under State and federal law to possess or receive a firearm, and deny a FOID application of any applicant who is prohibited under federal law from possessing or receiving a firearm." *Id.* § 1230.20(h).

ISP has the authority to deny a FOID card application or revoke a FOID card for a variety of reasons. 430 ILCS 65/8 (2016). Specifically, if a person holds a FOID card, section 8(n) of the Act allows ISP to revoke it if she is "prohibited from acquiring or possessing firearms or firearm ammunition by any Illinois State statute or by federal law." 430 ILCS 65/8(n) (2016).

When a FOID card is revoked because of an MCDV conviction, a federal prohibitor, 18 U.S.C. § 922(g)(9), the person "may petition the circuit court in writing . . . for a hearing upon such denial," 430 ILCS 65/10(a) (2016) (a "section 10 petition"); *see People v. Heitmann*, 2017 IL App (3d) 160527, ¶ 11. When considering a section 10 petition, the circuit court must evaluate the following four requirements in section 10(c) to determine whether to grant

relief and order ISP to issue the person a FOID card. First, whether the individual has been convicted of a "forcible felony under the laws of this State or any other jurisdiction" within 20 years of the FOID card application. 430 ILCS 65/10(c)(1) (2016). Second, "the circumstances regarding a criminal conviction, where applicable, the applicant's criminal history and [her] reputation are such that the applicant will not be likely to act in a manner dangerous to public safety." 430 ILCS 65/10(c)(2) (2016). Third, whether "granting relief would not be contrary to the public interest." 430 ILCS 65/10(c)(3) (2016). And fourth, relevant here, whether "granting relief would not be contrary to federal law." 430 ILCS 65/10(c)(4) (2016).

In addition, during section 10 proceedings, the circuit court holds a hearing to determine if "substantial justice has been done." 430 ILCS 65/10(a), (b) (2016). At the hearing, the parties may present relevant evidence, including about the petitioner's temperament and reputation, as well as her "criminal history and reputation," past convictions, "social responsibility," psychological state, and "relationships with others." *Coram v. State*, 2013 IL 113867, ¶¶ 11-13; *see also Walton v. Ill. State Police*, 2015 IL App (4th) 141055, ¶ 7; *Baumgartner v. Greene Cty. State's Atty's Off.*, 2016 IL App (4th) 150035, ¶¶ 7-15, 19. If the circuit court determines that "substantial justice has not been done," it will order ISP to issue a FOID card. 430 ILCS 65/10(b) (2016). But the court "shall not issue the order" if the

petitioner "is otherwise prohibited from obtaining, possessing, or using a firearm under federal law." 430 ILCS 65/10(b), (c)(4) (2016).

Federal law prohibits those "who ha[ve] been convicted in any court of a misdemeanor crime of domestic violence" from possessing a firearm. 18 U.S.C. § 922(g)(9). An MCDV is defined as an offense that (1) "is a misdemeanor under federal, State or Tribal law," and (2) "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim [.]" *Id.* § 921(a)(33)(A). This offense need not "include, as a discrete element, the existence of a domestic relationship between offender and victim." *United States v. Hayes,* 555 U.S. 415, 421 (2009). Moreover, a state law misdemeanor offense against a domestic relation satisfies the "use of force" standard if one of the elements of the offense is a common-law battery. *United States v. Castleman*, 572 U.S. 157, 176-79 (2014); *see also Voisine v. United States*, 136 S. Ct. 2272, 2278-80 (2016).

There is a limited exception to the federal prohibition on firearm possession for those with an MCDV conviction under 18 U.S.C. § 921(a)(33)(B)(ii) ("section 921(a)(33)(B)(ii) exception"). This applies in one of three enumerated instances: (1) the misdemeanor conviction has been either "expunged, or set aside"; (2) the misdemeanant has been "pardoned"; or (3) the misdemeanant has had "[her] civil rights restored." *Id.* Determining whether a misdemeanant's civil rights have been 'restored" is

based on the law of the convicting jurisdiction. *Beecham v. United States*, 511 U.S. 368, 374 (1994). The civil rights discussed in this exception are the core constitutional civil rights — to vote, hold public office, and serve on a jury. *Logan v. United States*, 552 U.S. 23, 28 (2007); *Heitmann*, 2017 IL App (3d) 160527, ¶ 21. If there has been no revocation of these rights, then there is nothing to restore and so an individual will not qualify for this exception. *See Logan*, 552 U.S. at 28. But if the section 921(a)(33)(B)(ii) exception does apply, a misdemeanor conviction is not an MCDV for purposes of the federal firearm prohibition, meaning that the person can again possess firearms under federal law. *Id.* at 28-29; *United States v. Skoien*, 614 F.3d 638, 642 (7th Cir. 2010).

There is a separate statutory avenue by which an individual may lift her federal firearm prohibition — the "federal safety valve" under 18 U.S.C. § 925(c). Under the federal safety valve, one who is federally prohibited from possessing firearms "may make application to the Attorney General for relief from the disabilities imposed by Federal laws with respect to . . . possession of firearms." *Id.* The Attorney General,[3] then "may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that granting of

[3] The Attorney General has since delegated this power primarily to the Director of the Bureau of Alcohol Tobacco and Firearms. *See United States v. Bean*, 537 U.S. 71, 74 n.2 (2002); *see also* 27 C.F.R. § 178.144 (2002).

the relief would not be contrary to the public interest." *Id.* If denied relief, the applicant "may file a petition with the United States district court in which he resides for judicial review of such denial." *Id.*

Johnson's Case

On March 26, 2001, Johnson was charged with domestic battery for hitting her then-husband Michael Korstick "on the face and head causing bruises and abrasions." C245. On June 7, 2001, she pleaded guilty to misdemeanor battery. C42, 246.

Johnson held a FOID card in June 2012 when she was denied a handgun purchase in Indiana because of her 2001 battery conviction. C335, 801-02. On June 27, 2012, ISP revoked Johnson's FOID card because her battery conviction was an MCDV under section 922(g)(9). SUP E1; 18 U.S.C. § 922(g)(9); 430 ILCS 65/8(n) (eff. Jan. 1, 2012). ISP directed her to immediately return her FOID card. SUP E1. She did not do so. C803-04. On August 1, 2013, ISP directed her to surrender the FOID card to local law enforcement within 48 hours of receiving notice of the revocation. SUP E9. Johnson complied on August 12, 2013. SUP E4.

Three days later, Johnson, proceeding *pro se*, filed a section 10 petition in the circuit court seeking relief from ISP's revocation of her FOID card. C16-23. She named ISP as a respondent and served the local State's Attorney with a copy of her petition. C22-23; *see* 430 ILCS 65/10(a), (b), (c)(0.05) (2016). ISP moved to dismiss the action arguing that Johnson was barred

from possessing a firearm under federal law because of her MCDV conviction for battery. C25, 28-39. At a hearing on that motion, C585-638, the local State's Attorney appeared and stated that she would not "take a position that [was] contrary to the [Illinois] Attorney General's position in this matter," who was counsel for ISP. C588. The circuit court denied ISP's motion to dismiss. C83-87 (A1-5).

ISP then answered Johnson's petition. C88. It contended that under section 10(c)(4) of the Act, 430 ILCS 65/10(c)(4), the circuit court "shall not . . . order" ISP "to issue a FOID card . . . if granting such relief would be contrary to federal law" under section 922(g)(9), as it would be here. C91.

ISP later moved for summary judgment, arguing in part that the circuit court could not grant Johnson relief under the Act. C94-5, 108-09. ISP explained that because Johnson's misdemeanor battery conviction qualified as an MCDV under federal law, she was barred from possessing or owning firearms and ammunition under section 922(g)(9). C106. Thus, she was ineligible for relief under sections 10(b) and (c)(4) of the Act. C108-09.

Johnson, proceeding with counsel, C149, opposed ISP's summary judgment motion, arguing in part that the circuit court could grant her relief from the prohibition on firearm possession caused by her MCDV conviction. C161-68. She also claimed that section 922(g)(9) and the Act were unconstitutional as applied to her because her MCDV conviction permanently barred her from possessing firearms, resulting in an "ongoing ban" of her

"Second Amendment rights, without an available means of restoration." C168-74.

Johnson also submitted an affidavit, stating that she had obtained a restraining order against her then-husband in early March 2001 but withdrew it days later. C191-92. She asserted that she "did not recall striking" her then-husband. C191. She added that the local State's Attorney informed her that her guilty plea to battery would probably not impact her FOID card, and if it did, it would be only for a short time. C192.

In reply, ISP argued that the circuit court could not grant relief because of Johnson's MCDV conviction, given that she could still not possess firearms under federal law. C205-14. ISP also argued that Johnson improperly raised her as-applied constitutional challenge for the first time in response to its summary judgment motion. C215-16.

In September 2014, the circuit court held a hearing on ISP's summary judgment motion, C641-708, and granted Johnson leave to file an amended petition to add her as-applied challenge, C697, 702. Meanwhile, the circuit court took ISP's summary judgment motion under advisement. C674.

The following week, Johnson filed an amended section 10 petition, contending that the "perpetual denial of [her] right to possess and use firearms violate[d her] rights under the Second and Fourteenth Amendments to the United States Constitution and is unconstitutional as-applied." C221-24.

ISP moved to dismiss this amended petition, C227-29, arguing that Johnson failed to allege which statute was unconstitutional as-applied to her, C234. It maintained that Johnson had an MCDV under federal law because of her battery conviction, and was ineligible for relief from the revocation of her FOID card under sections 10(b) and (c)(4) of the Act since she was federally prohibited from possessing firearms. C233-40. ISP later added that *O'Neill v. Dir. of Ill. Dep't of State Police*, 2015 IL App (3d) 140011, and *People v. Frederick*, 2015 IL App (2d) 140540, made clear that the circuit court was barred under the Act from ordering a FOID card to issue to Johnson because of her MCDV conviction. C252-53, 256.

Johnson contended that these decisions did "not control" her petition. C287. She argued that a circuit court has the "express authority" to remove a federal firearm disability caused by an MCDV conviction under the section 921(a)(33)(B)(ii) exception. C288-89. Specifically, Johnson cited *DuPont v. Nashua Police Dep't*, 113 A.3d 239 (N.H. 2015), to argue that she was entitled to relief because her firearm rights had been restored after her conviction. C288. She added that without a ruling in her favor as to her as-applied challenge, she would suffer a "lifetime abridgement [ ] of Second Amendment rights." C291-92.

In November 2015, the circuit court denied ISP's pending motion for summary judgment. C296-317. Relevant here, the court "reject[ed] ISP's claim that granting relief would be contrary to the public interest as a matter

of law" and that "granting relief would be contrary to/violative of federal law." C309 (A19). It found that Johnson had not been convicted of any felony since her 2001 conviction. C296-97 (A6-7). Although it acknowledged that it could not grant Johnson's section 10 petition if doing so "would violate federal law or Illinois state law," it concluded that the section 921(a)(33)(B)(ii) exception applied. C314. It explained that Johnson's rights were "restored" under this exception because she had served two days in county jail and "was given credit for 'time served' in her conditional discharge," meaning that her battery conviction could no longer be a "conviction" under section 922(g)(9) through operation of the section 921(a)(33)(B)(ii) exception. *Id.*

The court then scheduled a section 10(b) evidentiary hearing to ascertain whether Johnson would be likely to act in a manner dangerous to public safety and whether granting her relief would not be contrary to the public interest. C317 (A27); *see* 430 ILCS 65/10(c)(2), (3) (2016). It also gave Johnson "leave to re-plead her constitutional claim when and if such [became] necessary." C316 (A26).

Two days later, the circuit court held a status hearing and granted ISP leave to file a motion to reconsider. C729. It reiterated,

> in the event that the State convinces the Court to reconsider its ruling with respect to the civil rights restored, which I found in favor of Ms. Johnson then as the Court indicated in its ruling, this case may then turn into a Second Amendment as-applied challenge.

C730-31.

The next month, ISP moved to reconsider, arguing that because Johnson was sentenced to "time served" for the days spent in jail awaiting disposition of charges in her 2001 battery case, and because that time could not be considered part of any sentence resulting from a criminal conviction, she had not lost and regained her civil rights, meaning that she could not qualify for the section 921(a)(33)(B)(ii) exception. C320. Johnson did not oppose ISP's reconsideration motion, but noted that *Odle v. Dep't of State Police*, 2015 IL App (5th) 140274 "provided guidance for analyzing as-applied constitutional claims." C323-25.

Three weeks later, the circuit court granted reconsideration, finding that

> under Illinois law, since Ms. Johnson was not sentenced to jail time that she actually served subsequent to her conviction and sentence . . . of conditional discharge, her right to vote was never revoked, and thus, never restored. Therefore Ms. Johnson is not afforded the "civil rights restored" exemption under 18 U.S.C. § 921(a)(33)(B)(ii), and, federal and state law still preclude her from possessing a firearm under 18 U.S.C. § 922(g)(9).

C332 (A33). It added that it was "precluded from ordering ISP to issue a F.O.I.D. card to Mrs. Johnson under state and federal law," *id.*, and granted Johnson "leave to re-plead her Constitutional (Second Amendment ('As Applied')) claim," C332-33 (A33-34).

Johnson filed a second amended section 10 petition, C334-37, contending that ISP should be ordered to reissue her FOID card because

section 922(g)(9), 430 ILCS 65/8(n), 10(b), and (c)(4), and 20 Ill. Admin. Code § 1230.20 were unconstitutional as applied to her under the Second and Fourteenth Amendments. C336-37. In addition, she contended that she was not likely to act in a manner dangerous to public safety because she was well respected in the community, gainfully employed and her misdemeanor offense happened 14 years ago. C335-36. She also explained that she needed a firearm for protection and hunting. *Id.*

ISP moved to dismiss that petition, arguing that Johnson stated no claim that she was perpetually banned from firearm ownership and therefore could not prevail on an as-applied constitutional challenge. C353. Although Johnson was prohibited from possessing a firearm because of her MCDV conviction under section 922(g)(9), C354, 18 U.S.C. § 921(a)(33)(B)(ii) provided several avenues under federal law for a person to remove a federal firearm prohibitor, C353, and Johnson could still seek relief through those avenues. In addition, she did not allege that she had ever sought and was denied a pardon, and so her constitutional challenge was premature. C354.

ISP further argued that the circuit court should reject Johnson's constitutional challenge on the merits because several federal courts have held that section 922(g)(9) was constitutional under the Second Amendment. C355-57 (citing *Skoien*, 614 F.3d at 638; *United States v. Booker*, 644 F.3d 12 (1st Cir. 2011); *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013)). And granting Johnson's as-applied challenge would "swallow" the categorical

prohibition of section 922(g)(9), because "nearly any individual subject to the prohibition could be entitled to put on evidence of their good character and unlikeness to reoffend." C357.

Johnson responded that she adequately alleged a constitutional violation and was under a perpetual ban on firearm possession because of her MCDV conviction. C361-62. She contended that based on *Odle*, the circuit court was required to consider her as-applied challenge, *see* C363-64, and that federal cases had allowed as-applied challenges, C366. Johnson attached to her response the 2015 letter from the Governor denying her a pardon, C369, presumably for her March 2001 battery conviction.

In January 2016, the circuit court denied ISP's motion to dismiss. C370-74 (A35-39). The same day, it held an evidentiary hearing on Johnson's as-applied challenge. C734-911. At the outset, the court took judicial notice of *Korstick v. Korstick*, 2001 OP 5 (Johnson's 2001 order of protection case against Michael), *People v. Korstick*, 2001 CM 31 (March 2001 case for Michael battering Johnson), and *People v. Korstick*, 2001 CM 56 (March 2001 case for Johnson battering Michael), and had each case file brought before it. C754.

The court then proceeded to hear evidence. C755. Johnson, C785-821, and her current husband, James "Jimmy" Johnson, C896-907, testified, along with several community law enforcement personnel who knew Johnson personally.

Johnson married Michael in 1981 when she was 24; they divorced in 1990 or 1991; remarried in 1998; and divorced again in 2008. C787, 819. Johnson, Jimmy, and Michael worked together at a car dealership. C897-98. Both Johnson and Jimmy thought that Michael was aggressive and abusive. C789, 897-98. Johnson called the police to intervene four or five times during her first marriage to Michael. C788. In March 2001, Johnson obtained an order of protection against Michael after he hit her in the nose. C789. Days later, Johnson had that protective order dissolved because working with Michael made the terms difficult to adhere to. C790.

A few weeks later, Johnson went to a party; when Michael arrived, he was "abusive" and shoved her "out [the] [ ] door." C791. Johnson agreed to let another man give her a ride home, and Michael attempted to stop them. *Id.* Johnson did not remember hitting Michael. *Id.* The next day, she was arrested and charged with domestic battery. *Id.*; C71. Johnson claimed that at the police station, Michael told officers that "he didn't want [her] arrested" and asked that they "not press charges." C793. The officer told him "no, that it was up to the State's Attorney, that he wanted to teach [her] a lesson." *Id.* According to Johnson, who was not offered a public defender, she pleaded guilty to battery so that she could keep her job. C794-95. She received a sentence of conditional discharge, and the offense was discharged in 2008. C797.

Johnson also admitted that she "smacked" her child's babysitter in 1991. C818. She pleaded guilty to battery for that incident and paid a $1.00 fine. *Id.* She had not been arrested or convicted of any criminal offenses, apart from "seatbelt tickets," since 2001. C816-17.

Johnson and Jimmy married in 2009. C799, 900. Johnson reapplied for a FOID card in 2010, which was the one that ISP revoked. C799. On the 2010 FOID card application, she answered "no," at Sheriff Joe Keeling's advice, to the question of whether she had been convicted of a crime of domestic violence. C800. Keeling told her that she had been convicted of battery, not domestic battery, which was not an MCDV. *Id.*

Johnson asked for a pardon for her battery conviction in 2012, "before [she] found out that [her] FOID card had been revoked." C815. She did not receive it. C815; SUP E5. In July 2012, while attempting to buy a handgun in Indiana, a federally licensed firearms dealer told her that her FOID card had been revoked. C801. On July 27, 2012, ISP revoked her FOID card because of her battery conviction. C803; SUP E1. Thereafter, she "put [her] FOID card in an envelope and put a stamp on it and thought [she] mailed it" back to ISP. C803. Johnson "later [ ] found out" that she had not mailed her FOID card back to ISP and that the envelope containing it was misplaced in a box. C804.

On August 1, 2013, ISP informed Johnson that she needed to surrender her FOID card to local law enforcement within 48 hours of

receiving notice of the revocation. SUP E3; C807. She then retrieved her FOID card from her safekeeping box and took it to her local sheriff's office. C808, 811-12; SUP E4. Johnson and Jimmy testified that Jimmy took possession of her firearms, changed the lock on their gun cabinet safe, and kept the key. C810, 901. Johnson said that she was a responsible person and would not use a firearm to harm anyone. C820.

Jimmy testified that he currently worked for a construction company, and owned a mechanic shop at his home where he worked on personal and fleet vehicles for local law enforcement personnel. C898-99. He also had an Illinois Concealed Carry License and owned firearms. C901. Jimmy said that Johnson had not struck him and he did not fear her possessing a firearm. C904.

Johnson also had five current and former local police officers, whom she knew personally, testify: retired police officer Larry Blaize, C755-81; Sergeant Michael McWilliams, 831-34; Wabash County Deputy Sheriff D-Ray Etzkorn, C834-46; Former Wabash County Sheriff Joe Keeling, C848-68; and Mt. Carmel Chief of Police John Lockhart, C869-96. Each had known Johnson for many years either as a member of the community or from her time at the car dealership, C771, 758, 824, 851, and many had Jimmy provide them with vehicle maintenance, C824, 851, 771, 758. Each thought that Johnson had good character and was well respected in the community. C779, 826-27, 839-41, 856, 858, 860, 863, 894. They all thought that Michael was

aggressive, abusive, and agitated. C826, 836-37, 856, 884. Lockhart noted that Michael was often intoxicated. C884.

Blaize befriended Johnson after she married Jimmy. C758, 771. In 2008, Blaize went shooting with Johnson, C763, 775, and has allowed her to shoot his firearms, C762, where he said she exhibited firearm safety, C762-63.

Lockhart knew Johnson as a neighbor and was the police officer who responded to a domestic situation at her home in February 2001. C870. He said that when he responded, Johnson had a bloody nose. C883. The circuit court admitted Lockhart's written arrest narratives from the February 2001 domestic violence incident, *id.*; SUP E6, and the March 2001 incident that led to Johnson's battery conviction, C890-91; SUP E7.

In post-hearing supplemental briefing, Johnson, citing to *Odle*, maintained that ISP's revocation was unconstitutional as applied to her. C416-17. She argued that she fell "outside the rationales and justifications that justify disarming domestic violence misdemeanants," under section 922(g)(9), C13, noting that 15 years had passed since her MCDV, during which time she had been well-respected in the community, law abiding, and had never been charged with a felony, C14-20. She maintained that "no relief [was] actually available" for her to remove the firearm prohibition caused by her MCDV conviction because she could not qualify for a section 921(a)(33)(B)(ii) exception or apply for relief under the federal safety valve because it was unfunded. C421-22.

ISP responded that Johnson was not entitled to relief from the firearm prohibition caused by her MCDV conviction. C429-31. It noted that section 922(g)(9), in concert with the Act, was not unconstitutional as applied to her, as numerous federal courts applying intermediate scrutiny had found it to be constitutional under the Second Amendment. *Id.*

ISP added that Johnson's character witnesses did not socialize with her or have first-hand knowledge of her home life and that she had not "distinguish[ed] herself from other[s] subject to the prohibition for misdemeanants who committed domestic battery." C432. It pointed out that Johnson had not put forth sufficient evidence to establish that 15 years since her conviction equated to a reduced risk of recidivism. C431-32. It contended that Johnson was "unable to deny the allegation" that she "struck her husband in the event leading to her battery conviction." C432.

Johnson replied, C435-78, arguing that her evidentiary submissions had distinguished her "from the core rationales of the 922(g)(9) prohibition," C436. She contended that there was "little doubt" that she was one of the "law abiding individuals who lie at the core of the Second Amendment's protection" who was entitled to possess firearms since 15 years had passed since her MCDV conviction. C444, 456-57. She maintained that section 922(g)(9) "effectively operate[d] as a ban to virtually everyone subject it." C438-40.

In its sur-reply, C479-488, ISP maintained that intermediate scrutiny applied to Johnson's as-applied challenge, C484-85, and that her evidence did not rebut the justification for section 922(g)(9) that every federal circuit court had accepted, including the Ninth Circuit in *Chovan,* 735 F.3d 1127, C486. In addition, even if Johnson could maintain her as-applied challenge, she presented no evidence to rebut federally-supported evidence that "individuals who commit domestic violence are highly likely to do so again." C487. ISP pointed out that Johnson provided no evidence that she had not reoffended since her domestic violence conviction, nor did she offer "reliable reasons to believe that she will not do so." *Id.*

On October 19, 2018, the circuit court granted Johnson relief, concluding that section 922(g)(9), sections 8(n), 10(b), and 10(c)(4) of the Act, and 20 Ill. Admin. Code § 1230.20 were unconstitutional as applied to her under the Second and Fourteenth Amendments. C499-523 (A40-64).

It implicitly concluded that Johnson was federally prohibited from firearm possession. *See* C509 (A50). It explained that none of the exceptions in section 922(g)(9) or 18 U.S.C. § 921(a)(33)(B)(ii) applied to Johnson, and that after the 2013 amendments to the Act, adding section 10(c)(4), it could no longer order issuance of the FOID card "when the defendant/applicant was convicted of [a] crime involving domestic violence and if the defendant/applicant possessing firearms would violate federal law." C509, 512 (A50, 53).

The court then proceeded to the constitutional issue. *See* C516 (A57). It concluded that Johnson's "'as-applied' challenge [was] not only 'ripe,' but . . . should bear fruit," for "short of a constitutional as-applied challenge, [she] would be perpetually precluded under federal and state law from possessing a firearm. *Id.;* C517 (A58). The court "fully adopt[ed] the analysis, including both the recitation of facts and the application of law in Petitioner's supplemental briefing filed herein on March 24, 2015," even though no such brief existed.[4] *See id.* It stated that it

> believe[d] the analysis of Petitioner's counsel in such Supplemental Briefing is "spot-on" with regard to the discussion about how Shawna Johnson's situation [should be] considered in light of the factors under 430 ILCS 65/10(c) and especially with regard to the Petitioner's "as applied" challenge to the federal and state statutes at issue.

Id. It found that "[b]ut for 18 U.S.C. Sect. 922(g)(3)" — presumably section 922(g)(9) — "Petitioner . . . would be eligible to have her FOID Card reinstated under 430 ILCS 65/10(c)," given the circumstances of her battery conviction and her short criminal history record with no felonies, combined with the fact that "five (5) current and former local law enforcement officers - from all levels (City, County and State) — all testified [to] Shawna Johnson's impeccable and impressive reputation in the community." C518-19 (A59-60).

The circuit court further found that Johnson had "led a law abiding life for an extended period of time such that ISP's revocation of her FOID card

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[4] Johnson filed no supplemental brief on March 24, 2015. Presumably, the court was referring to the supplemental briefs filed on March 14, 2016, C411-22, or April 25, 2016, C435-61.

and the State and Federal Statutes upon which such revocation is based are unconstitutional as applied" to her. C519 (A60). It added: "Johnson and her counsel have presented other important facts which distinguish [her] and her circumstances from Others Historically barred from Second Amendment Protections Due to Domestic Violence Convictions." C519-20 (A60-61). It stated that Johnson had "previously (even after her two battery convictions) and legally had a FOID card and possessed and used firearms and ammunitions" and was told at the time of her battery conviction that she should be able to have her FOID card restored in five years. C520 (A61). It added that she was not represented by counsel when she was convicted of battery in 2001, but acknowledged that "the Wabash County Circuit Court apparently found that Ms. Johnson made a knowing and voluntary waiver of her rights to counsel and to trial when she pled guilty to battery and received conditional discharge." *Id.* And it recalled that the local State's Attorney did not object to Johnson's section 10 petition. *Id.*

Ultimately, the circuit court found it "hard to imagine a case and a set of facts where a Petitioner convicted of a (domestic violence) battery would be more deserving than Shawna Johnson of having her FOID card and her right to possess a firearm restored." C521 (A62). It added that Johnson's battery did not involve a firearm, explaining that

> even in that ("domestic") battery, Shawna Johnson was not the aggressor or the abuser. She was actually the victim in and of her own crime. She was the victim on that night in March of 2001. She was fighting-off and trying to flee from her abuser, Michael Korstick. She

> was also the victim of a cursory (at best) investigation following the incident. Shawna Johnson and other witnesses weren't even interviewed, and the "victim" had even asked to have the charges dropped.

Id. It concluded: "Shawna Johnson continues to be the victim of that crime and an intricate system of federal and state statutes that perpetually deny her a FOID card and the use of firearms even though she — as a long-time domestic violence victim and not an abuser — is precisely NOT the type of person who those laws were meant to bar from owning and possessing firearms." C522 (A63) (emphasis in original).

"SUBSTANTIAL JUSTICE HAS NOT BEEN DONE," the court reiterated, C522 (emphasis in original), before concluding that section 922(g)(9), sections 8(n), 10(b), and (c)(4) of the Act, and 20 Ill. Admin. Code § 1230.20 "violate[d] Shawna Johnson's rights under the Second and Fourteenth Amendments to the Constitution of the United States" as applied to her. C522-23 (A63-64). It ordered ISP's Director to "reinstate and reissue" Johnson a FOID card. C523 (A64).

ISP appealed directly to this Court. C529-30 (AT App. A65-66).

ARGUMENT

Although Johnson is prohibited from possessing firearms and a FOID card because of her MCDV conviction, the circuit court impermissibly granted her relief. This error was two-fold. First, a necessary party — the United States Attorney General — who has the authority to grant relief under the federal safety valve and who has an interest in the constitutionality of the Federal Gun Control Act, was not made a party to this litigation. This Court, therefore, should refrain from considering Johnson's constitutional claim unless and until he is named as a party and supplemental briefing has occurred.

Second, seven federal circuit courts have held that section 922(g)(9) is constitutional, both facially and as applied. If this Court reaches the merits of Johnson's as-applied challenge, it should reverse the circuit court's judgment and join with these courts in holding that section 922(g)(9) does not violate the Second Amendment. More specifically, this Court should follow the Sixth and Ninth Circuits and hold that, contrary to Johnson's position and the circuit court's conclusion below, the "passage of time" and lack of recidivism do not provide a basis for an as-applied challenge to section 922(g)(9).

I. The United States Attorney General is a necessary party to Johnson's action without whom this Court cannot fully consider her request for relief.

This case hinges on the interpretation and application of section 922(g)(9), a federal statute. Given that, Johnson should have joined the

United States Attorney General as a necessary party to this case. Because federal law prohibits Johnson from possessing firearms, only the Attorney General could grant her relief under the statutory federal safety valve. Because of that, this Court is unable to fully consider Johnson's as-applied challenge without the United States Attorney General being a party to this action, and should decline to rule on the merits of that challenge unless and until the Attorney General is added as a necessary party and there is supplemental briefing.

A. Johnson is barred from possessing a firearm under federal law because of her MCDV conviction and, in turn, cannot have a FOID card under the Act.

Johnson's battery conviction was an MCDV under federal law, and so she is federally prohibited from possessing a firearm. *See* 18 U.S.C. § 922(g)(9). Johnson pleaded guilty to battery in 2001. C246. At that time, this offense required a person to "intentionally or knowingly without legal justification and by any means (1) cause [ ] bodily harm to an individual or (2) make[] physical contact of an insulting or provoking nature with an individual." 720 ILCS 5/12-3 (2000). That offense involves physical contact, thus satisfying the "use of force" requirement for an MCDV. *See Castleman*, 572 U.S. at 176-79; *Voisine*, 136 S. Ct. at 2281. And she committed the offense against her then-husband, C71, a domestic relation, *see Hayes*, 555 U.S. at 421.

Johnson does not qualify for the section 921(a)(33)(B)(ii) exception and so her federal prohibitor is not removed by that statutory mechanism. As explained, *see supra* pp. 8-9, this exception provides that an MCDV conviction is not a conviction under section 922(g)(9) if the misdemeanant has had that MCDV conviction "expunged, or set aside," or if she has been "pardoned," or has "had [her] civil rights restored." 18 U.S.C. § 921(a)(33)(B)(ii). Johnson has not obtained a pardon for her battery offense, C369, and Illinois does not allow expungement for those with batteries that are domestic in nature, *see* 20 ILCS 2630/5.2 (2016).

Moreover, Johnson lost no core civil rights as a result of her misdemeanor conviction, and so her civil rights have not been (and could not be) restored. *See Heitmann*, 2017 IL App (3d) 160527, ¶ 27. The "civil rights" discussed in the section 921(a)(33)(B)(ii) exception are the three core *constitutional* civil rights — to vote, hold public office, and serve on a jury. *Id.* ¶ 21; *Logan*, 552 U.S. at 23. In Illinois, only felons lose the constitutional right to hold an office created by the Illinois Constitution, Ill. Const. art. XIII, § 1, and only those imprisoned after a conviction lose the right to vote, Ill. Const. art. III, § 2. These rights are restored upon completion of either the term of imprisonment or sentence. *See Coram*, 2013 IL 11387, ¶ 18; *Baumgartner*, 2016 IL App (4th) 1500035, ¶ 49; Ill. Const. art. III, § 2; 730 ILCS 5/5-5-5(b) (2016).

But as a misdemeanant who did not serve time in jail following her conviction, Johnson lost no core civil rights. Indeed, the "the words 'civil rights restored'" in section 921(a)(33)(B)(ii) "do[es] not cover the case of an offender who lost no civil rights," *Heitmann*, 2017 IL App (3d) 160527, ¶ 27, and so that exception does not apply to Johnson.

In addition, the circuit court here lacked the authority to remove Johnson's federal prohibitor. In *Coram*, a majority of this Court concluded that the amendments to the Act that added sections 10(b) and (c)(4) — and here applicable to Johnson — removed the circuit court's ability to grant any relief where federal law prohibits the petitioner from possessing a firearm. *See* 2013 IL 113867, ¶¶ 101, 124 (Burke, J., and Freeman, J., specially concurring; Theis, J., and Garman, J., dissenting). Thus, a four-justice majority in *Coram* concluded that the 2013 amendments to the Act prevented a circuit court from directing ISP to issue a FOID card when the petitioner was prohibited from possessing a firearm under federal law; and that majority's holding is the holding of this Court on the issue. *See People v. Lampitok*, 207 Ill. 2d 231, 238 (2003); *see also Heitmann*, 2017 IL App (3d) 160527, ¶ 14; *In re Bailey*, 2016 IL App (5th) 140586, ¶ 16; *Walton*, 2015 IL App (4th) 141055, ¶¶ 23, 25; *Frederick*, 2015 IL App (2d) 140540, ¶ 32; *Odle*, 2015 IL App (5th) 140274, ¶ 33; *O'Neill*, 2015 IL App (3d) 140011, ¶ 31.

In sum, because Johnson had no core civil rights revoked and restored because of her misdemeanor battery conviction, and has not obtained a

pardon or expungement for this offense, her conviction remains an MCDV. As such, she cannot possess firearms under federal law. And the circuit court had no authority to remove her federal prohibitor. Ordering ISP to grant Johnson a FOID card, then, would be "contrary to federal law," 430 ILCS 65/10(b), (c)(4) (2016); *see, e.g., Heitmann*, 2017 IL App (3d) 160527, ¶¶ 14-15, and so the Act prohibits her from having a FOID card.

B. The United States Attorney General is a necessary party in this case.

Currently, Johnson's MCDV conviction prevents her from possessing firearms under federal law, *see* 18 U.S.C. § 922(g)(9), as no section 921(a)(33)(B)(ii) exception applies, *see* 18 U.S.C. § 921(a)(33)(B)(ii); C369. Johnson still could have sought relief through the federal safety valve, 18 U.S.C. § 925(c), however, and so she should have added the United States Attorney General to this lawsuit, as only he can grant her that relief.

In Illinois, if a "complete determination of a controversy cannot be had without the presence of other parties, the court may direct them to be brought in." 735 ILCS 5/2-406 (2016). Necessary parties are those whose "participation is required to: (1) protect its interest in the subject matter . . . which would be materially affected by a judgment entered its in absence; (2) reach a decision protecting interests of parties already before the court; or (3) "allow the court to completely resolve the controversy." *Zurich Ins. Co. v. Baxter Int'l, Inc.*, 275 Ill. App. 3d 30, 37 (2d Dist. 1995).

A party may raise the issue of the absence of a necessary party at any time, including on appeal. *Georgeoff v. Spencer*, 400 Ill. 300, 302 (1948); *Emalfarb v. Krater*, 266 Ill. App. 3d 243, 248 (2d Dist. 1994). The rule to add a necessary party is "inflexible," and this Court "should not proceed further in the matter until the omission has been corrected." *Oglesby v. Springfield Marine Bank*, 385 Ill. 414, 423 (1944). This ensures that all persons who are "legally or beneficially interested in the subject matter and result of the suit" are made parties. *Texas Co. v. Hollingsworth*, 375 Ill. 536, 544 (1941). A necessary party should be added to the litigation if the party's "interest in the litigation [is] so interconnected with the appearing parties' interests that the presence of the absent party is absolutely necessary." *Allied Am. Ins. Co. v. Ayala*, 247 Ill. App. 3d 538, 544 (2d Dist. 1993).

Johnson's federal firearms disability is not caused by the Act or the Illinois Administrative Code. Instead, federal law, specifically section 922(g)(9), bars Johnson from firearm possession. And no matter which State in which Johnson may live or visit, she will continue to be barred from possessing firearms by operation of federal law. Accordingly, the United States Attorney General is a necessary party because at this point only he can grant Johnson the relief that she seeks — to be able to legally possess a firearm under federal law.

The United States Attorney General is charged with evaluating applications for relief under the federal safety valve, which would allow

Johnson a way to remove her federal firearm prohibitor. 18 U.S.C. § 925(c); *see supra* pp. 9-10. Adding him as a necessary party in this case then, will ensure that this Court could, if necessary, provide full relief — *i.e.,* removal of the federal prohibitor on firearm possession, so that Johnson would no longer be prohibited from possessing firearms under federal law, which would then mean she could possess a FOID card as it would not be "contrary to federal law" under sections 10(b) and (c)(4) of the Act. *See Zurich Ins. Co.*, 275 Ill. App. 3d at 37. For even if Johnson somehow obtained a FOID card in this case, without the Attorney General's involvement, she would still be subjected to the bar on firearm possession under section 922(g)(9), thereby preventing her from firearm possession and purchase in Illinois and in other States.

In addition, only the United States Attorney General has the authority to advance the interests of the United States in a court action. *See* 28 U.S.C. § 517. Here, he has the special interest in defending the constitutionality of section 922(g)(9), a statute that effects not only firearm possession under federal law, but also federal sentencing enhancements under the Armed Career Criminal Act. *See* 18 U.S.C. § 924(e)(1). In addition, the federal safety valve program has been unfunded since the 1990s, *see Coram*, 2013 IL 113867, ¶¶ 35, 38; Carly Lagrotteria, *Heller's Collateral Damage: As-Applied Challenges to the Felon-in-Possession Prohibition*, 86 Fordham L. Rev. 1963, 1971 (2018), and only the Attorney General can speak about the effect the underfunding has on Johnson's ability to possess firearms under federal law.

Accordingly, this Court should refrain from continuing proceedings here unless and until the United States Attorney General has been added as a necessary party on appeal, and the United States Attorney General and the parties have had an opportunity to submit supplemental briefing on the United States Attorney General's position in this case. *See Georgeoff*, 400 Ill. at 302.

II. Should this Court reach the merits of the circuit court's decision, the issue presented is narrow.

If this Court were to conclude that the United States Attorney General is not a necessary party to this case, the issue becomes whether section 922(g)(9) — and the provisions of the Act and Illinois Administrative Code incorporating and applying that federal statute — were constitutional as applied to Johnson under the Second and Fourteenth Amendments. They were, and so this Court should reverse the circuit court's judgment.

Before the circuit court, Johnson attempted to have section 922(g)(9), sections 8(n), 10(b), and (c)(4) of the Act, and 20 Ill. Admin. Code § 1230.20 in its entirety held unconstitutional as applied to her. C336-37. But within 20 Ill. Admin. Code § 1230.20, only subsection (h) deals with the application of section 922(g)(9). This provision requires ISP as part of the FOID card application process to "ask any questions necessary to determine eligibility under State and federal law to possess or receive a firearm, and deny a FOID Application of any applicant who is prohibited under federal law from possessing or receiving a firearm." *Id.* All other parts of 20 Ill. Admin. Code

§ 1230.20 — like those discussing licensing of permanent military members in Illinois, Illinois law enforcement, or nonimmigrant visa applicants, *id.* § 1230.20(e)-(g); paying an application fee, *id.* § 1230.20(b); or providing a photograph, *id.* — are either inapplicable to Johnson or do not incorporate section 922(g)(9). The circuit court thus erred in finding that 20 Ill. Admin. Code § 1230.20 in its entirety was unconstitutional as applied to Johnson, rather than limiting its order to the specific subsection of that regulation that references section 922(g)(9) and provisions of federal law, *i.e.,* 20 Ill. Admin. Code § 1230.20(h). Accordingly, only the constitutionality of 20 Ill. Admin. Code § 1230.20(h) should be considered by this Court.

In addition, this Court should not consider whether these statutes or regulations are unconstitutional under the Fourteenth Amendment as applied to Johnson, for that issue is not properly before it. While Johnson generally cited to the Fourteenth Amendment for relief in the circuit court, *see* C336-37, she made no argument that included procedural or substantive due process, so there was no basis presented to or articulated by the circuit court in its cursory conclusion that the provisions violated the Fourteenth Amendment as applied to Johnson, C522 (A63). Thus, to the extent that Johnson would seek to raise a substantive or procedural due process claim under the Fourteenth Amendment before this Court, it should find these arguments forfeited because they were not developed in the circuit court. *See Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996).

To the extent that the references to the Fourteenth Amendment were because the Second Amendment was incorporated to the States through that amendment, *see McDonald v. City of Chi.*, 561 U.S. 742, 791 (2010), that was proper. Thus, this brief focuses only on Johnson's as-applied Second Amendment challenge to section 922(g)(9), and the provisions of the Act, 430 ILCS 65/8(n), 10(b), (c)(4) (2016), and Administrative Code, 20 Ill. Admin. Code § 1230.20(h), that apply this federal statute.

III. Section 922(g)(9) does not violate the Second Amendment, nor do the provisions of the Act or Administrative Code that incorporate it.

The circuit court's order concluding that section 922(g)(9) and the sections of the Act and Illinois Administrative Code incorporating and applying it, violate the Second Amendment as applied to Johnson should be reversed. Federal courts have held that section 922(g)(9) is constitutional. In fact, no federal circuit court has accepted the position that Johnson advanced and the circuit court adopted in its holding here. There is no basis for this Court to deviate from the persuasive authority of these federal circuit courts.

A. This Court reviews the constitutional issue before it *de novo*.

This Court reviews the constitutionality of a statute, a legal question, *de novo*. *People v. Plank*, 2018 IL 122202, ¶ 10. Statutes are presumed to be constitutional and this Court construes them as such whenever "reasonably possible." *People v. Ligon*, 2016 IL 118023, ¶ 11. For an as-applied challenge, this Court must consider the challenging party's particular facts and

circumstances to determine if the statute's application in a particular context is unconstitutional. *People v. Gray,* 2017 IL 120958, ¶ 58.

B. This Court should follow the federal courts that unanimously have upheld the constitutionality of section 922(g)(9) under the Second Amendment.

The seven federal circuit courts to consider the question presented here have held section 922(g)(9) constitutional under the Second Amendment, both facially and as applied. *Stimmel v. Sessions*, 879 F.3d 198 (6th Cir. 2018); *Chovan*, 735 F.3d at 1127; *United States v. Staten*, 666 F.3d 154 (4th Cir. 2011); *Booker*, 644 F.3d at 12; *Skoien*, 614 F.3d at 638; *United States v. White*, 593 F.3d 1199 (11th Cir. 2010); *In re United States*, 578 F.3d 1195 (10th Cir. 2009). There is no basis to conclude otherwise here.

Although federal appellate court decisions are "persuasive but not binding in the absence of a decision of the United States Supreme Court," the outcome here hinges on federal law, and this Court has recognized "the importance of maintaining a uniform body of law in interpreting federal statutes if the federal courts are not split on an issue." *State Bank of Cherry v. CGB Enters., Inc.,* 2013 IL 113836, ¶ 34. Thus, when faced with a challenge to the constitutionality of a federal statute this Court "generally follow[s] the decisions of federal courts to ensure that the statutory scheme is uniformly applied," *Wilson v. Norfolk & Western Ry. Co.*, 187 Ill. 2d 369, 374 (1999), and gives "considerable weight" to federal court decisions concerning the statute's constitutionality, *Bowman v. Am. River Transp. Co.*, 217 Ill. 2d 75, 91 (2005).

Both this Court and federal courts employ the same two-step test to determine whether a statute violates the Second Amendment as applied to an individual. *See In re Jordan G.*, 2015 IL 116834, ¶ 22; *see also Stimmel*, 879 F.3d at 204; *Chovan*, 735 F.3d at 1136-38; *Staten*, 666 F.43d at 159-60. First, they ask whether the challenged law "imposes a burden on conduct understood to be within the scope of the second amendment's protection at the time of ratification." *Jordan G.*, 2015 IL 116834 ¶ 22; *accord Fisher v. Kealoha,* 855 F.3d 1067, 1070 (9th Cir. 2017); *Stimmel*, 879 F.3d at 204. If the regulated activity is "categorically unprotected" under the Second Amendment, the analysis "can stop there," and the regulated activity is "not subject to further Second Amendment review." *Stimmel*, 879 F.3d at 204; *Staten*, 666 F.3d at 159; *accord Jordan G.*, 2015 IL 116834, ¶ 22. But if evidence on this point is "inconclusive" or suggests that the regulated activity is categorially protected, then courts proceed to the second step to look "into the strength of the government's justification for restricting or regulating the exercise of Second Amendment rights," applying intermediate scrutiny. *Stimmel*, 879 F.3d at 204; *Chovan*, 735 F.3d at 1138-39; *accord People v. Chairez*, 2018 IL 121417, ¶¶ 49-50.

Neither element was met here. To begin, Johnson, as a person with an MCDV conviction, is outside the group of persons the Second Amendment protects. And in any event, Section 922(g)(9) passes constitutional muster under intermediate scrutiny.

1. Those with MCDV convictions fall outside of the Second Amendment's protections.

Section 922(g)(9), which prohibits those with an MCDV conviction from possessing firearms, does not implicate the Second Amendment's protection of "the right of law-abiding, responsible citizens to use arms." *Dist. of Columbia v. Heller*, 554 U.S. 570, 635 (2008). Historically, the government has disarmed those who were dangerous because of a conviction for a serious crime. *See Booker*, 644 F.3d at 23-24. Section 922(g)(9), is "historically and practically, a corollary outgrowth of the federal felon disqualification statute." *Id.* at 24.

Keeping firearms out of the hands of dangerous citizens who had committed crimes and were not peaceful is a longstanding concept. *See Skoien*, 614 F.3d at 640. For example, as the Supreme Court in *Heller* recognized, the "highly influential" "precursor" to the Second Amendment — the "Address and Reasons of Dissent of the Minority of the Conviction of the State of Pennsylvania to Their Constituents" — provided that "citizens have a personal right to bear arms 'unless for crimes committed, or real danger of public injury.'" *Id.* (quoting *Heller*, 128 S. Ct. at 2804 (noting Report reprinted in Bernard Schwartz, *The Bill of Rights: A Documentary History*, 662, 665 (1971)). And Samuel Adams, a founding father, emphasized that the Second Amendment should never be construed to authorize Congress to prevent "'*peaceable* citizens [ ] from keeping their own arms[.]'" *Stimmel*, 879 F.3d at 204 (emphasis added).

Even though today's "exclusions need not mirror limits that were on the books" during the founding era or at the time of the ratification of the Fourteenth Amendment, *Skoien*, 614 F.3d at 641, section 922(g)(9) "fits comfortably among the categories of regulations that *Heller* suggested would be 'presumptively lawful,'" *Booker*, 644 F.3d at 24 (quoting *Heller*, 554 U.S. at 627 n.26). Those who fall under section 922(g)(9) are demonstrably neither law abiding nor peaceful. In fact, Congress enacted section 922(g)(9) to close the loophole created by existing felon-in-possession laws, which allowed domestic abusers to keep firearms as their crimes were underreported and undercharged. *See Skoien*, 614 F.3d at 643 (citing 142 Cong. Rec. 22985, 22986 (statements of Sen. Lautenberg). Indeed, this reinforces the longstanding notion that firearm possession was reserved only for peaceful citizens.

As those who are unable to possess firearms under section 922(g)(9) fall outside of Second Amendment protection, this Court should end the constitutional inquiry here. *See Jordan G.*, 2015 IL 116834, ¶ 22; *see also Stimmel*, 879 F.3d at 204. But if this Court disagrees, it should proceed to the second part of its Second Amendment test — intermediate scrutiny. Applying that inquiry, every federal circuit court to consider the question has concluded that section 922(g)(9) passes constitutional muster, and this Court should do the same.

2. After applying intermediate scrutiny, every federal circuit court has concluded that Section 922(g)(9) does not violate the Second Amendment, both facially and as applied.

Applying intermediate scrutiny, section 922(g)(9) is constitutional under the Second Amendment, given the government's substantial interest in stopping gun violence and preventing domestic abusers from possessing firearms. *See, e.g., Stimmel*, 879 F.3d at 206; *Skoien*, 614 F.3d at 201-02. Intermediate scrutiny requires the government to first establish a "significant, substantial, or important objective," and second, "a reasonable fit between the challenged restriction and that objective." *Stimmel*, 879 F.3d at 206; *Skoien*, 614 F.3d at 201-02; *accord Chairez*, 2018 IL 121417, ¶ 50.

To show an important government interest, the government may "rely on a wide range of sources, including legislative history, empirical evidence, case law, and even common sense." *Stimmel*, 879 F.3d at 207-08. Regarding a reasonable fit, the government need only show that its "scope is in proportion to the interest served," not that the statute "represents . . . the single best disposition." *Id.*; *see also Staten*, 666 F.3d at 162 (noting under intermediate scrutiny the government need not prove that challenged provision "is the least intrusive means of reducing gun violence or that there be no burden whatsoever" on Second Amendment rights for it to be upheld). Thus, the fit between the government's interest and Section 922(g)(9) does not need to be a perfect one, as some over-inclusiveness is constitutionally permissible. *See Stimmel*, 879 F.3d at 207.

The government has a compelling interest in "reducing domestic gun violence" and "preventing armed mayhem." *Stimmel*, 879 F.3d at 206; *see Staten*, 666 F.3d at 161; *Booker*, 644 F.3d at 25; *Skoien*, 614 F.3d at 642. And "domestic violence is a serious problem in the United States." *Staten*, 666 F.3d at 163; *accord People v. Gray*, 2017 IL 120958, ¶ 62 (noting the "serious problem of domestic violence" in Illinois). "This country witnesses more than a million acts of domestic violence, and hundreds of deaths from domestic violence, each year." *Castleman*, 572 U.S. at 159-60.

Adding a firearm to domestic violence situations makes them even deadlier. As the Supreme Court observed, "domestic violence often escalates in severity over time, and the presence of a firearm increases the likelihood that it will escalate to homicide." *Id*. Indeed, "domestic assaults with firearms are approximately 12 times more likely to end in the victim's death than are assaults by knives or fists." *Skoien*, 614 F.3d at 643 (citing Linda E. Saltzman, James A. Mercy, Patrick W. O'Carrol, Mark L. Rosenberg & Philip H. Rhodes, *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 J. Am. Medical Ass'n 3043 (1992)).

The federal courts of appeals have likewise recognized that "[t]he presence of a gun in the home of a convicted domestic abuser is strongly and independently associated with an increased risk of homicide." *Skoien*, 614 F.3d at 643 (citing Arthur L. Kellermann, *et al.*, *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 New England J. Medicine 1084, 1087

(1993)); *see also Booker*, 644 F.3d at 26. In fact, "in 2005, 678 women and 147 men were fatally shot by their respective intimate partners in the United States." *Staten*, 666 F.3d at 166 (citing U.S. Dep't of Justice, National Institute of Justice, Bureau of Justice Statistics, James Alex Fox and Marianne Sawitz, *Homicide Trends in the United States* at 101 (2007), available at http://bjs.ojp.usdoj.gov/content/publ/pdf/htius.pdf)).

In addition, those with MCDV convictions have a high recidivism rate. *Skoien*, 614 F.3d at 644. There is "an overall estimated recidivism rate range between 40% and 80%" for those with MCDV convictions. *Stimmel*, 879 F.3d at 208 (citing Carla Smith Stover, *Domestic Violence Research: What Have We Learned and Where Do We Go From Here?*, 20 J. Interpersonal Violence 448, 450 (2005)); *see also Staten*, 666 F.3d at 164-65. One study found that within three years of conviction, about 52% of abusers did not "suspend" their abusive behavior. *Skoien*, 614 F.3d at (citing John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, 28 Crime & Justice 1, 31 (2001)). Another study of over 3,000 individuals with MCDV convictions found that 17% of those who stayed in the jurisdiction were re-arrested for the same MCDV in a three-year period. *Skoien*, 614 F.3d at 644 (citing John Wooldredge & Amy Thistlewaite, *Reconsidering Domestic Violence Recidivism: Individual and Contextual Effects of Court Dispositions and Stake in Conformity* ii, iv (1999)).

Here, there is a reasonable fit between section 922(g)(9) and the government's interest in preventing and reducing domestic gun violence. "The belief underpinning [section] 922(g)(9) is that people who have been convicted of violence once — toward a spouse, child or domestic partner no less — are likely to use violence again." *Skoien*, 614 F.3d at 642. Disarming those who have been convicted of domestic abuse through section 922(g)(9) ensures that firearms will be kept "out of the hands of domestic abusers." *Hayes*, 555 U.S. at 426. In fact, as discussed, *see supra* p. 40, Congress enacted section 922(g)(9) to close the "dangerous loophole" that allowed domestic abusers who engaged in serious spousal and child abuse — but who were often not convicted of felonies because of undercharging or hesitation in bringing charges — from possessing firearms. *See Skoien*, 614 F.3d at 643 (citing 142 Cong. Rec. 22985-86 (statements of Sen. Lautenberg)).

Given the abundance of social science studies cited by the federal circuit courts, domestic violence plainly is a serious problem in the United States that worsens when firearms are present. *Id.*; *Stimmel*, 879 F.3d at 208. And those with MCDV convictions are likely to reoffend, thus exacerbating the problem.

The link between prevention of gun violence and a history of domestic abuse is beyond question. All federal circuit courts to consider the question have concluded that in light of this data and common sense, there is "a reasonable fit between the substantial government objective of reducing

domestic violence" and keeping firearms away from those convicted of an MCDV. *See, e.g., Staten*, 666 F.3d at 167. This Court should not depart from this sound and consistent precedent upholding the constitutionality of section 922(g)(9).

C. This Court should hold that Johnson cannot pursue her as-applied challenge given Congress' categorical prohibition on firearm possession for those with MCDV convictions.

Not only have the federal circuit courts unanimously rejected facial challenges to Section 922(g)(9), the courts that have been squarely presented with the question have likewise consistently rejected as-applied challenges. In particular, the Sixth and Ninth Circuits have held that because section 922(g)(9) is constitutional under intermediate scrutiny, courts should not further entertain as-applied challenges and examine personal circumstances — like the amount of time that has passed since the MCDV conviction and the likelihood to reoffend. *See Stimmel*, 879 F.3d at 211; *Fisher*, 855 F.3d at 1071; *Chovan*, 735 F.3d at 1141.

In *Chovan*, the Ninth Circuit rejected an as-applied challenge to section 922(g)(9) from a litigant with an MCDV conviction who argued that he was unlikely to recidivate given that he had been law abiding for the 14 years since his MCDV conviction. *See* 735 F.3d at 1141. The court found that he provided "no evidence to directly contradict" the government's evidence that as a general matter, the "rate of domestic violence recidivism is high." *Id.* at 1142.

Thus, the court held that section 922(g)(9)'s categorical disqualification on firearm possession was permissible. *Id.* It pointed out, "if [the] as-applied challenge succeeds, a significant exception to 922(g)(9) would emerge," adding that Congress could have limited the application of section 922(g)(9) to those with recent MCDV convictions, or created a good behavior clause but did not do so. *Id*. And so no case-by-case determination was necessary, given Congress' "express intent to establish a zero-tolerance policy towards guns and domestic violence." *Id.* Since *Chovan*, the Ninth Circuit has continued to reject the argument that individuals may bring as-applied constitutional challenges to section 922(g)(9) when their MCDV convictions occurred "many years ago" and when they have "not committed any other crimes since that time." *Fischer*, 855 F.3d at 1071.

The Sixth Circuit followed *Chovan* in *Stimmel*, 879 F.3d at 198, rejecting an argument that those who have "lived a law abiding life without any additional convictions" since their MCDV conviction, may press an as-applied challenge to Section 922(g)(9), *id.* at 210. The court found that the litigant was not entitled to produce evidence showing that he personally "no longer posed a risk of future violence" because it "declined to read *Heller* to require whether the government has made an improper categorization." *Id.* (internal citations and quotation marks omitted). To accept the plaintiff's "as applied challenge would thus create an exception to § 922(g)(9) that Congress did not establish and would undermine Congress' judgment that risk or

potential, not likelihood, probability or certainty of violence is sufficient." *Id.* at 211.

As in *Chovan, Fischer,* and *Stimmel*, this Court should reject the "passage of time" exception Johnson advanced in the circuit court, C417, and upon which the circuit court based its order, C522 (A63). Congress enacted section 922(g)(9) and its prohibition on firearm possession to address the serious problem that arises when those with domestic violence convictions may possess firearms. *See Skoien*, 614 F.3d at 643. Allowing Johnson to seek, much less obtain, individualized relief through an as-applied challenge to section 922(g)(9) would chip away at the valid categorization for firearm possession that Congress was entitled to make. This Court should not deviate from that persuasive authority.

Furthermore, allowing such individualized challenges to section 922(g)(9) would create an unworkable standard where state courts could substitute their own judgment for Congress' as to who may legally possess firearms. After all, Congress could have allowed States and state courts to grant individualized relief for those with MCDV convictions, but did not do so. *See Chovan*, 735 F.3d at 1141.

Congress has explicitly done so in other circumstances. For example, for those facing a federal firearm prohibition caused by 18 U.S.C. § 922(g)(4) for having been "adjudicated as a mental defective" or having been "committed to a mental institution," Congress enacted the NICS

Improvement Amendments Act of 2007, which allowed States to create programs to grant relief. Pub. L. No. 119-180, §§ 103(c), 105(a); *see* 34 U.S.C. § 40915; *see also* 34 U.S.C.A. § 40913 (West 2019) (noting program was formerly titled under the notes of 18 U.S.C. § 922). This scheme is akin to the relief that may be granted by the United States Attorney General under the federal safety valve (*see supra* pp. 9-10). Pub. L. No. 119-180, §§ 103(c), 105(a); 34 U.S.C. § 40915; *see also Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 682-83 (6th Cir. 2016) (en banc). But Congress has not enacted a similar provision for those with an MCDV conviction who has not had that conviction pardoned or expunged, or has not had their civil rights restored. Instead, Congress chose to leave decisions about whether an individual with an MCDV conviction may possess a firearm in the hands of the federal government, namely, the United States Attorney General, applying federal law and its categorizations through the federal safety valve. *See Chovan*, 735 F.3d at 1141; 18 U.S.C. § 925(c). Thus, Johnson should not be permitted to circumvent congressional intent with her as-applied challenge.

Thus, this Court should follow the unanimous decisions of the federal circuit courts directly considering the question and hold that Johnson's as-applied challenge to section 922(g)(9) fails.

CONCLUSION

For these reasons, Respondent-Appellant Illinois State Police asks that this Court decline to rule on the merits of Johnson's as-applied challenge unless and until the United States Attorney General is added as a necessary party and there is supplemental briefing. Alternatively, this Court should reverse and vacate the circuit court's judgment, thereby upholding Illinois State Police's revocation of Petitioner-Appellee Shawna Johnson's FOID card.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h) statement of points and authorities, the Rule 314(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 49 pages.

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Appendix Table of Contents

IN THE CIRCUIT COURT
FOR THE SECOND JUDICIAL CIRCUIT
WABASH COUNTY, MT. CARMEL, ILLINOIS

SHAWNA JOHNSON,	)	
Petitioner,	)	
	)	
-v-	)	**No. 13-MR-15**
	)	
ILLINOIS STATE POLICE,	)	
Respondent.	)	

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

This cause having come on for hearing on the Motion to Dismiss filed by Respondent, with parties and counsel all having been present, the Court having reviewed the pleadings including attachments to same, having heard the arguments of the parties and counsel, and, having considered the authorities presented, and now being fully advised in the premises, the Court **HEREBY FINDS AND ORDERS AS FOLLOWS:**

1. The Court has jurisdiction over the parties and subject matter herein.

2. The Petitioner filed (pro se) her Petition For Review of Denial of Firearm Owner's Identification (FOID) Card on August 15, 2013 and served same, along with a Notice of Hearing, on the Wabash County State's Attorney and the Illinois State Police (ISP), Firearms Services Bureau. The petition also attached and incorporated a letter addressed to Petitioner, dated August 1, 2013, from ISP's Bureau Chief, Jessica L. Trame, indicating that Petitioner had previously had her FOID card revoked, and directing that petitioner turn over her FOID card within 48 hours. The Notice of Hearing referenced set a hearing herein on September 5, 2013, within 30 days of the service of the petition and notice on the State's Attorney and ISP.

3. The Respondent, via the Attorney General, filed its Motion to Dismiss on September 3, 2013 along with Respondent's Memorandum of Law in Support of Motion to Dismiss. The Respondent's memorandum attaches and incorporates several documents including: ***Exhibit A*** - the charging document as amended and ***Exhibit B*** – the Petitioner's Plea of Guilty and Waiver of Jury Trial in Wabash County Case No. 2001-CM-56, where Petitioner received her conviction for Battery, relevant hereto; ***Exhibit C*** – a print-out from "Judici" showing Petitioner was still married to her husband and the alleged victim of the battery (originally charged as domestic battery) at the time of the offense; ***Exhibit D*** – a letter from ISP to Petitioner dated July 27, 2012 revoking Petitioner's previously issued FOID card as a result of ISP learning

that Petitioner had been previously "convicted of Battery, as a result of an incident involving domestic violence"; and, ***Exhibit E*** – the aforementioned letter attached to Petitioner's original petition.

4. The Wabash County State's Attorney, the chief law enforcement officer in Wabash County, has not filed any response to the petition and has indicated that she takes no position with regard to the merits of the petition.

5. Petitioner filed her own (again pro se) Memorandum of Law in Support of Petitioner's Response to Respondent's Motion to Dismiss on October 7, 2103. Much like Respondent's memorandum had recited not only legal authorities but had also made allegations of fact, Petitioner's memorandum recited factual allegations in addition to the allegations of her original petition, cited legal authorities, and attached and incorporated several documents including: letters from current and retired local law enforcement officers - which included the current Wabash County Sheriff, the current Mt. Carmel Chief of Police, and court documents. Petitioner cited portions of the recent Illinois Supreme Court decision in ***Coram v. The State of Illinois, Department of State Police, 2013 IL 113867, 996 N.E.2d 1057, 375 Ill.Dec. 1 (Sept. 12, 2013)***(hereinafter referred to as ***Coram***, which opinion was released on September 12, 2013, nine (9) days after the Respondent filed its memorandum of law herein and a few weeks before Petitioner filed her memorandum in response herein.) This Court had brought the ***Coram*** opinion to the attention of all parties and counsel via a docket entry on September 19, 2013.

6. This Court conducted a hearing on the Respondent's Motion to Dismiss on November 7, 2013, at which hearing all parties and counsel appeared and were given an opportunity to make arguments and recommendations. At the conclusion of such hearing, the Court gave Petitioner leave to file, within 14 days thereof, the letter she said she had sent to the Director of the ISP (essentially appealing the revocation of her FOID card) back in August 2012.

7. On November 21, 2013, the Petitioner filed additional documents, including: a letter dated August 16, 2102 that she purportedly sent to the Director of the ISP along with what appear to be certified copies (certified by the Wabash County Circuit Clerk) of documents from Petitioner's Wabash County misdemeanor case in question (01-CM-56).

8. The Respondent followed with its own Supplement to its Motion to Dismiss filed December 5, 2013 with an attached Affidavit essentially indicating that ISP never received and/or didn't have in its administrative file Petitioner's August 16, 2012 letter/appeal to the Director of ISP referenced in paragraph 7, immediately above.

The above-recited pleadings, along with the arguments and authorities presented by the parties and counsel, along with the Court's own legal research, is what this Court has considered

in ruling upon the Respondent's Motion to Dismiss. The Court will briefly address each category of contention in Respondent's Motion to Dismiss as Respondent has laid out such in its motion.

I. The Court DENIES Respondent's Motion to Dismiss Pursuant to 735 ILCS 5/2-615

A. Sufficient Allegations Plead Under 430 ILCS 65/10(c) of the FOID Card Act: In this regard, the Court finds that, having considered all of the allegations of fact in the Petitioner's Petition, as supplemented by further allegations contained in the subsequent pleadings /memoranda filed by both parties, in the light most favorable to the Petitioner, that the allegations sufficiently state a cause of action under 430 ILCS 65/10(c).

II. The Court DENIES Respondent's Motion to Dismiss Pursuant to 735 ILCS 5/2-619

B. Whether 430 ILCS 65/10(c)(4) Precludes Relief Because Federal Law Prohibits Petitioner from Possessing Ammunition or Firearms: If successful in her petition hearing herein, the Court believes that this question is answered in the negative by the Illinois Supreme Court's recent decision in ***Coram.***

As the Illinois Supreme Court stated in pertinent part in ***Coram***:

> "As we construe the interrelated federal and state statutory schemes, Coram has a remedy, and Illinois a procedure, which entitles him to relief/exemption from the disabling effect of section 922(g)(9)."

See *Coram*, 996 N.E. 2d 1057 at 1075.

And, as further stated in ***Coram***,

> "The individual scrutiny given Coram's circumstances, by Judge Schuering, pursuant to the standards for review set forth in Illinois' FOID Card Act (430 ILCS 65/10(c) (West 2010)), has resulted in an assessment that Coram "will not be likely to act in a manner dangerous to public safety" and "granting relief would not be contrary to the public interest." That is the same standard of review Congress as given the states the authority to employ in considering restoration of firearms rights for those who have previously suffered from disabling mental illness. That is the same standard Congress has established for use in federal programs for relief from federal firearms disabilities. Application of that standard, via section 10(c) of Illinois' FOID Card Act, removes the federal firearm disability and entitles Coram to a FOID card. Thus construed, there is no need to address the constitutionality of section 922(g)(9)."

See *Coram*, 996 N.E. 2d 1057 at 1080.

In ***Coram***, the Illinois Supreme Court also addressed the Illinois General Assembly's recent amendment to the FOID Act. Respondent-ISP argues in the instant case that this

amendment further precludes Petitioner from prevailing here because this amendment prohibits the court from ordering the issuance of a FOID card if the Petitioner is prohibited from obtaining, possessing, or using a firearm under federal law. However, the Illinois Supreme Court in ***Coram***, noting that this amendment was not in effect at the time of Coram's petition and hearing to reinstate his FOID card, indicated that it would not have mattered if such provision had been in effect (as it is in the instant case, for Petitioner, Shawna Johnson):

> "We note, in passing, the recent amendment of section 10 of the FOID Card Act via Public Act 97-1150, § 545, effective January 25, 2013, providing that a circuit court may not order issuance of a FOID card if the petitioner is otherwise prohibited from possessing or using a firearm under federal law, and that relief can be granted under subsection (c) only if "granting relief would not be contrary to federal law." Pub. Act 97-1150, § 545 (eff. Jan. 25, 2013) (amending 430 ILCS 5/10(b), (c)(4)). Obviously, the current version of the statute was not in effect when proceedings under section 10(c) were conducted with respect to Coram. However, given our construction of the statute, and our interpretation of its effect, it would not matter if the amendments had been in effect. Relief granted pursuant to statutory review removes the federal firearm disability."

See *Coram*, 996 N.E. 2d 1057 at 1080.

C. **Whether the Petitioner Should Be Denied Relief Because It Would Be Contrary to the Public Interest and in Violation of 430 ILCS 65/10(c)(3) of the FOID Act:** Again, if successful in her petition hearing herein, the Court believes that this question is answered in the negative by the Illinois Supreme Court's recent decision in ***Coram.*** See the discussion in II. B., above. The Court also finds that the Petitioner's pleadings have sufficiently placed the issue before this court as to whether granting Petitioner's request would be contrary to the public interest and/or in violation of the FOID Act.

D. **Whether the Petition Should Be Dismissed At This Time Because Petitioner Failed to Exhaust Her Administrative Remedies?** This Court answers this question in the negative at this time as the Court finds that it is a contested issue of fact and an arguable question of law as to whether Petitioner has exhausted her administrative remedies prior to petitioning to this court. Although the ISP states by affidavit in its supplemental response that ISP/the Director received no appeal/no letter from the Petitioner, Petitioner has alleged that she did make such appeal/mail such letter. At least, we have a contested issue of fact as to whether Petitioner made an appropriate appeal, if one was even necessary, to the Director prior to filing her petition herein. Petitioner argues in her "Conclusion" to her Memorandum of law that "[t]he Director clearly intends to deny Petitioner relief from revocation of her FOID card" and that "Petitioner has requested her formal hearing to no avail[.]" This Court is not ready to jump to that same conclusion or to make such finding until the Court considers evidence presented at an appropriate, contested hearing. However, this court does find that Petitioner is entitled to a hearing and that this case is ripe for a decision once such hearing is afforded.

E. **Whether the Petition Should Be Dismissed Because the State's Attorney Was Not Served With A Written Copy of the Petition at Least 30 Days Before the (Original September 5, 2013) Hearing, in Violation of the FOID Act?** The Court answers this question in the negative and finds that this issue is now moot. As indicated above,

the Wabash County State's Attorney was given a copy of the petition in August, 2013 – over 6 months ago. The State's Attorney has not filed any response to the petition and has indicated that she takes no position with regard to the merits of the petition. She had a copy of the petition and was on notice of Petitioner's requested relief almost 90 days in advance of the November 7, 2013 motion hearing.

For the reasons stated hereinabove, the Court DENIES the Respondent's Motion to Dismiss in total.

The Court Orders the Respondent to file a written answer/response to the petition within 21 days hereof.

The Court will establish a date for a contested, evidentiary hearing on the Petitioner's petition when the parties and counsel appear for the status and scheduling conference on Tuesday, February 25, 2014 at 1:30 p.m.

The Circuit Clerk is directed to provide a file-marked copy of this Order to all counsel of record.

FEB 2 4 2014
DATE

JUDGE

IN THE CIRCUIT COURT
FOR THE SECOND JUDICIAL CIRCUIT
WABASH COUNTY, MT. CARMEL, ILLINOIS

SHAWNA JOHNSON,	)	
Petitioner,	)	
	)	
-v-	)	**No. 13-MR-15**
	)	
ILLINOIS STATE POLICE,	)	
Respondent.	)	

ORDER

This matter having come on for hearing on the Respondent's Motion For Summary Judgment, the court, having reviewed the pleadings including all attachments, having reviewed the applicable authorities, and having heard and considered the arguments of counsel, **FINDS AND ORDERS AS FOLLOWS:**

Undisputed Facts

Based upon the entire record before this court, including the pleadings, the pending motions and attachments to same, and the stipulations of the parties through counsel, the court finds that most of the material facts are undisputed:

On June 7, 2001, Petitioner, Shawna L. Johnson (Johnson) pled guilty and was convicted of Battery, a Class A Misdemeanor under Illinois law, in the Circuit Court of the Second Judicial Circuit, Wabash County, Illinois in Case No. 2001-CM-56. At that time, Shawna Johnson's surname (married name) was Korstick. Johnson's conviction was part of a negotiated plea whereby she pled guilty to an amended charge of Battery (under 720 ILCS 5/12-3(a)) and received a sentence of one year conditional discharge, along with a jail sentence of 2 days (time served) in jail, and a $ 150 fine and court costs. The original charge was filed as Domestic Battery (under 720 ILCS 5/12-3.2(a)(1)). As part of the negotiated plea, the original charge was amended by interlineation - striking the allegations with the regard to the fact that the victim of the battery was Johnson's husband at the time. The amended count to which Johnson pled guilty stated in pertinent part that Johnson, "... without legal justification, knowingly caused bodily harm to Michael A. Korstick, in that [she] hit [Korstick] on the face and head causing bruises and abrasions ... ." There is no indication that any firearm or firearm ammunition was used by Johnson in any way in the commission of this domestic battery/battery. Johnson successfully completed the term of conditional discharge and was discharged on November 18, 2008. Other than this battery conviction, Johnson has not been convicted of any felony or misdemeanor in

Illinois or any other state. It is also undisputed that on March 25, 2001, the date of the alleged battery/domestic battery, Johnson was married to and had children in common with the alleged victim, Michael A. Korstick. **(See Respondent's Exhibit "H" - ISP's Request For Admission of Facts - attached to ISP's Memorandum of Law.)** Although Johnson never moved to withdraw her plea and never appealed her Battery conviction, in her answers to certain questions in the very same above- referenced "Request For Admission of Facts," she denies striking her husband. Johnson also alleges in an affidavit that she once had an Order of Protection against her husband, Michael Korstick. She claims this order of protection was in place prior to her pleading guilty in 2001-CM-56. And, she says that she dismissed her order of protection case due to pressure from her employer at that time indicating to her that such order of protection was creating problems at work. Johnson also claims that at the time she entered into the negotiated plea in question, she inquired about the impact of the negotiated plea on her FOID Card. Johnson claims the State's Attorney at that time told her that it would probably not impact her FOID card, and that, if it did, it would only be for a short time. **(See Affidavit of Shawna Johnson filed July 25, 2014.)**

On or about April 1, 2010, after Johnson's plea, conviction and successful discharge, Johnson sought and obtained a Firearms Owner's Identification Card (FOID card). However, the Illinois State Police (ISP) revoked Johnson's FOID card on the basis of the above-referenced Battery conviction and sent Johnson a letter dated July 27, 2012 informing Johnson that she was ineligible for a FOID card as a result of her Battery conviction. ISP's July 27, 2012 letter (Exhibit "D") states in pertinent parts:

> "[ISP] records reflect on June 7, 2001, you were convicted of Battery, as a result of an incident involving domestic violence. Pursuant to Federal and State law, The [ISP] is prohibited from issuing a [FOID] card to anyone convicted of any crime involving domestic violence. You are ineligible for a [FOID] card as result of your conviction. ... This action is in accordance with the Federal Gun Control Act of 1968, 18 USC 922(g)(9). This makes it unlawful for any person convicted of a 'misdemeanor crime of domestic violence' to ship, transport, possess or receive firearms or ammunition."

(See ISP's Exhibit "D" attached to its Memorandum of Law in support of ISP's Motion for Summary Judgment.)

Johnson claims she sent a letter dated August 16, 2012 to the Director of the Illinois State Police requesting a formal hearing regarding the revocation. Although Johnson claims under oath in an affidavit that she mailed such letter, she did not send such registered or certified mail. **(See documents filed by Petitioner on November 21, 2013.)** ISP claims that it did not receive Johnson's letter and that they have no record of any such letter in a file that they maintain regarding Johnson's FOID Card application and revocation. **(See Respondent's Motion For Summary Judgment and Memorandum in Support. And, see Affidavit of ISP Sergeant Mark Bayless filed December 5, 2013.)** On or about April 9, 2013, Johnson received a letter

from ISP indicating that she was required to turn over her revoked FOID card to a local law enforcement agency. Johnson turned her FOID card over to the Wabash County Sheriff on August 12, 2013. Johnson made no further contact or follow-up with ISP until she filed her petition in the instant case.

Johnson (pro se) filed the/her initial petition in this case, a petition entitled, "Petition For Review of Denial of Firearm Owner's Identification Card," back on August 15, 2013.

Respondent (ISP's) Motion For Summary Judgment

The Respondent, ISP claims that it is entitled to summary judgment and the dismissal of Petitioner, Shawna Johnson's Case/petition on several grounds:

A. Failure to Exhaust Administrative Remedies: That Johnson has failed to exhaust her administrative remedies prior bringing/filing suit;

A.1. Unavailability of the "Doctrine of Futility: That Johnson cannot rely on the "Doctrine of Futility" to bring her suit here or ask for relief from this court before she has exhausted her administrative remedies;

B. Contrary to the Public Interest: That Johnson's requested relief (the ordering of the issuance of a FOID Card), would be contrary to the public interest; and

C. Violative of Federal Law: That granting Johnson's requested relief (the ordering of the issuance of a FOID Card), would violate federal law.

Standard of Review for Summary Judgment Motion

The Illinois Code of Civil Procedure provides in 735 ILCS 5/2-1005(c) that summary judgment is appropriate when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." ***See 735 ILCS 5/2-1005(c). See also Busch v. Graphic Color Corp., 169 Ill.2d 329, 333 (Ill. 1996).*** In ruling on a motion for summary judgment, the court is required to construe the pleadings, affidavits, depositions, and admission strictly against the moving party and liberally in favor of the non-moving party/opponent to the motion. ***See Hudlin v. City of East St. Louis, 227 Ill.App.3d 817, 830.*** Moreover, if the opponent fails to controvert the proofs offered in support of the motion for summary judgment and the moving party's showing of uncontroverted facts would entitle him to judgment as a matter of law, then summary judgment is proper. The opponent cannot rely solely on his complaint or answer to raise genuine issues of material fact. ***Id.***

Applicable Federal Statutes

The Federal Gun Control Act of 1968 prohibits possession of a firearm by any person convicted of a felony. 18 U.S.C. § 922. In 1996, Congress extended the prohibition to include individuals convicted of a misdemeanor crime of domestic violence. **18 U.S.C. § 922(g)(9).** The Federal Gun Control Act defines "a misdemeanor crime of domestic violence" as an offense that:

> (i) is a misdemeanor under Federal, State, or Tribal law; and
>
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim." **18 U.S.C. § 921(a)(33)(A).**

In ***U.S. v. Hayes, 555 U.S. 415 (2009),*** the U.S. Supreme Court held that misdemeanors, such as Ms. Johnson's conviction for Battery, can/do bar the possession of firearms and ammunition under the Federal Gun Act (**18 U.S.C. § 922(g)(9)**) even though the predicate offense does not include/allege the existence of a domestic relationship between the offender and the victim as a discrete element of the offense. ***Hayes, 555 U.S. at 421.***

As argued by the ISP, even as here in the instant case, where a charge of Domestic Battery was amended to Battery, and, where the discrete or specifically alleged element of the domestic relationship between the offender and the victim has been removed/amended-out of the charging document/Information, it appears that 18 U.S.C § 922(g)(9) still bars the offender from possessing a firearm or ammunition if, in reality, there was one of the domestic relationships as delineated in the federal statute in existence between the offender and the victim. ***See 18 U.S.C. § 922(g)(9) and 18 U.S.C. § 921(a)(33)(A).***

However, federal law also includes certain exceptions/exemptions which, if applicable to the specific facts of a certain case, would negate the conviction for a misdemeanor crime of domestic violence and remove the federal bar to possession of a firearm and ammunition. These exceptions, set-forth in section **921(a)(33)(B)(ii)** of Title 18 **(18 U.S.C. § 921(a)(33)(B)(ii))** (Supp. II 1996)), provide that:

> "... a person shall not be considered to have been convicted of misdemeanor domestic violence if the conviction has been expunged or set aside, if the person has been pardoned, ***or if the person's "civil rights" have been "restored."***

See 18 U.S.C. § 921(a)(33)(B)(ii).

Applicable Illinois Statutes

The Illinois Firearms Owner's Identification Act (FOID Act) is found at 430 ILCS 65/0.01 et.seq. The Illinois General Assembly amended Section 10 (c) of the

FOID Act effective January 2013, adding language stating that a court may grant relief (the issuance of a FOID card) only where the granting of such relief would not be contrary to federal law.

430 ILCS 65/10 now reads in pertinent parts:

"§ 10. Appeal to director; hearing; relief from firearm prohibitions.

(a) Whenever an application for a Firearm Owner's Identification Card is denied, whenever the Department fails to act on an application within 30 days of its receipt, or whenever such a Card is revoked or seized as provided for in Section 8 of this Act, the aggrieved party may appeal to the Director of State Police for a hearing upon such denial, revocation or seizure, unless the denial, revocation, or seizure was based upon a forcible felony, stalking, aggravated stalking, domestic battery, any violation of the Illinois Controlled Substances Act, the Methamphetamine Control and Community Protection Act, or the Cannabis Control Act that is classified as a Class 2 or greater felony, any felony violation of Article 24 of the Criminal Code of 1961 or the Criminal Code of 2012, or any adjudication as a delinquent minor for the commission of an offense that if committed by an adult would be a felony, in which case the aggrieved party may petition the circuit court in writing in the county of his or her residence for a hearing upon such denial, revocation, or seizure.

(b) At least 30 days before any hearing in the circuit court, the petitioner shall serve the relevant State's Attorney with a copy of the petition. The State's Attorney may object to the petition and present evidence. At the hearing the court shall determine whether substantial justice has been done. Should the court determine that substantial justice has not been done, the court shall issue an order directing the Department of State Police to issue a Card. However, the court shall not issue the order if the petitioner is otherwise prohibited from obtaining, possessing, or using a firearm under federal law.

(c) Any person prohibited from possessing a firearm under Sections 24-1.1 or 24-3.1 of the Criminal Code of 2012 or acquiring a Firearm Owner's Identification Card under Section 8 of this Act may apply to the Director of State Police or petition the circuit court in the county where the petitioner resides, whichever is applicable in accordance with subsection (a) of this Section, requesting relief from such prohibition and the Director or court may grant such relief if it is established by the applicant to the court's or Director's satisfaction that:

(0.05) when in the circuit court, the State's Attorney has been served with a written copy of the petition at least 30 days before any such hearing in the circuit court and at the hearing the State's Attorney was afforded an opportunity to present evidence and object to the petition;
(1) the applicant has not been convicted of a forcible felony under the laws of this State or any other jurisdiction within 20 years of the applicant's application for a Firearm Owner's Identification Card, or at least 20 years have passed since the end of any period of imprisonment imposed in relation to that conviction;
(2) the circumstances regarding a criminal conviction, where applicable, the applicant's criminal history and his reputation are such that the applicant will not be likely to act in a manner dangerous to public safety;
(3) granting relief would not be contrary to the public interest; and
(4) granting relief would not be contrary to federal law. " **See 430 ILCS 65/10.**

430 ILCS 65/8

65/8. Grounds for denial and revocation

"§ 8. Grounds for denial and revocation. The Department of State Police has authority to deny an application for or to revoke and seize a Firearm Owner's Identification Card previously issued under this

Act only if the Department finds that the applicant or the person to whom such card was issued is or was at the time of issuance:

> (n) A person who is prohibited from acquiring or possessing firearms or firearm ammunition by any Illinois State statute or by federal law;

Upon revocation of a person's Firearm Owner's Identification Card, the Department of State Police shall provide notice to the person and the person shall comply with Section 9.5 of this Act."

See 430 ILCS 65/8.

430 ILCS 65/13
65/13. Acquisition or possession prohibited by law

"§ 13. Nothing in this Act shall make lawful the acquisition or possession of firearms or firearm ammunition which is otherwise prohibited by law."

See 430 ILCS 65/13.

The Court Rejects ISP's Claim That Johnson has Failed to Exhaust Her Administrative Remedies

The court disagrees with ISP's argument that Shawna Johnson was required/has failed to exhaust her administrative remedies before bringing this action and requesting relief from this court. Even if Johnson did not send a letter to the Director, her suit/petition is properly before this court under 430 ILCS 65/10. Based upon the authority cited below - much of which case law has been decided since the instant case was argued, the Court agrees with Petitioner that the circuit court does have jurisdiction because Respondent's revocation of Petitioner's FOID Card was "based upon" domestic battery. And, therefore, Petitioner's petition is properly before this court under 430 ILCS 65/10.

In ***People v. Frederick*** ***2015 IL App (2d) 140540 (Ill. App. 2nd Dist., 2015) (Note: This appellate opinion had not yet been released for publication at the time of this writing.)*** the Petitioner challenged revocation of his firearm owner's identification (FOID) card by the Department of State Police. The Circuit Court, Stephenson County, John F. Joyce, J., ordered the Department to issue Petitioner a FOID card. The Department appealed. The Appellate Court, Schostok, P.J., reversed the trial court and held that: 2013 amendment to FOID Card Act applied; applying 2013 amendment did not involve prohibited retroactive application of new penalty; and that the trial court did not have authority to override petitioner's disqualification from acquiring or possessing firearm under federal Gun Control Act. The Second District Appellate Court first addressed the exact same jurisdictional argument that is made here in the instant (Johnson) case and then also resolved the issue of whether the circuit court's order to issue a FOID Card was in contravention of federal law:

"After the Illinois Department of State Police told Darcey Frederick that it was revoking his firearm owner's identification (FOID)

card because of an earlier conviction of misdemeanor battery against his former girlfriend, he filed a petition challenging the revocation in the circuit court of Stephenson County. The circuit court ordered the Department to issue Frederick a FOID card. The Department appeals, arguing that (1) the circuit court did not have jurisdiction to hear the petition because Frederick had not properly exhausted his administrative remedies, and (2) in any event, neither the circuit court nor the Director of the Department could issue a FOID card to Frederick under the current version of the Firearm Owners Identification Card Act (FOID Act) (430 ILCS 65/1 *et seq.* (West 2012) (as amended by Pub. Act 97–1131, § 15 (eff. Jan. 1, 2013))), because doing so would be contrary to federal law. We reject the Department's first argument but agree with its second. We therefore reverse the judgment of the circuit court. In April 1991, Frederick was charged with two Class A misdemeanors: domestic battery (Ill.Rev.Stat.1991, ch. 38, ¶ 12–3.2) and criminal trespass to a residence (Ill.Rev.Stat.1991, ch. 38, ¶ 19–4). Frederick does not dispute that the victim of the battery was a woman with whom he had cohabited. In August 1991, Frederick entered into a plea bargain, under which the charge of domestic battery was amended to battery (Ill.Rev.Stat.1991, ch. 38, ¶ 12–3). Frederick pled guilty to that charge, and the charge of criminal trespass to a residence was dismissed. Frederick was sentenced to conditional discharge. In 2011, Frederick applied to the Department for a FOID card. At that time, the following statutes relating to the issuance of a FOID card were in effect. Section 8(n) of the FOID Act provided that the Department had authority to deny an application for a FOID card, or revoke a previously issued FOID card, if the person was "prohibited from acquiring or possessing firearms or firearm ammunition by any * * * federal law." 430 ILCS 65/8(n) (West 2010). Section 922(g)(9) of the federal Gun Control Act imposed such a prohibition on anyone "convicted * * * of a misdemeanor crime of domestic violence." 18 U.S.C. § 922(g)(9) (2006). However, the FOID Act also provided that, upon appeal of a denial or revocation of a FOID card, the Department's Director or the circuit court (whichever was hearing the appeal) could grant the relief requested if the petitioner established that: (1) he or she had not been convicted of or served time for a forcible felony within the last 20 years; (2) considering the petitioner's criminal history and reputation, he or she was "not * * * likely to act in a manner dangerous to public safety" in the future; and (3) granting the relief "would not be contrary to the public interest." 430 ILCS 65/10(c)(1)-(3) (West 2010). If the petitioner met these requirements, courts construed the FOID Act as allowing the Director or the circuit court to override or ignore the federal prohibition against possession of a gun or ammunition. See *Coram v. State of Illinois,* 2013 IL 113867, 375 Ill.Dec. 1, 996 N.E.2d 1057 ("Subsections (2) and (3) of section [10] (c) of the 2010 version of the FOID Card Act allow a court to grant relief from the denial of a FOID card," when the denial is based on section 8(n).); *Hiland v. Trent,* 373 Ill.App.3d 582, 585, 311 Ill.Dec. 396, 868 N.E.2d 396 (2007) (even where section 8(n) of the FOID Act applies, Director has authority in extraordinary cases to issue FOID cards to "persons who have established their fitness to possess a gun" (internal quotation marks omitted)). The Department granted Frederick's application and issued him a FOID card. In 2012, the General Assembly amended section 10 of the FOID Act in two ways relevant here. Pub. Act 97–1131, § 15 (eff. Jan. 1, 2013). First, subsection (b), which allowed a circuit court to order the Department to issue a FOID card if it found that "substantial justice ha[d] not been done" in the denial or revocation of such a card, was amended to add the following restriction: "However, the court shall not issue the order if the petitioner is otherwise prohibited from obtaining, possessing, or using a firearm under federal law." *Id.* Second, the General Assembly added subsection (c)(4), which limited the authority of the Director and the circuit court by imposing an additional requirement: before relief could be granted, the Director or the court must find that "granting relief would not be contrary to federal law." *Id.* These amendments to the Act became effective on January 1, 2013.

Thereafter, Frederick sought to buy a gun and the seller contacted the Department to see if Frederick was eligible to own the weapon. On March 13, 2013, the Department notified Frederick that it was revoking his FOID card based on his 1991 conviction. The Department's letter stated that it was "prohibited from issuing a [FOID] card to anyone convicted of any crime involving domestic violence." It also noted that the revocation was "in accordance with the Federal Gun Control Act of 1968, 18 USC [§] 922(g)(9)." In May 2013, Frederick filed a petition seeking the issuance of a FOID card, in the circuit court of Stephenson County. The Department filed a "non-party response"[1] to the petition, arguing that the circuit court lacked subject matter jurisdiction to hear the petition because section 10(a) of the FOID Act (430 ILCS 65/10(a) (West 2012)) provided that the sole avenue of appeal for Frederick was an administrative appeal to the Director. It also argued that the petition should be denied because Frederick was barred by the federal Gun Control Act from possessing guns and ammunition. Frederick responded that his petition was properly directed to the circuit court and that Illinois law permitted him to have a FOID card because his conviction was not for domestic battery as that term is defined under federal law.

The hearing on the petition was held on December 12, 2013. At the close of the oral arguments, the circuit court ruled that it would grant the petition. In explaining its ruling, the circuit court began by stating that it would not apply the 2013 amendments to the FOID Act, because the Department initially granted Frederick a FOID card in 2011. A written order embodying the ruling was entered on January 8, 2014, in which the circuit court found that Frederick had not been convicted of a forcible felony within the last 20 years, he was not likely to act in a manner dangerous to public safety, and granting him relief would not be contrary to the public interest. The court ordered the Department to issue Frederick a FOID card. On appeal, the Department renews its arguments that the circuit court lacked jurisdiction to hear the petition and that, under the 2013 amendments to the FOID Act, Frederick cannot be issued a FOID card. "

In considering the Department's jurisdictional argument, the ***Frederick*** court cited 430 ILCS 65/10(a) (West 2012) (as amended by Pub. Act 97–1131, § 15 (eff. Jan. 1, 2013)) and stated,

> ***"The Department argues that, under this provision, Frederick was required to appeal to the Director rather than proceeding directly in the circuit court, because his conviction was for battery, not domestic battery. ... Here, the plain language of the statute permits appeals directly to the circuit court where the FOID card denial or revocation was "based upon a * * * domestic battery." The issue before us is whether that language encompasses denials or revocations based upon the commission of a domestic battery, or only those denials or revocations based upon a conviction of domestic battery. Because the statutory language makes no mention of conviction, we conclude that a conviction of one of the offenses enumerated in section 10(a) is***

not required in order to satisfy the statute. Rather, as the plain language of section 10(a) states, an appeal directly to the circuit court is permitted whenever the denial or revocation was "based upon" an enumerated offense such as domestic battery."

Then, the ***Frederick*** court also cited ***Miller v. Department of State Police, 2014 IL App (5th) 130144, 382 Ill.Dec. 737, 13 N.E.3d 150***, and stated that the Department of State Police (ISP) raised a similar jurisdictional argument in Miller in that ISP argued that Miller (the petitioner) could not appeal directly to the circuit court, because the Department's revocation of his FOID card was based not upon a conviction of domestic battery but upon a *charge* for that offense. Citing Miller, the ***Frederick*** court stated:

"Noting that courts should not insert requirements or impose limitations that are inconsistent with the plain language of a statute, the court held that Miller's petition to the circuit court was proper, as the revocation had indeed been "based upon" a domestic battery. *Id.* We reject, as contrary to the plain language of the statute, the Department's attempt to distinguish *Miller.* The Department narrowly focuses on battery as the underlying Illinois offense for Frederick's revocation. Since battery is not an offense enumerated in section 10(a), the Department argues that the circuit court lacked jurisdiction. The Department's letter to Frederick emphasized the domestic nature of his offense, stating that he had been "convicted of Battery, as a result of an incident involving domestic violence." It further stated that Frederick's conviction of a "crime involving domestic violence" rendered him ineligible to hold a FOID card, and so the Department was revoking his FOID card. Thus, the stated basis for the Department's revocation of Frederick's FOID card was that Frederick had, in fact, committed a domestic battery. ***The legislature's choice of the words "based upon" (as opposed to "convicted of" or some other more limiting language) allows for a broader reading of when an enumerated offense such as domestic battery is implicated. Under these circumstances, the revocation was indeed "based upon" a domestic battery, despite the fact that Frederick's conviction was for battery. ... Accordingly, Frederick could appeal the revocation of his FOID card directly to the circuit court, and the circuit court did not lack jurisdiction to hear his petition. We therefore turn to the issue of whether the circuit court erred in granting that petition...." (Emphasis added)***

Finally, the ***Frederick*** court turned its attention to ISP's argument that granting Frederick the relief requested (ordering ISP to re-issue a FOID card), would violate federal law. The court also discussed which version of 430 ILCS 65/10 (pre-2013 version or the version effective 1/1/2013) should apply to Frederick's case:

"... The circuit court's factual findings in support of its judgment requiring the Department to issue Frederick a FOID card are not at issue in this appeal. Rather, the Department raises purely legal issues, asserting that, under the 2013 version of the FOID Act, Frederick's 1991 conviction prevented him from being issued a FOID card. We review issues of law, including issues of statutory interpretation, *de novo. People v. Marshall,* 242 Ill.2d 285, 292, 351 Ill.Dec. 172, 950 N.E.2d 668 (2011). ... Before turning to the merits, we must address a threshold issue: which version of the FOID Act applies to Frederick's petition, the statute as it existed in 2011 when the Department first issued a FOID card to him, or the version of the statute in effect when the Department revoked that card in 2013? Remarkably, neither party addressed this issue in its brief before this court—each side simply applied the version of the statute that favored its position. We therefore asked the parties to address the issue at oral argument. Based upon their arguments and our own research, we conclude that the 2013 version of the statute—the version in effect when the Department revoked Frederick's FOID card—must be applied. ...

Ordinarily, the law to be applied is the law that is in effect at the time of the administrative action at issue. See *Goral v. Illinois State Board of Education,* 2013 IL App (1st) 130752, ¶ 27, 378 Ill.Dec. 85, 3 N.E.3d 365 (the date of the administrative body's decision or action is the relevant date in determining which version of a statute applies). Here, the action challenged by Frederick was the Department's revocation of his FOID card in 2013, not its 2011 issuance of that card. Thus, a court reviewing that revocation must apply the version of the statute in effect when the revocation occurred, and the circuit court erred in applying the 2011 version of the statute. ... To the extent that the circuit court may have feared that applying the 2013 version of the FOID Act would retroactively deprive Frederick of rights he possessed when he was first issued the card in 2011, those concerns were unfounded. In 2011 Frederick was barred from possessing a gun or ammunition by section 922(g)(9) of the federal Gun Control Act, just as he is now. Section 8(n) of the FOID Act, which permitted the Department to deny a FOID card (or revoke a card that had been issued) to anyone who was barred by federal law from possessing a gun or ammunition, was likewise in effect in 2011. However, on January 1, 2013, amendments to the FOID Act took effect, which prevented the Director or the courts from overlooking Frederick's disqualification under federal law. Thus, when he sought to purchase a gun, the Department revoked his FOID card. ... As our supreme court has explained, this type of administrative action does not involve the retroactive application of a new penalty. Rather, it simply operates prospectively to deny a benefit in the future. In *Hayashi v. Illinois Department of Financial & Professional Regulation,* 2014 IL 116023, 388 Ill.Dec. 878, 25 N.E.3d 570. ... Like the new laws applied in *Hayashi* and *Mohammad,* the 2013 amendments to the FOID Act do not penalize Frederick's past conduct; they simply affect his present and future eligibility to hold a FOID card. Accordingly, there is no obstacle to applying the 2013 version of the FOID Act here. ... Did the Trial Court Err in Ordering the Issuance of a FOID Card? ... The Department revoked Frederick's FOID card under section 8(n) of the FOID Act, which authorizes the Department to revoke a FOID card previously issued to a person who is "prohibited from acquiring or possessing firearms or * * * ammunition" by state or federal law. 430 ILCS 65/8(n) (West 2012). Section 922(g)(9) of the Gun Control Act imposes such a disqualification on anyone convicted of a "misdemeanor crime of domestic violence." 18

U.S.C. § 922(g)(9) (2006) ... Further, as amended in 2013, the FOID Act forbids courts from ordering the issuance of a FOID card if the person seeking the card is prohibited from obtaining or possessing a gun under federal law. 430 ILCS 65/10(b) (West 2012) (as amended by Pub. Act 97–1131, § 15 (eff. Jan. 1, 2013)). Thus, if Frederick's battery conviction qualifies as a "misdemeanor crime of domestic violence," the circuit court erred as a matter of law in ordering the issuance of a FOID card to him. ...The term "misdemeanor crime of domestic violence" is defined in section 921(a)(33)(A) of the Gun Control Act to include any offense that is a misdemeanor under federal, state, or tribal law, and that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by * * * a person who is cohabiting with or has cohabited with the victim as a spouse * * * or by a person similarly situated to a spouse." 18 U.S.C. § 921(a)(33)(A) (2006). In *United States v. Hayes,* 555 U.S. 415, 426, 129 S.Ct. 1079, 172 L.Ed.2d 816 (2009), the Supreme Court held that a state law conviction is properly classified as a "misdemeanor crime of domestic violence" so long as the first part of this definition (the use or attempted use of physical force, or the threatened use of a deadly weapon) was a required element of the offense of conviction. The second portion of the definition (that the offense was committed within a domestic relationship as defined in section 921(a)(33)(A)) need not have been a required element of the offense of conviction. *Id.* Thus, a conviction of battery may qualify as a "crime of domestic violence." *Id.*... A conviction for battery (as opposed to domestic battery) therefore triggers the prohibition of section 922(g)(9), so long as the State can show that the required domestic relationship was in fact present. ... On appeal, Frederick does not dispute that he was convicted of a "misdemeanor crime of domestic violence" as that term is defined in the Gun Control Act, or that, under federal law, he may not possess a gun or ammunition. Rather, he argues that section 922(g)(9) does not prevent him from having a FOID card, relying upon Illinois case law holding that a circuit court may override the federal prohibition and issue a FOID card nevertheless. See, *e.g., Coram,* 2013 IL 113867, ¶ 76, 375 Ill.Dec. 1, 996 N.E.2d 1057; *Hensley v. Illinois State Police,* 2012 IL App (3d) 110011–U, ¶ 14, 2012 WL 7005485; *Hiland,* 373 Ill.App.3d at 586, 311 Ill.Dec. 396, 868 N.E.2d 396; *Braglia v. McHenry County State's Attorney's Office,* 371 Ill.App.3d 790, 792, 309 Ill.Dec. 253, 863 N.E.2d 1150 (2007). However, the courts in all of these cases were interpreting and applying versions of the FOID Act that predated the 2013 amendments. As we noted earlier, those previous versions of the law permitted courts to override a federal disqualification. By enacting the 2013 amendments, however, the General Assembly explicitly foreclosed that avenue of relief under the FOID Act. Thus, these cases do not assist Frederick here, as the 2013 amendments apply. ... We acknowledge that Justice Karmeier's lead opinion in *Coram,* which was joined by two other justices, briefly noted "in passing" the 2013 amendments to the FOID Act, but opined that they did not change the ability of courts to override the federal prohibition. *Coram,* 2013 IL 113867, ¶ 75, 375 Ill.Dec. 1, 996 N.E.2d 1057. However, four justices (a majority of the Illinois Supreme Court) concluded the opposite: that the 2013 amendments did indeed prevent a circuit court from overlooking the federal prohibition. In the special concurrence, Justice Burke (joined by Justice Freeman) stated that "[t]he amendments make clear that a circuit court no longer has the authority to make findings or grant relief under section 10 if the court concludes that the applicant would be in violation of federal law if he or she were to possess a firearm." *Id.* ¶ 101 (Burke, J., specially concurring, joined by Freeman, J.). Similarly, in the dissent, Justice Theis (joined by Justice Garman) agreed that, "under the amended statute, the relief procedures under section 10 cannot remove a federal firearms disability," commenting that the 2013 amendments clarified the General Assembly's "intent to make the Act consistent with the prohibitions on firearm possession established under federal law, including section 922(g)(9)." *Id.* ¶ 124 (Theis, J., dissenting, joined by Garman, J.). ... As the proper construction of the 2013 amendments was not at issue in *Coram*—it was undisputed that the earlier version of the FOID Act applied—the extent to which the various justices' interpretations of those amendments should be considered binding is not altogether clear. ... ***A majority of the justices in Coram agreed that, under the 2013 amendments, a circuit court may no longer grant relief to a petitioner whose possession of a gun or ammunition would violate federal law. Even if this majority consensus cannot be considered binding precedent owing to the fragmented nature of the disposition in Coram, at a minimum it supports our interpretation of the 2013 amendments as precluding the issuance of a FOID card to Frederick. The circuit court's order requiring the Department to issue a FOID card to Frederick is contrary to the statute and must be reversed. The judgment of the circuit court of Stephenson County is reversed."(Emphasis added)***

See People v. Frederick 2015 IL App (2d) 140540 (Ill. App. 2nd Dist., 2015) (Note: This appellate opinion had not yet been released for publication at the time of this writing.)

In ***Miller v. Department Of State Police, 2014 IL App (5th) 130144 (Ill. App. 5th Dist., 2014),*** the Petitioner (Miller) sought relief from the revocation of his FOID card by Department of State Police (ISP). The Circuit Court, Edwards County, David K. Frankland, J., granted the petition, and ISP appealed. The Appellate Court held that the circuit court had subject matter jurisdiction over the petition and affirmed the circuit court's order. On August 27, 2004, ISP had notified Miller that it had revoked his FOID card. The notice indicated that records maintained by the Department revealed that Miller had been *charged* with unlawful possession of a controlled substance and domestic battery. The notice stated that revocation was pursuant to section 8(n) of the Act (430 ILCS 65/8(n) (West 2004)), which authorized the revocation of a FOID card that had been issued to an individual who was prohibited by federal law from acquiring firearms or firearm ammunition, and 18 U.S.C. § 922(n), which made it unlawful for Miller to receive any firearms or firearm ammunition

because he was charged with a felony. On November 4, 2011, Miller filed a petition for relief from firearm possession prohibition in the circuit court of Edwards County. The petition was filed pursuant to section 10 of the Act (430 ILCS 65/10 (West 2010)). ...The petition alleged that on August 4, 2004, Miller was convicted of domestic battery, a Class A misdemeanor, and was placed on probation for 12 months. The petition further alleged that, on the same date, Miller had pled guilty to unlawful possession of a controlled substance, a Class 4 felony, and was placed on first-offender probation for 24 months. Miller had successfully completed his sentences of probation and was discharged from probation. Therefore, Miller was not under indictment for a felony at the time that the revocation letter was issued. Additionally, because charges for offenses under the Illinois Controlled Substances Act (720 ILCS 570/100 *et seq.* (West 2010)) are dismissed upon successful completion of first-offender probation under section 410(f) of the Illinois Controlled Substances Act (720 ILCS 570/410(f) (West 2010)), Miller did not have a felony conviction for unlawful possession of a controlled substance at the time that the revocation letter was issued. ... The Department argued as follows: (1) that the circuit court lacked subject matter jurisdiction to consider Miller's petition for relief from firearm possession prohibition because the basis for the revocation of Miller's FOID card, which was that Miller was prohibited from possessing firearms under federal law, was not one of the bases listed under section 10(a) of the Act (430 ILCS 65/10(a) (West 2012)) that gives the circuit court jurisdiction; (2) that Miller was required to seek relief for the revocation of his FOID card through the Department's administrative process; and (3) that Miller was prohibited from possessing firearms under federal law because of his conviction for domestic battery pursuant to 18 U.S.C. § 922(g)(9), which provided that any person convicted of a misdemeanor crime of domestic violence may not ship or transport in interstate commerce or possess or affect in commerce any firearm or firearm ammunition. ... The sole issue raised on appeal is whether the circuit court lacked subject matter jurisdiction to consider Miller's petition. The Department argues that the circuit court's January 13, 2012, order is void for lack of subject matter jurisdiction because the Department's stated basis for revoking Miller's FOID card, *i.e.,* Miller was prohibited under federal law from possessing a firearm as a result of being under indictment for a felony, is not one of the bases set forth under sections 10(a) and 10(c) of the Act (430 ILCS 65/10(a), (c) (West 2012)) for giving the circuit court jurisdiction. ... The notice indicated that Miller had been *charged* with unlawful possession of a controlled substance and domestic battery.

The ***Miller*** Court citing 430 ILCS 65/10, stated:

" Further, section 10(c) of the Act states as follows:"Any person prohibited from possessing a firearm under Sections 24–1.1 or 24–3.1 of the Criminal Code of 2012 or acquiring a [FOID] Card under Section 8 of this Act may apply to the Director of State Police or petition the circuit court in the county where the petitioner resides, whichever is applicable in accordance with subsection (a) of this Section * * *." 430 ILCS 65/10(c) (West 2012).

... In the present case, the Department appears to acknowledge that the stated basis contained in the revocation letter, *i.e.,* being barred from possessing a firearm because Miller was under indictment for a felony, was incorrect as Miller had already been convicted of domestic battery and had pled guilty to the unlawful-possession offense at the time that the Department issued the revocation letter. However, the Department cites *Schlosser v. State,* 2012 IL App (3d) 110115, 358 Ill.Dec. 359, 965 N.E.2d 430, for the proposition that it is the stated basis contained in the revocation letter, not the correctness of that basis, that determines whether the Director of State Police or the circuit court has subject matter jurisdiction over a petition seeking relief under section 10 of the Act. ... In *Schlosser,* 2012 IL App (3d) 110115, ¶ 1, 358 Ill.Dec. 359, 965 N.E.2d 430. ... The *Schlosser* court determined that the denial of Schlosser's FOID card application was based upon a determination that he had a prior forcible-felony conviction and therefore the circuit court had subject matter jurisdiction to consider his petition. *Id.* ... The *Schlosser* majority did not address the question of whether the Department's stated basis for denial or revocation of a FOID card controls whether the Director of State Police or the circuit court has subject matter jurisdiction, regardless of whether the stated basis is correct. Rather, the *Schlosser*

court found that an appeal to the circuit court was proper because Schlosser's application had been denied on the basis that he had committed a forcible felony, indecent solicitation of a child. However, we need not determine whether the Department's stated basis for revoking a FOID card controls regardless of whether that stated basis is correct because we find that the central issue in this appeal involves the interpretation of section 10(a) of the Act (430 ILCS 65/10(a) (West 2012)).

The Department argues that Illinois courts have interpreted section 10(a) of the Act (430 ILCS 65/10(a) (West 2012)) as vesting subject matter jurisdiction in the circuit court only where the revocation of a FOID card is based upon a conviction for one of the enumerated offenses. Therefore, the Department argues that because the basis for the revocation of Miller's FOID card was an indictment for one of the enumerated offenses and not a conviction, the circuit court lacked subject matter jurisdiction. In contrast, Miller argues that the circuit court has subject matter jurisdiction regardless of whether the basis for revocation was for pending charges or for a conviction of one of the enumerated offenses because section 10(a) of the Act does not require a conviction. As previously stated, section 10(a) of the Act (430 ILCS 65/10(a) (West 2012)) sets forth circumstances under which a petitioner can obtain relief from a firearm prohibition in the circuit court. Specifically, section 10(a) of the Act provides that an aggrieved party may appeal to the circuit court if the revocation of his FOID card was "based upon" one of the enumerated offenses, inter alia, domestic battery and any violation under the Illinois Controlled Substances Act. 430 ILCS 65/10(a) (West 2012). Here, the revocation of Miller's FOID card was not "based upon" a conviction for one of the enumerated offenses, but instead upon his being charged with a felony and therefore prohibited by federal law from possessing firearms. The charges referenced in the revocation letter were domestic battery and a violation of the Illinois Controlled Substances Act, both of which are listed offenses in section 10(a) of the Act. The plain language of section 10(a) of the Act provides that an aggrieved party may appeal to the circuit court if the revocation of his FOID card was "based upon" one of the enumerated offenses. Nowhere in the statute did the legislature impose the limitation that the aggrieved party must be convicted of one of the enumerated offenses as opposed to merely being charged. See 430 ILCS 65/10(a) (West 2012). "Courts should not, under the guise of statutory construction, add requirements or impose limitations that are inconsistent with the plain meaning of the statute." Williams, 348 Ill.App.3d at 659, 284 Ill.Dec. 742, 810 N.E.2d 532. Therefore, we conclude that section 10(a) of the Act (430 ILCS 65/10(a) (West 2012)) encompasses a denial or revocation of a FOID card based on the applicant's being prohibited by federal law from possessing firearms, which is based on the applicant's having been charged with a felony, where that felony is one of the enumerated offenses in section 10(a) of the Act. Accordingly, the circuit court had subject matter jurisdiction to consider Miller's petition, and we affirm the circuit court's judgment ordering the Department to issue a FOID card to Miller. ... For the foregoing reasons the judgment of the circuit court of Edwards County is hereby affirmed. "

See *Miller v. Department Of State Police*, 2014 IL App (5th) 130144 (Ill. App. 5th Dist., 2014)

In ***O'Neill v. Director Of The Illinois Department Of State Police, 2015 IL App (3d) 140011 (Ill. App. 3d Dist., March 11, 2015)***, the Department of State Police revoked petitioner's firearm owner's identification card following his battery and reckless conduct convictions resulting from an incident of domestic violence, petitioner sought reinstatement of card under the Firearm Owners Identification Card (FOID) Act. The Circuit Court, Marshall County, Scott A. Shore, J., ordered reinstatement. Department appealed. The Appellate Court, Schmidt, J., reversed the trial court and held that: circuit court did not lack subject matter jurisdiction over petition, and as a matter of first impression, federal law prohibited petitioner from possessing a gun and thus he was not entitled to reinstatement of card under the FOID Act.

In its opinion, the 3rd District Appellate Court stated in pertinent parts:

"The Illinois Department of State Police (Department) revoked petitioner Michael O'Neill's firearm owner's identification (FOID) card. The Department sent O'Neill a letter stating that it revoked his FOID card based on his conviction of battery, resulting from an incident of domestic violence.

O'Neill petitioned the circuit court, which ordered the Department to reinstate O'Neill's FOID card. The Department intervened and filed a motion to vacate the court's order, which the court denied.

The Department appeals, arguing that the circuit court lacked jurisdiction. Alternatively, the Department argues that O'Neill is not entitled to relief due to the fact that federal law prohibits him from possessing firearms. O'Neill has not filed an appellee's brief. For the following reasons, we reverse.

In 1999, O'Neill pled guilty to battery (720 ILCS 5/12–3 (West 1998)) and reckless conduct (720 ILCS 5/12–5 (West 1998)) after being arrested for an incident involving domestic violence; O'Neill punched his son. The court ordered O'Neill to pay a fine and sentenced him to 24 months' probation. The State's Attorney declined to prosecute charges against O'Neill in 1996 for domestic battery and in 1988 for battery.

The Department sent O'Neill a letter on May 31, 2013, stating that the Department revoked his FOID card due to his 1999 convictions for battery and reckless conduct resulting from an incident of domestic violence. The letter stated, "[t]his action is in accordance with the Federal Gun Control Act of 1968, 18 U.S.C. 922(g)(9) and the State FOID Act, 430 ILCS 65/8(1). These acts make it unlawful for any person convicted of a 'misdemeanor crime of domestic violence' to ship, transport, possess or receive

firearms or ammunition." The letter further stated, "the Director of State Police cannot grant relief for denials, based on particular listed offenses. Since your conviction is one of those identified offenses, the Illinois State Police is unable to consider an appeal of your FOID card revocation. The FOID Act, 430 ILCS 65/10(c)(1), does provide that the aggrieved party may petition in writing, the circuit court in the county of residence."
The Department sent O'Neill a second letter on July 12, 2013, providing the same information as the first letter. Additionally, the second letter directed O'Neill to return any FOID cards in his possession to the Department.
O'Neill filed his petition in the circuit court seeking reinstatement of his FOID card pursuant to section 10(b) of the Firearm Owners Identification Card Act (Act) (430 ILCS 65/10(b) (West Supp.2013)). ... The court ordered the Department to reinstate O'Neill's FOID card. The court found that O'Neill had not committed a forcible felony within 20 years and was not likely to act in a manner dangerous to public safety. Further, the court found that granting relief was not contrary to the public interest.

... The Department appeals. We reverse."

Addressing the Department of State Police's argument that the court lacked Subject Matter Jurisdiction, the ***O'Neill*** court stated:

"The Department argues that the trial court lacked subject matter jurisdiction; the Department revoked O'Neill's FOID card based on O'Neill's conviction for battery, which is not an enumerated offense providing jurisdiction to the trial court.
... Here, the revocation of O'Neill's FOID card was based on his battery conviction arising out of a domestic violence incident. Section 10(a) of the Act requires only that the revocation be based on ***one of the enumerated defenses; a conviction of an enumerated offense is not required.*** Miller, ***2014 IL App (5th) 130144, ¶ 19, 382 Ill.Dec. 737, 13 N.E.3d 150. Under the plain language of the Act, O'Neill could not appeal his revocation to the director. Furthermore, the letter constituted a final administrative decision. The letter explicitly stated that the Director of State Police could not grant relief for denials based on particular offenses; O'Neill's conviction constituted one of those offenses. Further, the letter directed O'Neill to petition the circuit court to appeal the revocation of his card. (Emphasis added.)*** "It is one of the oldest and perhaps the wisest maxims of equity that the law will not require a person to do a useless act." *Rock Island Y.W.C.A. v. Bestor,* 48 Ill.App.3d 761, 765, 6 Ill.Dec. 731, 363 N.E.2d 413 (1977). The Department informed O'Neill that it would not grant relief; therefore, it would have been useless for O'Neill to appeal to the Department. The Department's jurisdiction argument is simply disingenuous. The circuit court properly exercised jurisdiction."

Then, the ***O'Neill*** court turned its attention to ISP's contention that Federal Law Prohibited Petitioner From Possessing Firearms and therefore the court could not order the issuance of a FOID Card:

"Alternatively, the Department argues that the court could not grant relief due to the fact that federal law prohibits O'Neill from possessing a firearm. The Department is not arguing that the trial court's findings are against the manifest weight of the evidence. Instead, the Department argues that federal law prohibits O'Neill from possessing a gun and, therefore, he is not entitled to reinstatement of his FOID card under state law. We review questions of law *de novo. People v. Belk,* 203 Ill.2d 187, 192, 271 Ill.Dec. 271, 784 N.E.2d 825 (2003) (citing *People v. Richardson,* 196 Ill.2d 225, 228, 256 Ill.Dec. 267, 751 N.E.2d 1104 (2001)).
... Below, O'Neill conceded that his conviction constituted a misdemeanor crime of domestic violence under the Gun Control Act. O'Neill was convicted of simple battery after he punched his son. In *United States v. Hayes,* 555 U.S. 415, 426, 129 S.Ct. 1079, 172 L.Ed.2d 816 (2009), the United States Supreme Court addressed the issue of whether the definition of "a misdemeanor crime of domestic violence" covers situations whenever the battered victim was in a domestic relationship with the offender. In that case, the offender was convicted of simple battery and the victim was his "then-wife" and cohabited with the offender as a spouse. *Id.* at 418, 129 S.Ct. 1079. The court held that although a domestic relationship must be established, a domestic relationship need not be an element to the predicate offense. *Id.* Instead, section 921(a)(33) requires that the predicate offense have an *element* of the use or attempted use of force or the threatened use of a deadly weapon. *Id.* ...

The General Assembly added section 10(c)(4) when it revised the Act in 2013. Pub. Act 971150, § 545 (eff. Jan. 25, 2013); see *Coram v. State of Illinois,* 2013 IL 113867, ¶ 75, 375 Ill.Dec. 1, 996 N.E.2d 1057.
... It is unclear whether the circuit court has the ability to remove a federal disability. Our supreme court has not directly addressed the issue—therefore, we are left to read the tea leaves based on what the supreme court has said on the issue. In *Coram,* a plurality decision, our supreme court, in *dicta,* addressed the issue of whether the circuit court has the ability to remove a federal firearm disability under the relief procedures enumerated in section 10. Even though in *Coram* the current version of the Act was not applicable, the case provides insight as to the circuit court's ability to remove a federal impediment under the 2013 amendments. *Coram,* 2013 IL 113867, ¶ 75, 375 Ill.Dec. 1, 996 N.E.2d 1057.
... Although purely *dicta* and not binding, four justices in *Coram* found that the state court cannot remove a federal impediment pursuant to the 2013 amendments to the Act. The special concurrence stated that nothing in the amendments rebuts that presumption and such amendments "make clear that a circuit court no longer has the authority to make findings or grant relief under section 10 if the court concludes that the applicant would be in violation of federal law if he or she were to possess a firearm." *Coram,* 2013 IL 113867, ¶ 101, 375 Ill.Dec. 1, 996 N.E.2d 1057 (Burke, J. specially concurring, joined by Freeman, J.). The dissent stated that the 2013 amendments make it "abundantly clear the legislative intent to incorporate by reference the federal prohibitions under section 922(g)(9)." *Id.* ¶ 123 (Theis, J., dissenting, joined by Garman, J.). "[U]nder the amended statute, the

relief procedures under section 10 cannot remove a federal firearms disability." *Id.* ¶ 124 (Theis, J., dissenting, joined by Garman, J.). "
...

The ***O'Neill*** court also shared its concern about a perpetual firearm ban based upon a misdemeanor crime of domestic violence and foreshadowed a potential Second Amendment ("as applied") constitutional challenge:

> "In light of recent second amendment decisions, we see a serious constitutional issue with the perpetual ban on the possession of firearms based upon a misdemeanor crime of domestic violence. *Coram,* 2013 IL 113867, 375 Ill.Dec. 1, 996 N.E.2d 1057; *Schrader v. Holder,* 704 F.3d 980 (D.C.Cir.2013). Here, O'Neill punched his son in the mouth. Had he acted in the same manner toward a stranger, he would have faced a five-year prohibition from possessing a firearm."

But, since O'Neill had not raised the issue (in fact he didn't even participate in the appeal) and because the ***O'Neill*** court had "read the tea leaves" or "counted the votes" from the ***Coram*** opinion, the ***O'Neill*** court concluded that it could not (after January 1, 2013, the effective date of the amendment to 430 ILCS 65/10)) order the issuance of a FOID Card because it would violate federal law:

> "O'Neill conceded that his conviction constituted a misdemeanor crime of domestic violence. The Act prohibits the court from granting relief where doing so would be contrary to federal law. *Coram* suggests that four justices would find that the circuit court cannot remove a federal disability. Given the state of the law and the fact that O'Neill did not participate, we have no choice but to reverse. We make it clear that we are not reversing the court's findings, which as stated above are the same findings that the Attorney General is required to make under section 925(c), that: O'Neill had not committed a forcible felony within 20 years; that he was not likely to act in a manner dangerous to public safety; and that granting relief was not contrary to the public interest. We are only reversing the court's order requiring the Department to reinstate O'Neill's FOID card. For the foregoing reasons, the judgment of the circuit court of Marshall County is reversed."

See O'Neill v. Director Of The Illinois Department Of State Police, 2015 IL App (3d) 140011 (Ill. App. 3d Dist., March 11, 2015).

The Court Rejects ISP's Claim That Johnson is Relying on the "Doctrine of Futility"

ISP argues that Johnson cannot rely on the "Doctrine of Futility" to bring her suit here and ask for relief from this court before she has exhausted her administrative remedies - before she appeals to the Director of State Police. The court notes that much time, paper and ink has spent on the issue of whether Johnson sent a letter and sought direct review/appeal to the Director of State Police prior to her filing her suit herein. There has also been much discussion about whether it would have been a futile act for Johnson to pursue such direct review/appeal to the Director of State Police. However, because this court finds that Johnson's suit/petition is properly before this court under 430 ILCS 65/10, it is immaterial whether Johnson sent a letter to ISP/the Director. Johnson has/had the right to petition the court per 430 ILCS 65/10 after ISP revoked her FOID card. **Again, see the Court's discussion above concerning its rejection of ISP's argument that Petitioner has failed to exhaust her administrative remedies.**

The Court Rejects ISP's Claim That Granting Relief Would Be Contrary to the Public Interest As a Matter of Law

ISP argues that it is entitled to summary judgment as a matter of law because granting Johnson's requested relief (the ordering of the issuance of a FOID Card), would be contrary to the public interest. ISP mainly bases this argument on ISP's position that it would violate federal law for Johnson to possess a firearm, thus, it would be contrary to the public interest for the court to order the issuance of a FOID card. And, ISP further argues that it would therefore be a court order requiring ISP to "condone criminal conduct" by issuing a FOID Card to someone could not legally possess a firearm under federal law. However, as noted herein below, this court finds that, because Johnson's sentence included incarceration, her conviction is exempted under **18 U.S.C. § 921(a)(33)(B)(ii)** and, therefore, for the court to order the re-issuance/reinstatement of Johnson's FOID card would not in and of itself be contrary to the public interest. Therefore, ISP is not entitled to a judgment as a matter of law on this point.

It is unclear whether ISP claims or could argue that it would be contrary to the public interest for the court to order the reinstatement of Johnson's FOID card for some reason other than that it would be a violation of federal law. Perhaps ISP believes that, because Johnson did not immediately turn over her FOID card to law enforcement as instructed, that this somehow warrants a denial of the reinstatement of her FOID card as against public interest.

Regardless, the court believes ISP and Johnson should be entitled to argue whether all of the facts of this case, once they are ultimately determined, would merit a denial of Johnson's petition and relief because such would be against the public interest.

The Court Rejects ISP's Claim That Granting Relief Would Be Contrary to/Violative of Federal Law

ISP argues that it is entitled to summary judgment as a matter of law because granting Johnson's requested relief (the ordering of the issuance of a FOID Card), would violate federal law. In ***Coram v. The State Of Illinois, 2013 IL 113867 (Supreme Court of Illinois, Sept. 12, 2013)***, after reviewing Mr. Jerry Coram's application, the Department [ISP] concluded that Coram's conviction of domestic battery fit within the federal definition of misdemeanor domestic violence. The Department also determined that certain exceptions found in federal law which would negate the conviction for misdemeanor domestic violence were inapplicable. These exceptions, set forth in section 921(a)(33)(B)(ii) of Title 18 (18 U.S.C. § 921(a)(33)(B)(ii) (Supp. II 1996)), provide that a person shall not be considered to have been convicted of misdemeanor domestic violence if the conviction has been expunged or set aside, if the person has been pardoned, or if the person's "civil rights" have been "restored." Because these exceptions were inapplicable, the Department concluded that if Coram were permitted to possess a firearm in or affecting interstate commerce (which presumably would be most firearms), he would violate federal law. Based on this determination, the Department denied Coram's application.

In the trial judge's Order/opinion in ***Coram***, a copy of which Order is attached to Petitioner/Johnson's Response to ISP's Motion for Summary Judgment, Judge Thomas Ortbal makes a correct recitation of the meaning and interpretation of the "civil rights restored" exception found in **18 U.S.C. § 921(a)(33)(B)(ii)** as interpreted under Illinois law. Judge Ortbal states in his order in pertinent parts:

> "Notwithstanding Illinois' adoption in 2001 of the statutory procedure permitting judicial review of the administrative denial of a FOID card based upon a domestic battery conviction (430 ILCS 65/10(a))(which is the very procedure Coram availed himself of in this case), DSP [Judge Ortbal's acronym for "The Department of State Police"] and the United States [who submitted a "Statement of Interest" in ***Coram***] maintain that the federal prohibition is permanent and is only subject to the exemptions provided under the federal scheme. Federal law specifically defines "conviction" for the purposes of the application of the section 922(g)(9) ban. Section 921(a)(33)B(ii), of Title 18 of the [United States] Code states:
>
> > "A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned ***or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such offense)unless the pardon, expungement, or restoration of civil rights, expressly provides that the person may not ship, transport, possess, or receive firearms.*** **(18 U.S.C., section 921(a)(33)B(ii)).**
>
> As noted, following the initial oral argument, the court inquired whether the judicial review and appeal procedures provided under Illinois 430 ILCS 65/10 constituted a mechanism for restoration of the Petitioner's rights to possess a firearm within the meaning of section 921(a)(33)B(ii) of the federal act. (See, District of Columbia v. Heller (2008) 128 S.Ct. 2783). Based upon the authorities cited by the DSP and the United States (in its filed Statement of Interest) the court is satisfied that the "civil rights" included within the federal exception set forth in section 921(a)(33)B(ii) are the right to vote, hold public office and serve on a jury. [Cites omitted.] The court agrees with DSP and the United States that the appeal and review process of 430 ILCS 65/10 does not provide for the restoration of a "civil right" within the meaning of 921 (a)(33)B(ii). The court further questioned the parties as to whether Coram would otherwise be considered to have had his "civil rights restored" in connection with his prior conviction. In Illinois a person convicted of a misdemeanor domestic battery would not lose the right to hold public office (ILCS Const., Art. 13, section1) or serve on a jury (705 ILCS 305/0.01 et. seq.). ***The court specifically requested the parties to address the issue of whether the exemption under Section 921(a)(33)B(ii) was applicable to a person who was incarcerated upon conviction of a misdemeanor crime of domestic battery by reason of losing the right to vote during the period of imprisonment. Illinois law provides for the loss of the right to vote upon imprisonment until released. (730 ILCS 5/5-5-5(c)). The term 'imprisonment' includes sentences for misdemeanors, as well as felonies. Section 5-8-6(b) provides:***
>
> > ***"(b) Offenders sentenced to a term of imprisonment for less than one year shall be committed to the custody of the sheriff. (730 ICLS 5/5-8-6(b)).***
> >
> > ***Section 2 of article III of the Illinois Constitution provides:***
> >
> > ***A person convicted of a felony, or otherwise under a sentence in a correctional institution, or jail, shall lose the right to vote, which right shall be restored not later than upon completion of his sentence. (Emphasis added).***
> > ***(Illinois Constitution of 1970, article III, section 2)."***
>
> ***Thus, a person convicted and incarcerated for misdemeanor domestic battery suffers a loss of and***

restoration of their right to vote within the meaning of Section 921(a)(33)B(ii). (see, 1976 Op.Atty.Gen.No. S-1056). DSP concedes that a misdemeanor defendant convicted and incarcerated would be upon release from incarceration be entitled to possess a firearm under federal law because he would no longer be considered to have been "convicted" of the domestic battery offense by virtue of having his civil rights to vote restored. (18 U.S.C., section 921(a)(33)B(ii)).
The parties conceded that Coram was never incarcerated for his 1992 domestic battery conviction. The case of Logan v. United States, 552 U.S. 23 (2007) cited by the United States clearly established that the "civil rights restored" language of 921(a)(33)B(ii) does not cover a person whose civil rights were never taken away. Accordingly, Coram remains subject to the prohibition of 922(g)(9). ...

As noted above, the United States and DSP concede that a defendant convicted of a misdemeanor offense of domestic battery who actually serves time in jail as a part of his sentence would not be subject to the ban of 922(g)(9) upon his release from incarceration because that person's civil right to vote would have been restored. It is only logical to assume that one who is sentenced to imprisonment or incarceration for an offense of misdemeanor domestic battery poses a greater threat to the victim and/or general public safety than one who has not sentenced to serve a term in jail. ... Thus, 922(g)(9) permits one who is logically and presumably more of a danger to the victim and the public to ***automatically regain their right to possess firearms under the 921(a)(33)B(ii) "civil rights restored."To deny (other than through the governor's pardon) the right to a statutorily created judicial review appeal for restoration of such right is arbitrary and not narrowly tailored to its objective, as applied to the Plaintiff, a person who has led a law abiding life for an extended period of time and who based upon a judicial consideration of the offense, criminal history and reputation and character is found to be unlikely to act in a manner dangerous to the public safety. The DSP and the United States respond that this type of anomalous disparate treatment was addressed and sanctioned in the case of Logan v. United States (2007), 522 U.S. 23, 128 S.Ct.475, 169 L.Ed2d 432.*** However, Logan involved the issue of the use of misdemeanor convictions as predicate offenses for mandatory sentencing enhancements of an individual convicted under the Armed Career Criminal Act (cites omitted). ... Logan did argue that the result where a person who never lost their civil rights would be treated more harshly than those who lost their civil rights and then regained them was an anomaly that could not be sustained. ... In rejecting the interpretation challenge to the "civil rights restored" exemption, the Supreme Court found that Logan's argument overstated the anomaly based upon the contingency language contained in the Act that still allowed for the weapons ban notwithstanding the restoration of civil rights in some circumstances. It noted further that the anomaly he complained of had been eliminated in Wisconsin, the state of his predicate misdemeanor conviction. The Court further rejected Logan's proposed construction because it would produce its own anomalies. The Court reasoned that were the statutory exemption read to include those who retained their civil rights, then the very misdemeanors the law was meant to cover would be excluded. in contrast, acceptance of Coram's challenge here would not create its own anomaly or inconsistency with the purpose of the Act. Rather it would simply place him in the same circumstance as the class of presumptively more dangerous and riskier (previously imprisoned) misdemeanants who would have the right to seek the statutorily permitted review of the denial of their application for an F.O.I.D. card. Finally, this pre Heller decision did not address the issue here: whether the categorical ban is constitutional as applied under the applicable intermediate scrutiny standard. ... Again, the record here establishes that the Plaintiff has led a law abiding life for an extended period of time (over 18 years at the time of his application). Further based upon Judge Schuering's judicial consideration of
The offense, criminal history and Coram's reputation and character (including a psychological evaluation) he has been found to be unlikely to act in a manner dangerous to public safety. To continue the categorical ban to possessing a firearm for the Plaintiff under those circumstances, while permitting a person who logically and presumably presents a greater risk of harm to the public ***to automatically regain their right to possess firearms under the 921 (a)(33)B(ii) "civil rights restored" exemption fails to meet the government's burden to narrowly tailor its strong interest to the objective or end sought. Coram has presented facts distinguishing his current circumstances from those of other domestic battery misdemeanants who are categorically banned from possessing firearms. Skoien left open the question of whether circumstances such as those presented could result in a successful Second Amendment challenge to the 922(g)(9) ban. The court finds that they may. The court accordingly,***

finds that to deny an eligible applicant potential relief under the statutorily created scheme of 430 ILCS 65/10, adopted subsequent to the federal ban created by 922(g)(9) would be arbitrary and a denial of substantive due process as applied to the Petitioner Coram."

[See Judge Ortbal's Order in Coram which is attached to Petitioner/Johnson's Response to ISP's Motion for Summary Judgment.]

In the appeal of Judge Ortbal's judgment to the Illinois Supreme Court in ***Coram***, the Court did not ultimately concur with Judge Ortbal's reasoning with regard to his finding that Jerry Coram had no remedy under the FOID Act and that, therefore, the FOID Act and federal law "as applied" to Mr. Jerry Coram violated his Second Amendment rights. However, the Illinois Supreme Court left unchallenged Judge Ortbal's interpretation of the "civil rights restored" exception found in **18 U.S.C. § 921(a)(33)(B)(ii)** under Illinois law.

In ***Coram v. The State Of Illinois, 2013 IL 113867 (Supreme Court of Illinois, Sept. 12, 2013),*** Jerry Coram, sought a FOID card approximately 17 years after he was convicted of misdemeanor domestic battery. The Department of State Police denied the application. Coram petitioned for judicial review. The Circuit Court, Adams County, Mark Schuering, J., entered an order directing the department to issue a FOID card to Coram. The department filed a motion to intervene, which was allowed, and a motion to vacate the order. The Circuit Court, Thomas Ortbal, J., denied the motion to vacate. The department appealed. The Supreme Court, Karmeier, J., held that application of the federal standard for relief from federal firearms disabilities, via a provision of the FOID Card Act, removed applicant's federal firearm disability and entitled applicant to a FOID card. Thus, the Illinois Supreme affirmed that part of the circuit court's order directing ISP to issue a FOID Card. However, the Court vacated that part of the circuit court's order finding the federal/state statutory scheme unconstitutional "as applied" to Coram, because the Court found that it was unnecessary to take up the constitutional challenge because there was a way of interpreting the statutes to grant Coram's requested relief without need to consider the constitutional challenge. Justice KARMEIER delivered the judgment of the court, with Justices Kilbride and Thomas joining his opinion. Justice Burke, J., specially concurred and filed opinion in which Justice Freeman joined. Justice Theis dissented and filed opinion in which Justice Garman joined.

Although it was not applicable to the Petitioner in the case, Jerry Coram, the ***Coram*** court's discussion of the "civil rights restored" exemption is instructive:

> "In 1994, the Supreme Court rendered its opinion in *Beecham v. United States,* 511 U.S. 368, 114 S.Ct. 1669, 128 L.Ed.2d 383 (1994). The question in *Beecham* was "which jurisdiction's law is to be considered in determining whether a felon 'has had civil rights restored' for a prior federal conviction." *Beecham,* 511 U.S. at 369, 114 S.Ct. 1669. The Court answered that question in the manner clearly mandated by section 921(a)(20)—a provision modified by Congress in response to the Court's prior opinion in *Dickerson v. New Banner Institute, Inc.,* 460 U.S. 103, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983) (holding that federal law alone determined whether a state conviction counted, regardless of whether the state had expunged the conviction). ***The Beecham Court held that the restoration-of-rights exemption "refer[s] only to restorations of civil rights by the convicting jurisdiction."*** *(Emphasis added.) Beecham, 511 U.S. at 372, 114 S.Ct. 1669. The Court dismissed the suggestion that, because there is apparently no federal procedure for restoring civil rights to a federal felon, the restoration-of-rights provision must in that case refer to a state procedure. Beecham, 511 U.S. at 372, 114 S.Ct. 1669. The Court acknowledged, "[h]owever one reads the statutory scheme * * * people in some jurisdictions would have options open to them that people in other jurisdictions may lack" (Beecham, 511 U.S. at 373, 114 S.Ct. 1669); nonetheless, the Court considered that disparate treatment inconsequential in light of clearly expressed congressional intent.* The Court semantically shrugged: "Under our reading of the statute, a person convicted in federal court is no worse off than a person convicted in a court of a State that does not restore civil rights." *Beecham,* 511 U.S. at 373, 114 S.Ct. 1669.

... Around the time of the NICS Improvement Amendments Act of 2007, the Supreme Court issued another decision bearing upon the interpretation and implementation of the restoration-of-civil-rights provisions in the federal gun control statute (18 U.S.C. § 921(a)(20), (a)(33)(B)(ii) (2006)). In Logan v. United States, 552 U.S. 23, 128 S.Ct. 475, 169 L.Ed.2d 432 (2007), the Court considered whether prior misdemeanor battery convictions counted for purposes of enhanced sentencing under the provisions of the Armed Career Criminal Act of 1984 (ACCA) (18 U.S.C. § 924(e)(1) (2006)). ***Logan, 552 U.S. at 26, 128 S.Ct. 475. The state convictions would, of course, not count if defendant, inter alia, had his "civil rights restored" with respect thereto. 18 U.S.C. § 921(a)(20) (2006). Logan, however, had not lost any civil rights as a result of his misdemeanor conviction. In its analysis, the Court first accepted the proposition that the "civil rights relevant" under section 921(a)(20) were "the rights to vote, **15 *1071 hold office, and serve on a jury." Logan, 552 U.S. at 28, 128 S.Ct. 475 (citing, without meaningful discussion, Caron v. United States, 524 U.S. 308, 316, 118 S.Ct. 2007, 141 L.Ed.2d 303 (1998)). However, the rights involved ultimately did not matter for purposes of the Court's disposition, because the Court concluded that a person who never had his civil rights taken away could not come within the exemptive provisions of the federal statute. Logan, 552 U.S. at 37, 128 S.Ct. 475. ... En route to that conclusion, the Court cited and quoted, in support of its holding, section 921(a)(33)(B)(ii), a definitional provision corresponding to section 921(a)(20). Section 921(a)(33)(B)(ii), as previously noted, provides an exemption from the federal firearm disability for a person convicted of a misdemeanor crime of domestic violence if, inter alia, that person "has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense)."*** Logan, 552 U.S. at 36, 128 S.Ct. 475 (adding emphasis to the statutory language). The Court cited the foregoing language of section 921(a)(33)(B)(ii) as an indicator that Congress intended to deny the restoration-of-civil-rights exemptions to offenders who retained their civil rights, and that Congress did not "labor[ ] under the misapprehension that all offenders—misdemeanants as well as felons—forfeit civil rights, at least temporarily." Logan, 552 U.S. at 35, 128 S.Ct. 475. ... The Court appears to chide Congress for amending section 921(a)(20), in response to the Court's decision in Dickerson, taking the determination of what defines a state conviction out of the purview of federal law and making it a matter of state law. *Logan, 552 U.S. at 33–35, 128 S.Ct. 475.* ***Logan contains no meaningful response to the assertion that a person sentenced to incarceration—and thus in a position, in certain jurisdictions, to have some civil rights restored—is presumptively more dangerous, inflicted greater harm, and/or has a poorer criminal history or character than a similarly situated individual who was not incarcerated upon conviction. ...*** Against this backdrop of what some might see as failed and inadequate federal procedures for the remediation—in appropriate cases—of federally imposed firearm disabilities, we cannot ignore what appears to be an ascendancy of second amendment rights in federal jurisprudence. At the core of resurgent second amendment jurisprudence are the Supreme Court's landmark 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. ——, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010). More than one court has acknowledged that the ground opened by Heller and McDonald is a "vast 'terra incognita' " that "has troubled courts since Heller was decided." (Internal quotation marks omitted.) Osterweil v. Bartlett, 706 F.3d 139, 144 (2d Cir.2013) (quoting Kachalsky v. County of Westchester, 701 F.3d 81, 89 (2d Cir.2012), quoting United States v. Masciandaro, 638 F.3d 458, 475 (4th Cir.2011) (Wilkinson, J.)). This much we know. ... In Heller, the Supreme Court noted for the first time that the second amendment "codified a pre-existing " individual right to keep and bear arms. (Emphasis in original.) Heller, 554 U.S. at 592, 128 S.Ct. 2783. The Court announced that the second amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." Heller, 554 U.S. at 635, 128 S.Ct. 2783. ... "

"Moreover, as interpreted by the Supreme Court, the federal exemption statutes provide an alternative avenue to indirect relief for persons who are seeking restoration of firearm rights, insofar as those statutes specify that a prior state conviction is not "a conviction"—in this situation a disabling conviction for purposes of section 922(g)—if, with respect thereto, the convicting jurisdiction has restored unrelated "civil rights" lost as a result of the conviction. As the Court acknowledged in* Logan, *section 921(a)(20)—a corollary statute to section 921(a)(33)(B)(ii)—"does not define the term 'civil rights.' "* Logan, *552 U.S. at 28, 128 S.Ct. 475. While the Court, in* Logan, *stated that "courts have held," and the petitioner therein "agree [d]," that the "civil rights relevant" to that section are "the rights to vote, hold office, and serve on a jury" (*Logan, *552 U.S. at 28, 128 S.Ct. 475 (citing,* inter alia, Caron v. United States, *524 U.S. 308, 316, 118 S.Ct. 2007, 141 L.Ed.2d 303 (1998))), as previously noted, we see no analysis in* Caron *dictating that result. Apart from the individualized assessment mandated by section 925(c), the Supreme Court has construed section 921(a)(20) and (a)(33)(B)(ii) in such a way as to give the states the authority to automatically restore, through operation of state law, unrelated civil rights of those whose state convictions—both felonies and misdemeanors—have resulted in federally imposed firearms disabilities, thus exempting those individuals from the disabling effect of the federal statute without an individual assessment of their future dangerousness going forward. With respect to that restoration-of-rights process, it has been held that those who never lost civil rights do not have an avenue to automatic restoration of their rights to possess firearms—only those who have lost rights due, in many cases, to incarceration. See *Logan,* 552 U.S. at 37, 128 S.Ct. 475 ("Having no warrant to stray from § 921(a)(20)'s text, we hold that the words 'civil rights restored' do not cover the case of an offender who lost no civil rights."). Though we acknowledge the binding precedent of cases like *Logan,* and abide by the principle of automatic restoration of firearm rights upon the restoration of unrelated rights, reasonable minds might rightfully find cause for concern with a statutory scheme for restoration or relief that does not afford individualized consideration of a person's mental and emotional state—both critical to an assessment of dangerousness—insofar as it could place the public at risk."

The ***Coram*** court also discussed the Adams County Circuit Court's ruling that the statutory scheme was unconstitutional "as applied" to Coram:

"In Schrader v. Holder, 704 F.3d 980 (D.C.Cir.2013), a 64–year–old veteran (Schrader), who had been convicted of common law misdemeanor assault and battery some 40 years ago, and who was thus barred "by virtue of 18 U.S.C. § 922(g)(1) * * * from ever possessing a firearm," contended that "section 922(g)(1) is inapplicable to common-law misdemeanants as a class and,

alternatively, that application of the statute to this class of individuals violates the Second Amendment." Schrader, 704 F.3d at 982. The court of appeals rejected the contention that section 922(g)(1) was unconstitutional as applied to the class of common law misdemeanants. However, the court noted that Schrader and the Second Amendment Foundation, at several points in their briefs, appeared to go beyond that contention and "claim that the statute is invalid as applied to Schrader specifically." Schrader, 704 F.3d at 991. Citing allegations of Schrader's exemplary record over the last 40 years, the court observed: "To the extent that these allegations are true, we would hesitate to find Schrader outside the class of 'law-abiding, responsible citizens' whose possession of firearms is, under Heller, protected by the Second Amendment." Schrader, 704 F.3d at 991 (quoting Heller, 554 U.S. at 635, 128 S.Ct. 2783). However, the court found it unnecessary to "wade into these waters" because plaintiffs had not argued in the district court that section 922(g)(1) was unconstitutional **18 *1074 as applied to Schrader. Schrader, 704 F.3d at 991. The court determined that the wisest course was to leave the resolution of "these difficult constitutional questions" to a case where the issues were properly raised and briefed. Schrader, 704 F.3d at 991. The court concluded: "Leaving these questions for their proper day has an added benefit: it gives Congress time to consider lifting the prohibition on the use of appropriated funds for the implementation of section 925(c), which * * * permits individuals to obtain relief from section 922(g)(1) by demonstrating that they no longer pose a risk to public safety. Without the relief authorized by section 925(c), the federal firearms ban will remain vulnerable to a properly raised as-applied constitutional challenge brought by an individual who, despite a prior conviction, has become a 'law-abiding, responsible citizen[ ]' entitled to 'use arms in defense of hearth and home.' " Schrader, 704 F.3d at 992 (quoting in part Heller, 554 U.S. at 635, 128 S.Ct. 2783). The circuit court of Adams County has found Coram to be the person described in Schrader—an individual who, despite a prior misdemeanor conviction, has become a " 'law-abiding, responsible citizen[ ]' entitled to 'use arms in defense of hearth and home.' " Schrader, 704 F.3d at 992 (quoting in part from Heller, 554 U.S. at 635, 128 S.Ct. 2783). However, as explained hereafter, the constitutional question is one we need not reach. We must consider nonconstitutional issues first and consider constitutional issues only if necessary to the resolution of this case. People v. Melchor, 226 Ill.2d 24, 34–35, 312 Ill.Dec. 632, 871 N.E.2d 32 (2007). As we construe the interrelated federal and state statutory schemes, Coram has a remedy, and Illinois a procedure, which entitles him to relief/exemption from the disabling effect of section 922(g)(9)."

Justice Karmeier concluded his opinion by noting ("in passing") the amendment to 430 ILCS 65/10 (effective January 2015), and, along with two other Justices, he found that, regardless of such amendment, relief granted pursuant to statutory review under 430 ILCS 65/10 ***removes*** the federal firearm disability:

"We note, in passing, the recent amendment of section 10 of the FOID Card Act via Public Act 97–1150, § 545, effective January 25, 2013, providing that a circuit court may not order issuance of a FOID card if the petitioner is otherwise prohibited from possessing or using a firearm under federal law, and that relief can be granted under subsection (c) only if "granting relief would not be contrary to federal law." Pub. Act 97–1150, § 545 (eff. Jan. 25, 2013) (amending 430 ILCS 65/10(b), (c)(4)). Obviously, the current version of the statute was not in effect when proceedings under section 10(c) were conducted with respect to Coram. However, given our construction of the statute, and our interpretation of its effect, it would not matter if the amendments had been in effect. Relief granted pursuant to statutory review *removes* the federal firearm disability. For the reasons stated, we affirm that part of the circuit court's judgment that upheld the original order of Judge Schuering, directing the issuance of a FOID card to Coram. We vacate that portion of the judgment that held section 922(g)(9) of the federal Act (18 U.S.C. § 922(g)(9) (2006)) unconstitutional."

See <u>Coram v. State of Illinois</u>, 2013 IL 113867, 996 N.E.2d 1057.

Although Justice Karmeier concludes, with two justices concurring, that relief granted pursuant to review under 430 ICLS 65/10 removes the federal firearm disability, this court acknowledges that ***<u>Coram</u>*** was decided under the pre-amended (pre - January 2013) version of the FOID Act. And, this court further acknowledges that the current version (post-amendment) version of 430 ILCS 65/10 of the FOID Act is the version which applies to Shawna Johnson. Finally, this humble trial judge "reads the tea leaves" ("counts the votes") in ***<u>Coram</u>*** the same way that ISP does in the instant case and the same way the ***<u>O'Neill</u>*** court did as cited above. In other words, this court cannot grant Ms. Johnson's petition and her request for an order directing ISP to re-issue/re-instate her FOID Card if to do so would violate federal law or Illinois state law. See ***<u>Coram v. State of Illinois</u>, 2013 IL 113867, 996 N.E.2d 1057*** and ***<u>O'Neill v. Director Of The Illinois Department Of State Police</u>, 2015 IL App (3d) 140011 (Ill. App. 3d Dist., March 11, 2015).***

However, in the instant case, it is not simply the review process that removes Shawna

Johnson's federal firearm disability. It is the "civil rights restored" exemption under Section 18 U.S.C. § 921(a)(33)B(ii) and the fact that Shawna Johnson was incarcerated as part of her conditional discharge sentence that removes the federal firearm bar. Shawna Johnson was convicted of battery. She was sentenced to conditional discharge. As part of her sentence of conditional discharge she was sentenced to and did serve two (2) days in the Wabash County Jail. Under Illinois law, Shawna Johnson was "incarcerated" for her offense. And, also according to Illinois law, while she was incarcerated, she lost her civil right to vote and had such civil right restored upon her being released from jail and/or successfully completing her sentence. The fact that Johnson was given credit for "time served" in her conditional discharge order does not change this court's interpretation of the "civil rights restored" exemption under Illinois law as it applies to this case. Jerry Coram received no jail time/was not incarcerated as part of his sentence. ***See Coram v. State of Illinois, 2013 IL 113867, 996 N.E.2d 1057.*** Shawna Johnson was incarcerated. Shawna Johnson can claim that she is entitled to the application of the "civil rights restored" exemption under 921(a)(33)B(ii). Jerry Coram could not. This court also finds that the fact that Jerry Coram was convicted of "domestic battery" and Shawna Johnson was convicted of "battery" does not change the court's interpretation and application of the 921(a)(33)B(ii) exemption to Shawna Johnson. Under the facts and circumstances of their cases, Coram's domestic battery and Johnson's battery were both "crimes of domestic violence." However, because Shawna Johnson's sentence and actual punishment included jail time/incarceration, her sentence is not considered a "conviction" under 18 U.S.C. § 922(g)(9) because of the exemption under 18 U.S.C. 921(a)(33)B(ii). Thus, Federal law does not ban Shawna Johnson from possessing a firearm or ammunition Under U.S.C. 18 U.S.C. § 922(g)(9). Moreover, federal law does not bar this court from ordering ISP to issue/re-instate Johnson's FOID card if she otherwise prevails pursuant to 430 ILCS 65/10. The court also notes that in all of the Illinois cases cited herein regarding misdemeanor convictions for either domestic battery or battery, the appellate reports of such cases do not reflect that any of the Petitioners (for FOID Cards) in such cases were ever sentenced to jail (as was Shawna Johnson) as part of their sentences. Moreover, there is no indication that any of those Petitioners raised nor did any of the appellate courts or trial courts (other than Judge Ortbal in ***Coram***) address the interpretation of the "civil rights restored" exemption as it applies to those who are incarcerated as part of their sentence for domestic battery or battery. ***See: Coram v. State of Illinois, 2013 IL 113867, 996 N.E.2d 1057; People v. Frederick (Ill. App. 2nd Dist., 2015); Miller v. Department Of State Police*, 2014 IL App (5th) 130144 (Ill. App. 5th Dist., 2014); *O'Neill v. Director Of The Illinois Department Of State Police, 2015 IL App (3d) 140011 (Ill. App. 3d Dist., 2015).***

THEREFORE, HAVING REJECTED ALL OF ISP'S CLAIMED BASES, THE RESPONDENT'S (ISP'S) MOTION FOR SUMMARY JUDGMENT IS DENIED IN TOTAL.

Petitioner's Amended Petition For Review and Her Second Amendment ("As Applied") Challenge

Petitioner raised, for the first time in her pleadings herein, in her Response to

Respondent's Motion For Summary Judgment, filed July 25, 2014, a challenge that the "ongoing ban" of her ability to possess firearms and ammunition under the current federal and state framework "as applied" to her is unconstitutional and violates of her Second Amendment rights. Petitioner followed-up by filing (on September 9, 2014) an Amended Petition For Review which incorporated such "as applied" constitutional challenge. Ms. Johnson's Amended Petition is essentially identical to her original Petition except that her Amended Petition adds her constitutional "as applied" challenge in Paragraph (15). In Paragraph (15) of her Amended Petition For Review, Ms. Johnson specifically alleges that:

> "(15) If the Court finds that it is impossible to grant relief pursuant to the FOID Act and the provisions of federal law that it references, then this perpetual denial of Petitioner's right to possess and use firearms violates Petitioner's rights under the Second and Fourteenth Amendments to the United States Constitution and is unconstitutional as-applied."

On October 1, 2014, Respondent (ISP) filed its Motion To Dismiss such Amended Petition For Review and a Memorandum in Support of such Motion to Dismiss.

The court acknowledges that Petitioner's Amended Petition For Review does not specifically delineate which federal and/or state statute(s) she alleges is(are) unconstitutional "as applied" to her. However, she does expound upon her constitutional ("as applied") challenge in her previously filed Memorandum of Law in Opposition to Respondent's Motion For Summary Judgment. Since the court finds that this case can be resolved/Petitioner may be entitled to the relief she requests without a resort to her constitutional "as applied" challenge, the court finds it unnecessary (at this time) to take up her constitutional challenge. ***See Coram v. State of Illinois, 2013 IL 113867, 996 N.E.2d 1057.*** As indicated herein above, there is a way of interpreting the statutes - particularly the "civil rights restored" exemption under **18 U.S.C. § 921(a)(33)(B)(ii)** - to grant Ms. Johnson's requested relief without the need to consider the constitutional challenge.

Thus, the Court dismisses the Amended Petition - essentially the court only strikes Paragraph (15) of the Amended Petition with regard to Petitioner's constitutional claim - as it is unnecessary at this time to take up such challenge. However, the court grants the Petitioner leave to re-plead her constitutional claim when and if such becomes necessary (i.e. if Petitioner is left with no other resort, consistent with this order). ***See Coram v. State of Illinois, 2013 IL 113867, 996 N.E.2d 1057.*** If this court is wrong in its interpretation of **18 U.S.C.§ 921(a)(33)(B)(ii)**, then Ms. Johnson would be precluded under federal law from possessing a firearm and ammunition. In that event, the court would need to consider such constitutional challenge. Without the "civil rights restored" exemption, like a harvest corn maze without an exit, 430 ILCS 65/10 gives Shawna Johnson a way into the circuit court for review of the revocation of her FOID Card, but, gives her no way out - at least no way out with a FOID Card.

Further Proceedings Herein

It appears to the court that from the pleadings, admissions and affidavits on file that Petitioner has shown sufficient undisputed facts and has satisfied as a matter of law the requirements of three of the five subparagraphs of 430 ILCS 65/10(c). As to 430 ILCS 65/10(c) (0.05), Petitioner has given notice to State's Attorney and an opportunity for her to present evidence and/or object. As to 430 ILCS 65/10(c)(1), Petitioner has no felony record. And, as to 430 ILCS 65/10(c)(4), Petitioner has shown that granting the requested relief would not be contrary to federal law.

However, even though Petitioner has submitted several affidavits from current and former local law enforcement officers and other prominent citizens, ISP disputes the facts and/or the application of the law to the ultimate facts with regard to the remaining two subparagraphs of 430 ILCS 65/10. **See 430 ILCS 65/10(c)(2) and (c)(3).** Therefore, this case will be set for further evidentiary hearing regarding the remaining contested issues of fact and application of law under 430 ILCS 65/10, which include: Whether the circumstances regarding Petitioner's criminal conviction, her criminal history and her reputation are such that the she will not be likely to act in a manner dangerous to public safety; AND Whether granting the relief requested would not be contrary to the public interest.

See 430 ILCS 65/10(c)(2) and (c)(3).

The Circuit Clerk shall provide a copy of this Order to all counsel of record.

OCT 2 8 2015

Date

Judge

IN THE CIRCUIT COURT
FOR THE SECOND JUDICIAL CIRCUIT
WABASH COUNTY, MT. CARMEL, ILLINOIS

SHAWNA JOHNSON,)
Petitioner,)
)
-v-) **No. 13-MR-15**
)
ILLINOIS STATE POLICE,)
Respondent.)

ORDER

This matter having come on for hearing on the Respondent-ISP's Motion To Reconsider (this Court's) Order Dated October 28, 2015 and the Petitioner-Shawna Johnson's Response to same motion, the Court, having reviewed such motion and response, having reviewed the applicable authorities, and, having heard and considered the arguments of counsel, **FINDS AND ORDERS AS FOLLOWS:**

In its October 28, 2015 Order denying ISP's Motion For Summary Judgment, this Court specifically found and legally concluded that, the "civil rights restored" exemption under Section 18 U.S.C. § 921(a)(33)B(ii) and the fact that Shawna Johnson was incarcerated as part of her conditional discharge sentence removed the federal firearm bar for Ms. Johnson because, as part of her sentence of conditional discharge, she was sentenced to and did serve two (2) days (pre-trial detention) in the Wabash County Jail. The Court further held that, under Illinois law, Shawna Johnson was "incarcerated" for her offense. And, the Court further concluded that, also according to Illinois law, while Ms. Johnson was incarcerated, she lost her civil right to vote and had such civil right restored upon her being released from jail and/or successfully completing her sentence. Moreover, the Court found the fact that Johnson was given credit for "time served" (and was only incarcerated for such period of pre-trial detention) in her conditional discharge order did not change this court's interpretation of the "civil rights restored" exemption as it applied to this case under Illinois law. The Court further surmised that, because Ms. Johnson's sentence and actual punishment included jail time/incarceration, her sentence is not considered a "conviction" under 18 U.S.C. § 922(g)(9) because of the exemption under 18 U.S.C. 921(a)(33)B(ii). Thus, the Court further declared that federal law does not ban Shawna Johnson from possessing a firearm or ammunition under 18 U.S.C. § 922(g)(9). Finally, the court held that federal law does not bar this court from ordering ISP to issue/re-instate Johnson's FOID card if she otherwise prevails pursuant to 430 ILCS 65/10.

After considering the Respondent's Motion, the Petitioner's Response, the arguments and authorities presented by counsel for both sides, and, additional authorities which the court has found, the Court determines that it must reconsider and reverse the above-recited rulings and findings with regard to the application of the "civil rights restored" exemption under

Section 18 U.S.C. § 921(a)(33)B(ii) to Ms. Johnson and her sentence of conditional discharge.

Article 3, § 2 of the Illinois Constitution provides that:

"§ 2. Voting Disqualifications.

A person convicted of a felony, or otherwise ***under sentence*** in a correctional institution or jail, shall lose the right to vote, which right shall be restored not later than upon completion of his sentence."

See ILCS Const. Art. 3, § 2.

With regard to the qualification (or disqualification) of certain voters, the Illinois Election Code provides in pertinent part(s):

"10 ILCS 5/3-5 (formerly cited as IL ST CH 46):

Convicts: No person who has been legally ***convicted***, in this or another State or in any federal court, of any crime, ***and is serving a sentence of confinement*** in any penal institution, or who has been convicted under any section of this Act and is serving a sentence of confinement in any penal institution, shall vote, offer to vote, attempt to vote or be permitted to vote at any election until his release from confinement.

Confinement for purposes of this Section shall include any person convicted and imprisoned but granted a furlough as provided by Section 3-11-1 of the "Unified Code of Corrections", or admitted to a work release program as provided by Section 3-13-2 of the "Unified Code of Corrections". Confinement shall not include any person convicted and imprisoned but released on parole.

Confinement or detention in a jail pending acquittal or conviction of a crime is not a disqualification for voting."

See 10 ILCS 5/3-5.

Thus, the Illinois Election Code revokes the voting rights of inmates who are convicted and serving sentences of confinement in either the Department of Corrections or a county jail. *The Election Code does not revoke the voting rights of pre-trial detainees*. Even the United States Supreme Court has held this to be an accurate interpretation of the Illinois Election Code.

In ***McDonald v. Board of Election Com'rs of Chicago*, *U.S.Ill.1969, 89 S.Ct. 1404, 394 U.S. 802, 22 L.Ed.2d 739***, the United States Supreme Court held that this paragraph (Illinois Election Code, Chap. 46, Sect. 3-5 now 10 ILCS 5/3-5) which specifically disenfranchises only those who have been convicted and sentenced does not operate as a whole to disenfranchise those who are held prior to trial in jails in counties of their residence and who are charged with nonbailable offenses or who cannot raise the necessary bail. ***McDonald v. Board of Election Commissioners of Chicago*** involved an action which was brought by inmates of the Cook County Jail to enjoin enforcement of statutes excluding them and others similarly situated from that class of persons entitled to cast absentee ballots. In ***McDonald***, the United States District Court for the Northern District of Illinois, Eastern Division granted the motion of the defendant for summary judgment and there was a direct appeal to the U.S. Supreme Court. ***(See McDonald***

***v. Board of Election Commissioners of Chicago*, N.D. Ill.1967, 265 F.Supp. 816 and 277 F.Supp. 14.)** The United States Supreme Court, per the opinion written by Chief Justice Warren, held that the Illinois absentee voting statutes providing for furnishing of absentee ballots to persons who for medical reasons cannot go to polls or will be out of the county do not deny equal protection of the laws for failure to make provisions for furnishing of absentee ballots to persons who are held, before trial, in jails in counties of their residence and who are either charged with non-bailable offenses or who are unable to raise necessary bail.

In ***McDonald***, The U.S. Supreme Court stated in pertinent parts:

> ***"[T]here is nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote.*** It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots. Despite appellants' claim to the contrary, the absentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny appellants the exercise of the franchise; ***nor, indeed, does Illinois' Election Code so operate as a whole, for the State's statutes specifically disenfranchise only those who have been convicted and sentenced, and not those similarly situated to appellants. Ill.Rev.Stat., c. 46, s 3—5 (1967).*** Faced as we are with a constitutional question, we cannot lightly assume, with nothing in the record to support such an assumption, that Illinois has in fact precluded appellants from voting. ... ***Since there is nothing to show that a judicially incapacitated, pretrial detainee is absolutely prohibited from exercising the franchise,*** it seems quite reasonable for Illinois' Legislature to treat differently the physically handicapped, who must, after all, present affidavits from their physicians attesting to an absolute inability to appear personally at the polls in order to qualify for an absentee ballot. Illinois could, of course, make voting easier for all concerned by extending absentee voting privileges to those in appellants' class. Its failure to do so, however, hardly seems arbitrary, particularly in view of the many other classes of Illinois citizens not covered by the absentee provisions, for whom voting may be extremely difficult, if not practically impossible. Similarly, the different treatment accorded unsentenced inmates incarcerated within and those incarcerated without their resident counties may reflect a legislative determination that without the protection of the voting booth, local officials might be too tempted to try to influence the local vote of in-county inmates. Such a temptation with its attendant risks to prison discipline would, of course, be much less urgent with prisoners incarcerated out of state or outside their resident counties. Constitutional safeguards are not thereby offended simply because some prisoners, as a result, find voting more convenient than appellants."

See *McDonald v. Board of Election Commissioners of Chicago*, U.S.Ill.1969, 89 S.Ct. 1404, 394 U.S. 802, 22 L.Ed.2d 739.

As indicated above, the United States Supreme Court in ***McDonald*** affirmed the decision and holdings of the United States District Court for the Northern District of Illinois, Eastern Division which had held in its opinion below that an otherwise qualified and registered voter would not be disenfranchised because of (pre-trial detention) incarceration while awaiting trial on a criminal offense since such voter has neither been convicted nor sentenced and is presumed to be innocent of the offense with which he is charged. ***See McDonald v. Board of Election Commissioners of Chicago*, N.D. Ill.1967, 265 F.Supp. 816 and 277 F.Supp. 14.**

See also 1976 Op.Atty.Gen. No. S-1056.("Persons serving sentences, including misdemeanor sentences, whether in the Department of Corrections or in the county jail, may not vote as long as they are imprisoned. ... A person serving a sentence of periodic imprisonment or

on conditional discharge, probation or parole has a right to vote, if he otherwise qualifies, but a person on work release does not.")

To date, no Illinois State or Federal Court has interpreted Illinois law to resolve the specific issue involved in the Respondent/ISP's Motion to Reconsider (i.e. whether a sentence which includes only "time served" in pretrial detention would count as "incarceration" so as to exclude the defendant's conviction under the "civil rights restored" exception under 18 U.S.C. 921(a)(33)B(ii)). Counsel for both sides and this Court have noted that this issue is now pending or may be pending before the Illinois 4th District Appellate Court in ***Baumgartner v. Greene County State's Attorney's Office and Illinois State Police, No. 4-15-0035.*** The website for the Fourth District Illinois Appellate Court indicates that such case is set for oral arguments on February 9, 2016. ***See http://www.illinoiscourts.gov/-AppellateCourt/OralCal/4thDist_PDF/02-16.pdf.***

However, courts from other jurisdictions and/or applying similar laws from other jurisdictions have rendered opinions on this specific issue which are helpful to the court and which seem to require the court to reconsider and grant ISP's Motion to Reconsider.

In ***United States v. Kirchoff, 387 F.3d 748 (U.S. Court of Appeals, 8th Cir., 2004),*** Defendant Kirchoff was convicted in the U.S. District Court for the Western District of Missouri on his plea of guilty to the charge of unlawful possession of firearms by a person who had been previously convicted of a misdemeanor crime of domestic violence. Defendant appealed the trial court's denial of his motion to dismiss the indictment. Kirchoff argued that § 922(g)(9) did not apply to him by virtue of the restoration-of-rights exception of 18 U.S.C. § 921(a)(33)(B)(ii) and because Missouri law provides that a person who is convicted "[o]f any crime shall be disqualified from registering and voting in any election under the laws of this state while confined ***under a sentence*** of imprisonment." In the underlying state court domestic violence misdemeanor charge(s)/case(s), Kirchoff was sentenced to concurrent sentences of one year in the county jail, but the state court suspended the execution of those jail sentences and placed Kirchoff on two years probation. The Eighth Circuit Court of Appeals rejected Kirchoff's arguments, including his argument that he (Kirchoff) lost his civil rights and then had his civil rights restored because of his suspended jail sentence:

> "Kirchoff first argues that the district court erred in dismissing his motion to dismiss because under Missouri law actual incarceration is not necessary to trigger the restoration exception. We disagree. 'In construing a statute, we look first to the plain meaning of the words of the statute.' In this case, the language of Mo.Rev.Stat. § 561.026 is plain. A convicted person only loses his or her civil rights "while *confined* under a sentence of imprisonment." Mo.Rev.Stat. § 561.026 (emphasis added).[2] [***Footnote 2***: The parties do not address whether the loss of the right to register to vote and to vote is a loss of civil rights as that term is used in 18 U.S.C. § 921(a)(33)(B)(ii). For purposes of this opinion we will assume that the loss of those rights satisfies the statute. We note, however, that "[a]lthough the Congress did not specify which civil rights it had in mind [in § 921(a)(33)(B)(ii)], the plurality view among the circuits ... is that Congress had in mind the core cluster of citizen rights-namely, the right to vote, to serve on a jury and to hold public office." *United States v. Keeney,* 241 F.3d 1040, 1044 (8th Cir.) (internal quotation omitted), *cert. denied,* 534 U.S. 890, 122 S.Ct. 205, 151 L.Ed.2d 146 (2001). *But see United States v. Wegrzyn,* 305 F.3d 593, 596 (6th Cir.2002) (holding that loss of right to vote was loss of civil rights under restoration exception).] At the time Kirchoff committed the § 922(g) offense he was not "confined under a sentence of imprisonment" and thus had not lost his civil rights under Missouri law. As in *Smith* and *Keeney,* because Kirchoff had not lost his civil rights, under the plain language of § 921(a)(33)(B)(ii), he could not have had them restored. Kirchoff asserts that *Smith* and *Keeney* are not controlling because, unlike Missouri, the state statutes at issue in those cases did not provide for loss of civil rights for misdemeanants. Kirchoff argues that because under Missouri law there is a possibility of restoration, he fits within § 921(a)(33)(B)(ii). He asks this court to follow the Sixth Circuit's reasoning in *United States v. Wegrzyn,* 305 F.3d 593 (6th Cir.2002).

In that case, a Michigan statute provided that a person convicted of a misdemeanor lost his or her civil rights "while confined" in a correctional facility. The Sixth Circuit held that, even if a misdemeanant had not been sentenced to incarceration, he or she was nonetheless entitled to the restoration exception. The court believed that to hold otherwise would lead to the "untenable situation" where a person "who presumably committed a more egregious offense justifying incarceration would ... be allowed-upon completion of the jail sentence-to possess a firearm," but that a person "whose transgression did not merit such severe punishment would be treated more harshly at the conclusion of a more lenient punishment." *Id.* at 595. We decline Kirchoff's invitation. Indeed, in *Smith,* this court rejected the reasoning of the Sixth Circuit. In *Smith,* the defendant argued that § 921(a)(33)(B)(ii) was unconstitutional because the distinction "between a misdemeanant who is ineligible for the restoration exception because he never lost his civil rights and a felon who has had his civil rights restored" was irrational and violated the equal protection clause. 171 F.3d at 624. We disagreed. We noted that the distinction was "caused by Congress's reference to state laws that differ in the application of their restoration rules." *Id.* We further noted that § 921(a)(33)(B)(ii) was modeled after § 921(a)(20), which provides that a person who had been convicted of a crime punishable by a term of imprisonment of more than one year, would not be considered of being so convicted if under state law the conviction had "been expunged, or set aside or for which the person has been pardoned or has had his civil rights restored." We cited with approval cases that had rejected challenges to § 921(a)(20), because the courts had held "it was rational for Congress to rely on 'a state's judgment that a particular person or class of persons is, despite a prior conviction, sufficiently trustworthy to possess firearms,' despite the anomalous results." *Id.* at 624–25 (quoting *McGrath v. United States,* 60 F.3d 1005, 1009 (2d Cir.1995)). We noted that "ten years after enacting the much-criticized restoration exception in § 921(a)(20)[,] ... Congress continued to look to state law to define the restoration exception" in § 921(a)(33)(B)(ii) and "was cognizant of the disparity it would create." *Id.* at 625.[3] [***Footnote 3:*** In *United States v. Smith,* 171 F.3d 617, 625 (8th Cir.1999) this court also rejected [an] equal protection challenge to § 921(a)(33)(B)(ii), reasoning that a misdemeanant could receive a pardon and thus have his rights restored under § 921(a)(33)(B)(ii).] In *Smith,* we acknowledged that "most misdemeanor convictions do not result in the loss of civil rights[,]" and thus would not fit within the restoration exception. *Id.* at 624. However, we noted that "Congress was concerned with domestic abuse offenders who were successful in pleading a felony charge down to a misdemeanor and thus escaping the effect of the felon-in-possession statutes." *Id.* at 625. Indeed, we noted that in enacting § 921(a)(33)(B)(ii), "Congress was concerned with the exact situation faced here: preventing a known (from the fact of the misdemeanor conviction) domestic abuser from later using a firearm to inflict the next bout of abuse." *Id.* Indulging in the legal fiction that a person who had not lost his civil rights had nonetheless had them restored, we reasoned, would vitiate the § 922(g) exception because "almost all misdemeanants would fit within the exception." *Id.* at 624. In this case, under Kirchoff's reasoning, all, or almost all, misdemeanants convicted of domestic assault in Missouri would be allowed to possess firearms, and thus "the exception would swallow the rule." *Id.* "Such a result is to be avoided." *Id.* We note the recent case of *United States v. Jennings,* 323 F.3d 263 (4th Cir.) (*Jennings*), *cert. denied,* 540 U.S. 1005, 124 S.Ct. 531, 157 L.Ed.2d 412 (2003). In *Jennings,* the defendant had a state misdemeanor conviction for domestic violence but had not lost his civil rights under a state law that provided for a loss of rights while confined under a sentence of imprisonment. The court first rejected his argument that he was entitled to the restoration exception under the plain language of § 921 U.S.C. § 921(a)(33)(B)(ii), stating that " 'restoration of a thing never lost ... is a definitional impossibility.' " *Id.* at 267 (quoting *McGrath,* 60 F.3d at 1007). The Fourth Circuit then addressed the defendant's argument that the statute was unconstitutional because it produced an "absurd result" by treating "misdemeanants who never lost their civil rights more harshly than those misdemeanants who temporarily lost their civil rights while incarcerated and had them restored upon release from incarceration." *Id.* The Fourth Circuit rejected the reasoning of the Sixth Circuit in *Wegrzyn,* finding this court's reasoning in *Smith* and *Keeney* "more persuasive on the question of whether a literal application of the word 'restored' to [the defendant] produce[d] an absurd result." *Id.* at 269. In addition to the reasons we rejected the identical argument in *Smith,* the Fourth Circuit also noted that "Congress reasonably could conclude that misdemeanants who had been through a state's restoration process and had regained their civil rights were more fit to own firearms than misdemeanants who had not lost their civil rights, had not had their convictions expunged, or had not been pardoned." *Id.* at 275. ***In the alternative, Kirchoff argues that if actual confinement is necessary for a loss of civil rights under Mo.Rev.Stat. § 561.026, he lost his civil rights from March 14 to April 13, 2001, while he was in jail pending disposition of his two misdemeanor cases. We disagree. Section 561.026 provides for a loss of civil rights only when a person is "confined under a sentence of imprisonment." From March 14 to April 13, 2001, Kirchoff was not confined under a sentence of imprisonment, but was a pre-trial detainee, and thus did not lose his civil rights. Rather, he lost his civil rights on August 14, 2002, when he was incarcerated.*** Although, as Kirchoff points out, Mo.Rev.Stat. § 558.031, provides that a person receives credit on a sentence for pre-trial detention, the statute does not provide for a loss of civil rights during pre-trial detention; nor does it merge his period of pre-trial detention into a single sentence of imprisonment, as he argues. As the government notes, Kirchoff did not have his civil rights restored until May 19, 2003, when he was released from incarceration, almost a year after he committed the federal firearms offense. It was only at that time [that] Kirchoff could legally possess a firearm."

See *United States v. Kirchoff, 387 F.3d 748, 748-752(U.S. Court of Appeals, 8th Cir. , 2004).*

In ***United States v. Logan, 453 F.3d 804 (U.S. Court of Appeals, 7th Circuit)***, the Defendant, Logan, was convicted in the U.S. District Court for the Western District of Wisconsin for being a felon in possession of a firearm. Logan contended in the 7th Circuit Court of Appeals that, since his conviction, under Wisconsin law, did not result in the loss of the civil rights to vote, hold public office, or serve on a jury that such conviction should be treated the same as a conviction following which those rights were terminated but later restored consistent with the opinion in ***U.S. v. Indelicato, 97 F.3d 627 (1st Circuit, 1996)***. Instead of following the First Circuit's lead in ***Indelicato***, the Fourth Circuit followed the reasoning of the Second Circuit

Court of Appeals in ***McGrath v. United States*, 60 F.3d 1005 (2d Cir. 1995)** and held that, since Logan had not had any civil rights revoked or restored, he could not take advantage of the "civil rights restored" exemption under Section 18 U.S.C. § 921(a)(33)B(ii).

See *United States v. Logan*, *453 F.3d 804*.

In ***Thomas v. State of Missouri*, *605 S.W.2d 792 (Supreme Court of Missouri, 1980)***, cited by ISP herein, the Missouri Supreme Court held that, under Missouri law (which has very similar if not the same language as Illinois law on the same point), the time spent in jail awaiting trial or sentence cannot be considered as part of any judgment subsequently pronounced and is not embraced within any penalty imposed:

> "Appellant further contends that by the failure to grant credit for pre-sentence jail time, the trial court imposed a sentence in excess of the statutory maximum. He argues that because the maximum sentence on each count of life imprisonment was given, the denial of jail time credit created a sentence of life plus 516 days. The maximum sentence of life was given by the trial court in this case as authorized by statute. Limitation on a court's sentencing power applies to the length of sentence it can impose and not to the total time of confinement. The trial court in this case did not sentence defendant to the time he spent in jail before conviction; ***pre-conviction confinement is not part of the sentence imposed. The time spent in jail awaiting trial or sentence cannot be considered as part of any judgment subsequently pronounced and is not embraced within any penalty imposed."***

See Thomas v. State of Missouri, 605 S.W.2d 792 at 796.

Even the *dissent* in **Thomas** found that "[p]reconviction detention is admittedly not part of a sentence imposed." However, the *dissent* did acknowledge that preconviction incarceration is a deprivation of liberty pure and simple and, particularly where the sentence imposed is the maximum, the time must be credited against the defendant's sentence."

See Thomas v. State of Missouri, 605 S.W.2d 792 at 797-798.

Having reviewed and considered the additional legal authorities suggested by counsel for the parties and having found additional authorities from its own additional research, the Court finds that, under Illinois law, since Ms. Johnson was not sentenced to jail time that she actually served subsequent to her conviction and sentence ("under [the] sentence") of conditional discharge, her right to vote was never revoked and, thus, never restored. Therefore, Ms. Johnson is not afforded the "civil rights restored" exemption under 18 U.S.C. 921(a)(33)B(ii), and, federal and state law still preclude her from possessing a firearm under 18 U.S.C. § 922(g)(9). Thus, the Court is precluded from ordering ISP to issue a F.O.I.D. card to Ms. Johnson under state and federal law. ***See: Coram v. State of Illinois, 2013 IL 113867, 375 Ill.Dec. 1, 996 N.E.2d 1057(Ill. 2013); O'Neill v. Director Of The Illinois Department Of State Police, 2015 IL App (3d) 140011 (Ill. App. 3d Dist., March 11, 2015); and, Odle v. Department of State Police, 2015 IL App (5th) 140274 (Ill.App. 5 Dist., November 18, 2015). See also: 18 U.S.C. § 922(g)(9); 430 ILCS 65/10; and, 430 ILCS 65/13.***

Therefore, the Court GRANTS Respondent-ISP's Motion to Reconsider.

Further Proceedings and Petitioner's Second Amendment ("As Applied") Challenge

In light of the Court's ruling herein, and, consistent with and as alluded to in its October 28, 2015 Order, the Court now GRANTS Petitioner leave to re-plead her Constitutional (Second Amendment ("As Applied")) claim.

The Court will establish a schedule for the filing of pleadings, briefs and any needed evidentiary hearing(s) at the telephone conference scheduled on Monday, December 21, 2015 at 2:00 p.m. Notice of such has been previously given.

The Court will E-mail a copy of this Order to counsel of record and the Court directs the Circuit Clerk to file and provide file-marked copies of this Order to counsel, once received by regular mail.

12/16/15
Date

Larry D. Dunn, Circuit Judge

IN THE CIRCUIT COURT
FOR THE SECOND JUDICIAL CIRCUIT
WABASH COUNTY, MT. CARMEL, ILLINOIS

FILED
JAN 2 0 2016
Angela K. Crum
WABASH CO. CIRCUIT CLERK

SHAWNA JOHNSON, Petitioner,	)	
	)	
-v-	)	No. 13-MR-15
	)	
ILLINOIS STATE POLICE, Respondent.	)	

ORDER DENYING RESPONDENT'S COMBINED MOTION TO DISMISS PETITIONER'S SECOND AMENDED PETITION

The Court, having reviewed the Petitioner-Shawna Johnson's Second Amended Petition, the Respondent-ISP's Combined Motion To Dismiss such, and, the Petitioner's "Opposition" to such Combined Motion to Dismiss, **FINDS AND ORDERS AS FOLLOWS:**

Petitioner raised, for the first time in her pleadings herein, in her Response to Respondent's Motion For Summary Judgment, filed July 25, 2014, a challenge that the "ongoing ban" of her ability to possess firearms and ammunition under the current federal and state framework "as applied" to her is unconstitutional and violates of her Second Amendment rights. Petitioner followed-up by filing (on September 9, 2014) an Amended Petition For Review which incorporated such "as applied" constitutional challenge. Ms. Johnson's Amended Petition was essentially identical to her original *pro se* Petition except that her Amended Petition added her constitutional "as applied" challenge in Paragraph (15). Johnson did further expound upon her constitutional ("as applied") challenge in her previously filed Memorandum of Law in Opposition to Respondent's Motion For Summary Judgment.

In its October 28, 2015 Order denying ISP's Motion For Summary Judgment, this Court specifically found and legally concluded that, the "civil rights restored" exemption under Section 18 U.S.C. § 921(a)(33)B(ii) and the fact that Shawna Johnson was incarcerated as part of her conditional discharge sentence removed the federal firearm bar for Ms. Johnson because, as part of her sentence of conditional discharge, she was sentenced to and did serve two (2) days (pre-trial detention) in the Wabash County Jail. Thus, the court found that Petitioner was entitled to the relief she requested (restoration of her F.O.I.D. card) without resorting to a resolution of her Constitutional claim. At that point, the court struck/dismissed Petitioner's Constitutional ("As-Applied") claim, with leave to re-instate such claim if it later became necessary to address such claim.

Subsequently, however, in its Order dated December 16, 2015, the Court granted the Respondent's Motion To Reconsider such ruling and granted Respondent-ISP's Motion For Summary Judgment on all requested relief except for Petitioner's previously pled Constitutional

"As-Applied" challenge. In its Order Granting Respondent's Motion to Reconsider, the court also granted Petitioner leave to re-plead her Constitutional ("As-Applied") challenge. ***See this Court's Orders dated October 28, 2015 and December 16, 2015.***

In ***Coram***, the Illinois Supreme Court majority ultimately neither concurred with or criticized the trial court's (Judge Ortbal's) reasoning with regard to his finding that Illinois law (specifically the FOID Act) and federal law "as applied" to Mr. Coram violated his Second Amendment rights. However, the Illinois Supreme Court determined that it didn't need to reach the Constitutional issues because Coram was otherwise entitled to the relief he had requested. In ***Coram***, the Illinois Supreme left open the possibility of the very type of "As-Applied" Constitutional claim that Petitioner, Ms. Johnson, now makes:

> "In Schrader v. Holder, 704 F.3d 980 (D.C.Cir.2013), a 64–year–old veteran (Schrader), who had been convicted of common law misdemeanor assault and battery some 40 years ago, and who was thus barred "by virtue of 18 U.S.C. § 922(g)(1) * * * from ever possessing a firearm," contended that "section 922(g)(1) is inapplicable to common-law misdemeanants as a class and, alternatively, that application of the statute to this class of individuals violates the Second Amendment." Schrader, 704 F.3d at 982. The court of appeals rejected the contention that section 922(g)(1) was unconstitutional as applied to the class of common law misdemeanants. ***However, the court noted that Schrader and the Second Amendment Foundation, at several points in their briefs, appeared to go beyond that contention and "claim that the statute is invalid as applied to Schrader specifically."*** Schrader, 704 F.3d at 991. Citing allegations of Schrader's exemplary record over the last 40 years, the court observed: "To the extent that these allegations are true, we would hesitate to find Schrader outside the class of 'law-abiding, responsible citizens' whose possession of firearms is, under Heller, protected by the Second Amendment." Schrader, 704 F.3d at 991 (quoting Heller, 554 U.S. at 635, 128 S.Ct. 2783). ***However, the court found it unnecessary to "wade into these waters" because plaintiffs had not argued in the district court that section 922(g)(1) was unconstitutional **18 *1074 as applied to Schrader. Schrader, 704 F.3d at 991. The court determined that the wisest course was to leave the resolution of "these difficult constitutional questions" to a case where the issues were properly raised and briefed. Schrader, 704 F.3d at 991. The court concluded: "Leaving these questions for their proper day has an added benefit: it gives Congress time to consider lifting the prohibition on the use of appropriated funds for the implementation of section 925(c), which * * * permits individuals to obtain relief from section 922(g)(1) by demonstrating that they no longer pose a risk to public safety. Without the relief authorized by section 925(c), the federal firearms ban will remain vulnerable to a properly raised as-applied constitutional challenge brought by an individual who, despite a prior conviction, has become a 'law-abiding, responsible citizen[ ]' entitled to 'use arms in defense of hearth and home.'" Schrader, 704 F.3d at 992 (quoting in part Heller, 554 U.S. at 635, 128 S.Ct. 2783). The circuit court of Adams County has found Coram to be the person described in Schrader—an individual who, despite a prior misdemeanor conviction, has become a " 'law-abiding, responsible citizen[ ]' entitled to 'use arms in defense of hearth and home.' " Schrader, 704 F.3d at 992 (quoting in part from Heller, 554 U.S. at 635, 128 S.Ct. 2783). However, as explained hereafter, the constitutional question is one we need not reach. We must consider nonconstitutional issues first and consider constitutional issues only if necessary to the resolution of this case.*** People v. Melchor, 226 Ill.2d 24, 34–35, 312 Ill.Dec. 632, 871 N.E.2d 32 (2007). As we construe the interrelated federal and state statutory schemes, Coram has a remedy, and Illinois a procedure, which entitles him to relief/exemption from the disabling effect of section 922(g)(9)."

See Coram v. State of Illinois, 2013 IL 113867, 996 N.E.2d 1057.

Citing ***Coram***, the ***O'Neill*** court also shared its concern about a perpetual firearm ban based upon a misdemeanor crime of domestic violence and foreshadowed a potential Second Amendment ("as applied") constitutional challenge:

> "In light of recent second amendment decisions, ***we see a serious constitutional issue with the perpetual ban on the possession of firearms based upon a misdemeanor crime of domestic violence.*** **Coram,** ***2013 IL 113867, 375 Ill.Dec. 1, 996 N.E.2d 1057***; *Schrader v. Holder,* 704 F.3d 980 (D.C.Cir.2013). Here, O'Neill punched his son in the mouth. Had he acted in the same manner toward a stranger, he would have faced a five-year prohibition from possessing a firearm."

See O'Neill v. Director Of The Illinois Department Of State Police, 2015 IL App (3d) 140011 (Ill. App. 3d Dist., March 11, 2015).

In the recent Illinois Appellate 5th District case of ***Odle v. Department of State Police, 2015 IL App (5th) 140274 (Ill.App. 5 Dist., November 18, 2015),*** the Illinois Appellate 5th District Court certainly left the door open (and even opined that the ***Coram*** court left the door open) for a potential "As-Applied" challenge to a perpetual firearm ban in an appropriate case.

The ***Odle*** court held that a petitioner in such an appropriate case would have to plead and show that he or she has led a law-abiding life for an extended period of time ***or*** that he or she could present other facts that would distinguish his/her circumstances from those of other persons who have been historically barred from Second Amendment protections due to having domestic violence convictions:

> "Finally, we briefly address the petitioner's second amendment arguments. He contends that the interplay between the FOID Act and the federal Gun Control Act could lead to a permanent prohibition on gun ownership. This is because the Gun Control Act provides that the federal prohibition against acquiring or possessing a firearm as a result of a conviction for a "misdemeanor crime of domestic violence" ends when the person's civil rights are restored, if the state in which the conviction occurred provides for the restoration of civil rights after a conviction. 18 U.S.C. § 921(a)(33)(B)(ii) (2012). In Illinois, however, an individual convicted of a misdemeanor does not lose any civil rights as a result of the misdemeanor and, as such, cannot have any rights restored within the meaning of the Gun Control Act. See *Coram,* 2013 IL 113867, ¶ 18, 375 Ill.Dec. 1, 996 N.E.2d 1057. **The petitioner argues that this result violates his rights to keep and bear arms under the second amendment. As the State Police points out, the petitioner did not raise this constitutional claim before the circuit court. As such, he has forfeited consideration of the issue on appeal.** See *In re Liquidations of Reserve Insurance Co.,* 122 Ill.2d 555, 567–68, 120 Ill.Dec. 508, 524 N.E.2d 538 (1988); *People v. Myles,* 131 Ill.App.3d 1034, 1046, 87 Ill.Dec. 341, 476 N.E.2d 1333 (1985). **Moreover, even if we were to consider the constitutional challenge on its merits, we would reject the petitioner's claim. The rights to keep and bear arms, like other constitutional rights, are not unlimited. *District of Columbia v. Heller,* 554 U.S. 570, 626, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). The prohibition on firearm ownership and possession by people convicted of crimes of domestic violence has been upheld repeatedly. *United States v. Skoien,* 614 F.3d 638, 642–44 (7th Cir.2010); *Enos v. Holder,* 855 F.Supp.2d 1088, 1098–99 (E.D.Cal.2012). The rationale behind this prohibition is that people convicted of crimes based on acts of domestic violence pose a danger to members of their families due to a high rate of recidivism. See *Hayes,* 555 U.S. at 426–27; *Enos,* 855 F.Supp.2d at 1098–99. However, both federal and state courts have noted that a lifelong prohibition might raise constitutional questions. See, *e.g., O'Neill,* 2015 IL App (3d) 140011, ¶ 29, 390 Ill.Dec. 367; *Skoien,* 614 F.3d at 645. In *Coram,* our supreme court found it unnecessary to address the constitutional question (*Coram,* 2013 IL 113867, 375 Ill.Dec. 1, 996 N.E.2d 1057), but the court noted that "Congress obviously did not believe it reasonable or necessary to impose a perpetual firearm disability on anyone in the listed categories in section 922(g)." ...The rationale underlying these concerns is the notion that a domestic abuser who has led a law-abiding life for many years may no longer pose the risk to family members that justified the initial ban.** See *Skoien,* 614 F.3d at 644. We note that while the petitioner in this case does not explicitly make these arguments, he does cite *Skoien* in support of his otherwise conclusory contention that a perpetual prohibition violates his rights under the second amendment. **The petitioner contends that a perpetual or lifelong ban on firearm ownership is unconstitutional. He does not specify whether he is arguing that the statutes at issue are unconstitutional on their face or unconstitutional as applied to him. Courts that have considered similar arguments have treated them as challenges to the statutes as applied.** See, *e.g., Skoien,* 614 F.3d at 645; *Enos,* 855 F.Supp.2d at 1099; see also *Coram,* 2013 IL 113867, ¶ 18, 375 Ill.Dec. 1, 996 N.E.2d 1057 (stating that the circuit court in that case found the FOID Act prohibition to be unconstitutional as applied to Coram). **The petitioner in this case is not in a position to make such a claim. As discussed previously, the petitioner pled guilty late in 2011 to a charge based on events that took place earlier that year. He petitioned for review less than two years later, in March 2013. Thus, he is not someone "who has been law abiding *for an extended period* " of time after his conviction (emphasis added) (*Skoien,* 614 F.3d at 645). Nor has he alleged any other facts "that distinguish his circumstances from those of persons historically barred from Second Amendment protections" due to domestic violence convictions (*Enos,* 855 F.Supp.2d at 1099 (explaining that such allegations are necessary to sustain an as-applied constitutional challenge (citing *United States v. Barton,* 633 F.3d 168, 174 (3d Cir.2011)))). As such, he has not provided us with any basis to find that an otherwise constitutional statutory scheme is not constitutional as applied to him. See *Skoien,* 614 F.3d at 645 (explaining that an individual "to whom a statute properly applies can't obtain relief based on arguments that a differently situated person might present").** Thus, even if the petitioner had not forfeited his constitutional claim, we would reject it. For the foregoing reasons, we deny the petitioner's motions to correct misnomer and dismiss the appeal, and we reverse the order of the circuit court."

See ***Odle v. Department of State Police, 2015 IL App (5th) 140274 (Ill.App. 5 Dist., November 18, 2015).***

A. This Court has subject matter jurisdiction. As the Petitioner argues and as this court has previously found, 430 ILCS 65/10(a) granted/grants the Petitioner the right to petition the Circuit Court of Wabash County, Illinois to seek relief from the revocation of her F.O.I.D. card by the Respondent-ISP because of her battery conviction. In ruling on the various motions

to date, including the motions for summary judgment, the court has determined that, "as-applied" to Petitioner, the state and federal statutory scheme prohibit the court from ordering ISP to re-issue Ms. Johnson's a F.O.I.D. card, short of a determination in her favor regarding her "as-applied" Constitutional challenge. The court previously granted the Petitioner leave to plead and pursue her "As-Applied" claim. The Respondent and the Wabash County State's Attorney have had more than adequate notice of such claim. And, this court has subject matter jurisdiction and the authority to hear such Constitutional claim. ***See: Coram v. State of Illinois, 2013 IL 113867, 375 Ill.Dec. 1, 996 N.E.2d 1057(Ill. 2013); O'Neill v. Director Of The Illinois Department Of State Police, 2015 IL App (3d) 140011 (Ill. App. 3d Dist., March 11, 2015); and, Odle v. Department of State Police, 2015 IL App (5th) 140274 (Ill.App. 5 Dist., November 18, 2015).***

B. The Second Amended Petition sufficiently alleges a Constitutional Violation/"As applied" challenge and a "Perpetual" Ban. The Court finds that the Petitioner's Second Amended Petition sufficiently alleges facts to support Petitioner's Constitutional ("As-Applied") Claim, to put Respondent on notice of such claim and to make such claim cognizable. The court further agrees with Petitioner's argument that Petitioner need not further plead specific additional allegations concerning the "perpetuity" of the ban against her possessing firearms because of the possibility of a pardon. This court finds that Petitioner was not required to first seek a pardon from the Governor before pursuing her petition herein. ***See Coram v. The State of Illinois, Department of State Police, 2013 IL 113867, 996 N.E.2d 1057, 375 Ill.Dec. 1 (Illinois Supreme Court, Sept. 12, 2013).*** Moreover, as shown by ***Exhibit "A"*** attached to Petitioner's Opposition/Response, Petitioner has indeed pursued a pardon and has been denied. The denial of the requested pardon was just issued by the Governor/Prisoner Review Board on December 23, 2015 - in the midst of Petitioner being required to file/filing her Second Amended Petition. It is unclear whether the Governor's denial of the requested pardon will be part of a stipulation of the parties during the evidentiary hearing. However, the court finds that it is not required to grant leave/require the Petitioner to once again amend her petition at this stage. If necessary, the Court has the authority to grant the Petitioner leave to amend her petition even during the evidentiary hearing to comport such petition with the proofs.

C. The Petitioner's "As-Applied" Constitutional Claim is Cognizable. In its October 2015 Order Regarding The Motions For Summary Judgment, this court granted the Petitioner leave to re-plead her constitutional claim when and if such became necessary (i.e. if Petitioner is left with no other resort). In its December 16, 2015 Order, the court reconsidered a portion of that October 2015 Order and determined that Petitioner could not prevail under an argument that her "civil rights were restored" by her pretrial detention. Thus, short of a Constitutional "As-Applied" challenge, Petitioner would be precluded under federal law from possessing a firearm. As indicated in both of the court's October 28, 2015 and December 16, 2015 Orders, in that event, this court would need to consider such constitutional challenge. The Illinois Supreme Court (in ***Coram***), the Illinois Appellate 5th District Court (in ***Odle***) and other Illinois Appellate Courts (e.g. the 3rd District Court in ***O'Neill***) have all indicated that an "As-Applied" challenge should be considered in the appropriate case. This court believes that, under the facts alleged

thus far, this is an appropriate case where the Petitioner's "As-Applied" challenge must be considered. ***See:*** ***Coram v. State of Illinois, 2013 IL 113867, 375 Ill.Dec. 1, 996 N.E.2d 1057(Ill. 2013); O'Neill v. Director Of The Illinois Department Of State Police, 2015 IL App (3d) 140011 (Ill. App. 3d Dist., March 11, 2015); and, Odle v. Department of State Police, 2015 IL App (5th) 140274 (Ill.App. 5 Dist., November 18, 2015).***

Therefore, the Respondent-ISP's Combined Motion to Dismiss is DENIED.

This Court will conduct an evidentiary hearing on the Petitioner's Second Amended Petition and her "As-Applied" Constitutional challenge commencing Wednesday, January 20, 2015 at 1:00 p.m., as previously scheduled and noticed.

The Court will E-mail a copy of this Order to counsel of record and the Court directs the Circuit Clerk to file and provide file-marked copies of this Order to counsel, once the original is received.

JAN 19 2016

Date

Larry D. Dunn, Circuit Judge

IN THE CIRCUIT COURT
FOR THE SECOND JUDICIAL CIRCUIT
WABASH COUNTY, MT. CARMEL, ILLINOIS

SHAWNA JOHNSON,)
Petitioner,)
)
-v-) **No. 13-MR-15**
)
ILLINOIS STATE POLICE,)
Respondent.)

ORDER

This matter having come before the court for hearing on Petitioner, Shawna Johnson's Second Amended Petition For Review of Denial of Firearm Owner's Identification Card filed with leave of court on December 28, 2015, all parties and counsel all having been present, the court having heard, seen and considered the sworn testimony, the exhibits, the various stipulation of facts, the relevant pleadings and entire record herein as relevant to the matters and issues before the court, the arguments and authorities presented by counsel and all other applicable authorities, and the court having jurisdiction over the parties and subject matter and being fully advised, **HEREBY FINDS AND ORDERS AS FOLLOWS:**

I. Findings of Fact and History of the Proceedings

Most of the facts are undisputed. Although the court has previously in prior rulings recited factual findings, the court again believes it is helpful to recite the material facts and the history of the proceedings in this case.

On June 7, 2001, Petitioner, Shawna L. Johnson pled guilty and was convicted of Battery, a Class A Misdemeanor under Illinois law, in the Circuit Court of the Second Judicial Circuit, Wabash County, Illinois in Case No. 2001-CM-56. At that time, Shawna Johnson's surname (married name) was Korstick. Johnson's conviction was part of a negotiated plea whereby she pled guilty to an amended charge of Battery (under 720 ILCS 5/12-3(a)) and received a sentence of one year conditional discharge, along with a jail sentence of 2 days (time served) in jail, and a $ 150 fine and court costs. The original charge was filed as Domestic Battery (under 720 ILCS 5/12-3.2(a)(1)). As part of the negotiated plea, the original charge was amended by interlineation - striking the allegations with the regard to the fact that the victim of the battery was Johnson's husband at the time. The amended count to which Johnson pled guilty stated in pertinent part that Johnson, "... without legal justification, knowingly caused bodily harm to Michael A. Korstick, in that [she] hit [Korstick] on the face and head causing bruises and abrasions ... ." There is no

indication that any firearm or firearm ammunition was used by Johnson in any way in the commission of this domestic battery/battery. Johnson successfully completed the term of conditional discharge and was discharged on November 18, 2008. Other than this battery conviction, and another 1991 Wabash County (non-domestic violence) battery conviction (with a $ 1 fine), Johnson has not been convicted of any felony or misdemeanor in Illinois or any other state. It is also undisputed that on March 25, 2001, the date of the alleged battery/domestic battery, Johnson was married to and had children in common with the alleged victim, Michael A. Korstick. **(See Respondent's Exhibit "H" - ISP's Request For Admission of Facts - attached to ISP's Memorandum of Law.)** Although Johnson never moved to withdraw her plea and never appealed her Battery conviction, in her answers to certain questions in the very same above- referenced "Request For Admission of Facts," she denies striking her husband. Johnson also alleges in an affidavit that she once had an Order of Protection against her husband, Michael Korstick. She claims this order of protection was in place prior to her pleading guilty in 2001-CM-56. And, she says that she dismissed her order of protection case due to pressure from her employer at that time indicating to her that such order of protection was creating problems at work. Johnson also claims that at the time she entered into the negotiated plea in question, she inquired about the impact of the negotiated plea on her FOID Card. Johnson claims the State's Attorney at that time told her that it would probably not impact her FOID card, and that, if it did, it would only be for a short time. **(See Affidavit of Shawna Johnson filed July 25, 2014.)**

On or about April 1, 2010, after Johnson's plea, conviction and successful discharge, Johnson sought and obtained a Firearms Owner's Identification Card (FOID card). However, the Illinois State Police (ISP) revoked Johnson's FOID card on the basis of the above-referenced Battery conviction and sent Johnson a letter dated July 27, 2012 informing Johnson that she was ineligible for a FOID card as a result of her Battery conviction. ISP's July 27, 2012 letter (Exhibit "D") states in pertinent parts:

> "[ISP] records reflect on June 7, 2001, you were convicted of Battery, as a result of an incident involving domestic violence. Pursuant to Federal and State law, The [ISP] is prohibited from issuing a [FOID] card to anyone convicted of any crime involving domestic violence. You are ineligible for a [FOID] card as result of your conviction. ... This action is in accordance with the Federal Gun Control Act of 1968, 18 USC 922(g)(9). This makes it unlawful for any person convicted of a 'misdemeanor crime of domestic violence' to ship, transport, possess or receive firearms or ammunition."

(See ISP's Exhibit "D" attached to its Memorandum of Law in support of ISP's Motion for Summary Judgment.)

Johnson claims she sent a letter dated August 16, 2012 to the Director of the Illinois State Police requesting a formal hearing regarding the revocation. Although Johnson claims under oath in an affidavit that she mailed such letter, she did not send such registered or certified mail. **(See documents filed by Petitioner on November 21, 2013.)** ISP claims that it did not receive

Johnson's letter and that they have no record of any such letter in a file that they maintain regarding Johnson's FOID Card application and revocation. **(See Respondent's Motion For Summary Judgment and Memorandum in Support. And, see Affidavit of ISP Sergeant Mark Bayless filed December 5, 2013.)** On or about April 9, 2013, Johnson received a letter from ISP indicating that she was required to turn over her revoked FOID card to a local law enforcement agency. Johnson turned her FOID card over to the Wabash County Sheriff on August 12, 2013. Johnson made no further contact or follow-up with ISP until she filed her petition in the instant case.

Shawna Johnson (pro se) filed the/her initial petition in this case, a petition entitled, "Petition For Review of Denial of Firearm Owner's Identification Card," back on August 15, 2013.

Ms. Johnson eventually obtained counsel and filed an amended petition. The Illinois Attorney General entered its appearance of behalf of ISP. The Wabash County State's Attorney, Cassandra Goldman, stepped aside indicating she did not object to the petition and that she would not participate in these proceedings.

Petitioner eventually raised her "as applied" challenge in her pleadings as she alleged and argued that the current federal and state framework which prohibits her from possessing firearms and ammunition, is unconstitutional and violates of her Second Amendment rights "as applied" to her. Petitioner's Amended Petition For Review filed on September 9, 2014 incorporated this "as applied" constitutional challenge. This Amended Petition was essentially identical to Ms. Johnson's original *pro se* Petition except that her Amended Petition added her constitutional "as applied" challenge in Paragraph (15). Johnson did further expound upon her constitutional ("as applied") challenge in her previously filed Memorandum of Law in Opposition to Respondent's Motion For Summary Judgment.

After various motions (Motion to Dismiss, Motion for Summary Judgment, etc.) were presented, argued and resolved, the Court ultimately granted Petitioner and her counsel leave to file and on December 28, 2015 Petitioner through her counsel did file her Second Amended Petition officially raising her claim that various applicable laws were unconstitutional "as applied" to the Petitioner, Shawna Johnson.

In its October 28, 2015 Order denying ISP's Motion For Summary Judgment, this Court specifically found and legally concluded that, the "civil rights restored" exemption under Section 18 U.S.C. § 921(a)(33)B(ii) and the fact that Shawna Johnson was incarcerated as part of her conditional discharge sentence removed the federal firearm bar for Ms. Johnson because, as part of her sentence of conditional discharge, she was sentenced to and did serve two (2) days (pre-trial detention) in the Wabash County Jail. Thus, the court found that Petitioner was entitled to the relief she requested (restoration of her F.O.I.D. card) without resorting to a resolution of her Constitutional claim. At that point, the court struck/dismissed Petitioner's Constitutional ("As-Applied") claim, with leave to re-instate such claim if it later became necessary to address such claim. Subsequently, however, in its Order dated December 16, 2015, the Court granted the Respondent's Motion To Reconsider such ruling and granted Respondent-ISP's Motion For

Summary Judgment on all requested relief except for Petitioner's previously pled Constitutional "As-Applied" challenge. As part of that December 16, 2015 Order Granting Respondent's Motion to Reconsider and Granting Summary Judgment, the court also granted Petitioner leave to re-plead her Constitutional ("As-Applied") challenge. ***See this Court's Orders dated October 28, 2015 and December 16, 2015.***

Then, on December 28, 2015, Petitioner, Shawna Johnson filed her Second Amended Petition For Review of Denial of Firearm Owner's Identification Card. And, this case proceeded to a final evidentiary hearing. On January 20, 2016, all participating parties and counsel took part in an evidentiary hearing where Petitioner, Shawna Johnson presented several witnesses. Although the ISP demanded such contested evidentiary hearing, the ISP presented no witnesses of its own. But, the Attorney General on behalf of the ISP did cross-examine Petitioner, Shawna Johnson and he other witnesses. Here is a summary of the testimony of Petitioner's witnesses:

Larry Blaize, a retired Illinois State Police trooper, testified on Shawna Johnson's behalf. Blaize was an ISP trooper for 21 years. He was also a City of Mt. Carmel police officer for 11 years. And, he further worked part-time for three years as an officer or deputy for the Edwards County Sheriff's Department, the Wabash County Sheriff's Department and the City of Albion Police Department. Blaize has known Shawna Johnson since about 1999. Blaize has even been present with and has observed Shawna Johnson and her husband (Jerry Johnson) use firearms several times when they had been shooting guns together (apparently when Shawna still had a valid FOID Card). As a former officer of course, Blaize has had training and experience in the handling and proper use of firearms. And, Blaize had also had experience, training and responsibility in determining whether and submitting a written report if someone might pose a (clear and present) danger in possessing/using a firearm. Blaize said Shawna Johnson exhibited no characteristics which would cause him concern about her being a threat to society or anyone else if she were to have a FOID Card. Blaize said he even allowed Shawna Johnson to shoot a couple of his own pistols and one of his rifles and that she "always exhibited good firearm safety and seemed very knowledgeable about firearms and was very competent in the use of a firearm." Blaize said that, based upon his observations and training, he had no reason to be concerned about Shawna Johnson's safety or qualifications to handle or use a firearm. Blaize said that he felt Shawna Johnson was actually better in her handling of firearms than a lot people he'd seen who carry guns for a living, such as security guards. Blaize even wrote a letter on behalf of Ms. Johnson at her request in 2009 or 2010 to try to help her get her conviction expunged or overturned or help her get a pardon. Blaize concluded his testimony by stating that he believes Shawna Johnson has "a very god character" and that she would be a "very good employee" and that he would "trust her to do his business."

Shawna Johnson testified on her own behalf and in support of her petition. Johnson has been married to her current husband, Jerry Johnson, since January, 2009. She was previously married to Michael Korstick, initially in August 1981 when Shawna Johnson was 14 years old and pregnant by Korstick. Michael Korstick was 24 years old at the time. Shawna Johnson has four daughters by Korstick and she has a step-daughter who is Jerry Johnson's daughter. Shawna Johnson testified that Michael Korstick was incarcerated and not present to help raise their children for a lot of their early marriage. When Michael Korstick was originally incarcerated for

"drinking and drugging" and stealing and slaughtering a hog, Shawna Johnson and her daughters were already living with Shawna's mother because Michael Korstick was "abusive" to Shawna. Shawna testified that Korstick first hit her right after they were married and while she was pregnant back in the summer of 1981. She said she had called the police about Korstick physically abusing her "maybe four or five times." But, she said she had did not always call the police after Korstick had abused her. In February, 2001, Johnson testified that she sought and obtained an order of protection against Korstick after he had punched her in the mouth. Johnson said that another one of Korstick's ex-wives also had got an order of protection against him. However, Johnson said that dropped her order of protection against Michael Korstick in March 2001 because of pressure from her employer, J. Wilderman's Autoplex. At the time, Shawna was the service manager and Michael Korstick was also working at J. Wilderman's. Shawna Johnson said she was told (by her employer) that she better drop the order of protection or she "wouldn't have a job."

Shortly after Shawna Johnson dropped her order of protection in March 2001, she was arrested for the "domestic violence" incident in question in the instant case. Concerning the offense which occurred later in March 2001 and which caused the ISP to revoked Shawna Johnson's FOID Card, Shawna Johnson testified that she went to a party. She and Korstick were not living together at the time. She said Korstick showed up at the party and that he was "getting abusive, verbally, physically, and that he shoved [Shawna] out of a trailer door." She said she asked another guy for a ride home. She got in the car. Korstick jumped into the car and other guys pulled him out of the car. Shawna said she went home. She said that, the next morning, a police officer came to her house and she was arrested for domestic (battery) for hitting Michael the night before. Shawna Johnson testified that she does not remember hitting Michael Korstick that night. When the officer took Shawna to the police station, Michael Korstick was there. Korstick was yelling at the officer that he (Korstick) didn't want Shawna to be arrested for the incident. He said he wanted to "take it back" and didn't want to press charges.

As a result of the March 2001 incident, Shawna Johnson was charged with domestic battery. She had four daughters at the time. She was working and making $ 700 per week. She said she had no money to pay for an attorney. She also said that she was not offered a public defender. Shawna thought that her only option was to talk to the State's Attorney, try to make a deal so she could keep her job. Once again, she was told, by her employer, that she "needed to make [the criminal charges] go away." So, she talked to the State's Attorney (Terry Kaid) and asked him what her options were. Kaid told her that he would amend the charge from domestic battery to "simple" battery, that she could plead guilty and that there may be the possibility of [getting] the FOID Card [back]." Kaid told her she wouldn't lose her FOID Card forever, "just maybe a short time because of a battery charge. Shawna received a conviction, she was sentenced to conditional discharge, and, she had to pay a fine and complete counseling. She was discharged successfully from the conditional discharge order, but not until 2008. ***See Wabash County Case No. 2001-CM-56 of which the court has taken judicial notice.***

Shawna Johnson testified that she had had a valid FOID Card since the early 1990's when the incident occurred and when was convicted of battery and received conditional discharge back in March, 2001. She said that, from her discussions with State's Attorney Terry

Kaid at the time of her plea, she understood that she would lose her FOID Card – for maybe five years – and that she would then be able to get it back.

Shawna and Michael Korstick were divorced in August, 2008. Michael Korstick died in January, 2011. Shawna had no further contact with Michael between the time of their divorce and his death.

In 2010, nine years after her battery conviction, Shawna Johnson applied for and received an Illinois FOID Card. When she filled out her application for such FOID Card, she went to visit Wabash County Sheriff, Joe Keeling to get help filling out the application. She said there was a question on the application about whether she'd had a domestic battery or domestic violence conviction. She said she answered the question "no," because she went and asked Sheriff Keeling specifically about her situation. She told him about the fact that she'd been charged with battery but she pleaded guilty to and was convicted of battery. Shawna testified that Sheriff Keeling told her that, "Shawna, if you were convicted of a battery, that's how you answer it." She completed the application and a FOID Card was issued. After she got her FOID Card, she purchased a handgun and a shotgun. She said she used the handgun for protection and target practice and that the shotgun was for hunting.

Shawna Johnson testified that she learned her FOID Card had been revoked in July 2012 when tried to purchase another handgun from a federally licensed firearm dealer in Indiana and she was advised that her FOID Card was revoked. She called the Illinois State Police (ISP) the next day. ISP informed her that she had a domestic battery and that she was prohibited from having a FOID Card. She did receive a revocation letter (dated July 27, 2012) shortly thereafter. ***See Petitioner's Exhibit # 1 from the January 20, 2016 hearing.*** Shawna Johnson said that, after she received the revocation letter, she put her FOID Card in an envelope to mail it back to ISP as instructed. She thought she had mailed the envelope at that time. But, according to Johnson's further testimony, which this court believes, she misplaced the envelope which contained the FOID Card along with some other important papers and indeed did not mail it back to ISP at that time (July 2012). On August 16, 2012, Shawna Johnson completed and mailed a letter to the ISP asking them to review the decision to revoke her FOID Card. Johnson said she never received a response to this letter. ISP denies they ever received it. The court believes Shawna Johnson's testimony that she mailed the letter to ISP shortly after she drafted it. ***See Petitioner's Exhibit # 2 from the January 20, 2016 hearing.***

Subsequently, Johnson received a letter from ISP, dated August 1, 2013, stating that they had not received her FOID card back as requested (in the July 27, 2012 letter) and that she must send it back or be charged with a misdemeanor. ***See Petitioner's Exhibit # 3 from the January 20, 2016 hearing.*** In response to this letter, Johnson searched her papers, found her FOID Card in the envelope she thought she'd mailed, and took the FOID Card to the Wabash Count Sheriff, so that it could be returned to ISP. At that time, she also filled out a form indicating that she herself did not possess any firearms. ***See Petitioner's Exhibit # 4 from the January 20, 2016 hearing.*** Shawna Johnson and her husband, Jerry Johnson, both testified about how Jerry owns/has title to all the guns in their home and that all guns and ammunition are locked up, with key or combination locks, and that only Jerry and not Shawna has access to and knowledge of the keys and combinations to the locks. Thus, Shawna Johnson testified that, if someone broke

into her home, she would be unable to use any of the guns to protect herself or her thirteen year-old step-daughter.

Shawna Johnson also testified about being hit by Michael Korstick in February, 2001 and her subsequent order of protection against him, which she later had dismissed in March 2001. Korstick was also charged and prosecuted for the February 2001 incident. ***See Wabash County Case No. 2001-CM-31 of which the court has taken judicial notice.***

Shawna Johnson also testified about her other efforts to remove her battery conviction and to have her FOID Card restored. Shawna Johnson filed for a pardon back in (March) 2012. In fact, she had applied for this pardon before she learned that her FOID Card had been revoked. Finally, almost four years later on January 2, 2016 – just a couple of weeks before the January 20, 2016 hearing - Shawna Johnson got a letter from the Governor/Prison Review Board of the State of Illinois, stating that her request for pardon had been denied. ***See Petitioner's Exhibit # 5 from the January 20, 2016 hearing.***

Shawna Johnson testified that she has not been arrested since the incident in question in March 2001 – over 17 years ago. As to the rest of her criminal history, she has had a couple of "seat belt tickets." And, in 1991, she was convicted of a battery and fined $ 1 in Wabash County Circuit Court, relating to an altercation with another (non-related) woman (babysitter). Johnson described the details of this 27 year old offense. **Other than the two battery convictions and the "couple of seat belt tickets," Shawna Johnson has led a law-abiding life.**

Apparently, Shawna and Michael Korstick were initially married, divorced and then got back together and re-married in 1998. Then, as indicated above, they were once and for all divorced and separated in 2010.

Shawna Johnson testified that she believes that she is a pretty responsible person. She said she went through actually two divorces with Michael Korstick and that she did not try to hurt him at any other time except the battery conviction. Shawna said she knows how to use a firearm. She does not want to hurt anyone. She said she learned a lot from her relationship with and being married to Michael Korstick. She does not want her daughters to have to go through any of the pain that she endured nor does she want to cause them pain by her own actions.

On cross-examination by the Attorney General, Shawna Johnson said that in her petition for a pardon, she presented letters of reference and explained the circumstances of her battery conviction much as she had to the court in the hearing on January 20, 2016. She said she didn't believe she left anything out of that petition for pardon.

Michael McWilliams, a Sergeant with the City of Mt. Carmel Police Department (MCPD) also testified on behalf of Petitioner. McWilliams had been with MCPD for 11 years. Just as Retired Trooper Larry Blaize had done, McWilliams talked about the "clear and present danger affidavit," which he said is a form provided by the State of Illinois and which is used by law enforcement officers and school officials to document and report threatening statements or actions of individuals whom such officers/officials believe might present a danger if they were allowed to have a firearm and to potentially convince the appropriate agency(ies) to revoke the

FOID card(s) of such individual(s). McWilliams said he'd known Shawna Johnson and her husband for approximately 7 years at the time of his testimony as the Johnson's had provided maintenance for the MCPD squad cars. And, he'd also known Ms. Johnson through her prior employment at "2Go's," a local gas station/convenience store. McWilliams testified that he'd also known and dealt with Shawna Johnson's ex-husband, Michael Korstick. McWilliams described Michael as "unreasonable" and "very difficult to deal with" as he would "get worked up and agitated over certain situations." As to McWilliams' many dealings with Shawna Johnson, however, McWilliams said that she had "never showed [him] any behavior whatsoever that would be concerning to [him]" and that [to his] knowledge, she has always been honest and truthful with [him]. … and that he'd [n]ever seen anything out of the way with her behavior that would alarm [him] in any way, shape or form." McWilliams also testified that he believed Shawna Johnson has a fine reputation and is well-respected in the Mt. Carmel/Wabash County, Illinois community. McWilliams also said that, during his time on the MCPD, he is not aware of Ms. Johnson being arrested or law enforcement having any difficulty with her. McWilliams said that he was "without a doubt" comfortable with Shawna Johnson possessing a firearm.

Wabash County Sheriff's Deputy D-Ray Etzkorn testified on behalf of Shawna Johnson. Etzkorn had been a full-time deputy for 19 years. He had known Shawna Johnson for over 20 years. Etzkorn knew Shawna Johnson through her work with her various employers. Etzkorn actually worked with Johnson's ex-husband, Michael Korstick, in the "clean-up shop" of a local car dealership in the late 1970's and/or early 1980's. Etzkorn described Michael Korstick "fairly jovial" on a day-to-day basis. But, Etzkorn said that Korstick was "quite prone to temper tantrums," that Korstick could "become agitated and quite often he became very animated." Etzkorn said that if Korstick lost his temper Korstick was prone to throw things, curse, and that Korstick could actually become so irritated that he would start to shake.

Etzkorn said that over the 20 years he has known her, Shawna has always been a friendly and outgoing individual. Etzkorn testified that he'd never had any issues with Shawna. Etzkorn further testified that he would not have any concerns about Shawna Johnson possessing firearms or a FOID card. Etzkorn said Shawna has been a very family-oriented person and that she looks out for her family. Etzkorn testified that, as far as he knew, Ms. Johnson seems to be well-liked. And, Etzkorn said he consider Ms. Johnson to be well-respected in the community.

Etzkorn was a deputy at the time of Shawna Johnson's battery conviction in question in 2001. Etzkorn said he had reviewed the report form the 2001 incident. Etzkorn testified that, notwithstanding Shawna Johnson's 2001 battery and prior 1991 battery convictions, he would believe Ms. Johnson would be safe with a gun, he would trust her with a gun and that he had never seen any reason or had any reason to think that she would act in a manner dangerous to the public safety.

Former Wabash County Sheriff Arnold "Joe" Keeling also testified on behalf of Shawna Johnson. Keeling was a two-term sheriff of Wabash County, Illinois from 2006 to 2014. Keeling started in law enforcement in 1989 and even worked as a deputy assigned to the Illinois State Police Drug Task Force for a period of time. Keeling actually arrested Michael Korstick for drugs. Keeling said he'd dealt with Korstick 4-5 times, including seeing Korstick at

his employment location(s). Keeling said Korstick had "kind of a lack of respect for any kind of authority" and "he like had a chip on his shoulder" and he "got pretty hot tempered sometimes."

Keeling also discussed the "clear and present danger" forms consistent with testimony of the other officers. Keeling said that he had completed such a form 2 to 3 times regarding individuals whom he believed should not possess a firearm or FOID Card.

Keeling testified that he'd known Shawna Johnson for 20-25 years. Over the lengthy period of time, Keeling said that he has known Shawna to be "pretty easygoing, good to work with, good to talk to, seems like a pretty good person." Keeling said he'd "never had any other dealings with her other than good."

Keeling further testified about meeting with Shawna Johnson in his office in August of 2013 when she signed a firearm disposition record and turned over her FOID Card to then Sheriff Keeling. ***See Exhibit 4.*** Keeling testified that Shawna Johnson was "complying with the law 100 percent" but that she was "definitely upset about the process" of and the fact that she was losing her FOID Card.

As to Shawna Johnson's reputation, Keeling said that "Shawna has a good reputation … [that] everybody likes her … and no one has really had any problems with her." And, he said she is a "well-respected person." Keeling was aware of Shawna's 2001 and 1991 battery convictions. Nonetheless, Keeling said he would not have any concerns about Shawna Johnson having a firearm. Keeling said that during the 20-25 years he's known Shawna Johnson, he had never seen her do anything that was illegal, rude or disrespectful to anybody nor had she done anything that would make him believe that she would do anything to harm anyone.

Mt. Carmel Police Chief John Lockhart testified on behalf of Shawna Johnson. Lockhart had been with the MCPD for 19 years and he'd known Shawna Johnson for 15 years at the time of his testimony. Initially he'd met Johnson as she was neighbor to his parents. But, he also met Johnson professionally as he was the officer responding to the complaint which resulted in Ms. Johnson's arrest for domestic battery in February, 2001, and which eventually resulted in a conviction for battery for Ms. Johnson. The officer who arrested Shawna Johnson (the day after the incident (Corporal Johnson) was no longer with the MCPD. Lockhart reviewed, identified and referred to his own police report from the incident in question. ***See Exhibit 6.*** Michael Korstick was observed to have a bloody nose or otherwise appeared to be injured at the time.

Chief Lockhart also recalled numerous times when he'd had contact with Michael Korstick when Korstick was often intoxicated, agitated, animated, and hard to talk or reason with.

Lockhart testified at the hearing that he then had almost daily contact with Shawna Johnson at her place of employment. As had the other officers in their testimony, Lockhart discussed the "clear and present danger" report forms that he has used and completed during his law enforcement career. Lockhart testified that, based upon his experience in law enforcement, and his knowledge or opinion of Shawna Johnson and her reputation in the community, that

Shawna Johnson is "one of the few people that [he's] dealt with that [he would] have no hesitation whatsoever on her ability and common sense to own a firearm." Lockhart continued, "I find no reason why she should not. I have no indications, other than the one report, of her being violent or anything unlawful that I'm aware of. She's had a good record and a good rapport within the community. And to be honest with you, I have people out there now that have FOID cards and even concealed carry that I would be more concerned about than I would Mrs. [Johnson]." Lockhart said that he did not believe that Shawna Johnson is someone who would be likely to act in a manner dangerous to public safety if she were issued a FOID card. Lockhart said this was true even after he was made aware of and also considered Ms. Johnson's previous (1991) battery conviction related to the dispute with a babysitter.

Shawna Johnson's husband, James "Jimmy" Johnson, testified on Shawna's behalf. Shawna and Jimmy had been married for 7 years at the time of the hearing. But, they've known each other, through working at common employers, for several years before that. The Johnson's (Jimmy and Shawna) now run an auto maintenance business out of their residence where they service fleet vehicles, including squad cars for local law enforcement agencies.

Jimmy Johnson also knew Michael Korstick, he worked for a time with both Shawna and Michael Korstick and he testified that had observed them together and how Michael Korstick treated Shawna. Jimmy Johnson testified that Korstick would call Shawna an "F'ing bitch" and other demeaning things.

Jimmy Johnson testified that he himself has a FOID Card and even an Illinois "Concealed Carry" permit. He said he'd been a gun owner for over 20 years and that he'd gone through 16 hours of training to get his concealed carry permit. Mr. Johnson said named the several firearms that he has at his home under lock and key or combination lock and that Shawna did not have access to the key or the combination for the two gun safes at their home. He said that since Shawna lost her FOID card, she has "never" been allowed to possess a firearm or ammunition. Jimmy Johnson said that Shawna has never struck him or threatened to hit him. He said that he would have no fear if Shawna would again be allowed to have a FOID Card and a firearm.

II. Applicable Federal Statutes

The Federal Gun Control Act of 1968 prohibits possession of a firearm by any person convicted of a felony. 18 U.S.C. § 922. In 1996, Congress extended the prohibition to include individuals convicted of a misdemeanor crime of domestic violence. **18 U.S.C. § 922(g)(9).** The Federal Gun Control Act defines "a misdemeanor crime of domestic violence" as an offense that:

> (i) is a misdemeanor under Federal, State, or Tribal law; and
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim." **18 U.S.C. § 921(a)(33)(A).**

In ***U.S. v. Hayes, 555 U.S. 415 (2009),*** the U.S. Supreme Court held that misdemeanors, such as Ms. Johnson's conviction for Battery, can/do bar the possession of firearms and ammunition under the Federal Gun Act (**18 U.S.C. § 922(g)(9)**) even though the predicate offense does not include/allege the existence of a domestic relationship between the offender and the victim as a discrete element of the offense. ***Hayes, 555 U.S. at 421.***

As argued by the ISP, even as here in the instant case, where a charge of Domestic Battery was amended to Battery, and, where the discrete or specifically alleged element of the domestic relationship between the offender and the victim has been removed/amended-out of the charging document/Information, it appears that 18 U.S.C § 922(g)(9) still bars the offender from possessing a firearm or ammunition if, in reality, there was one of the domestic relationships as delineated in the federal statute in existence between the offender and the victim. ***See 18 U.S.C. § 922(g)(9) and 18 U.S.C. § 921(a)(33)(A).***

However, federal law also includes certain exceptions/exemptions which, if applicable to the specific facts of a certain case, would negate the conviction for a misdemeanor crime of domestic violence and remove the federal bar to possession of a firearm and ammunition. These exceptions, set-forth in section **921(a)(33)(B)(ii)** of Title 18 **(18 U.S.C. § 921(a)(33)(B)(ii))** (Supp. II 1996)), provide that:

> "... a person shall not be considered to have been convicted of misdemeanor domestic violence if the conviction has been expunged or set aside, if the person has been pardoned, or if the person's "civil rights" have been "restored." **See 18 U.S.C. § 921(a)(33)(B)(ii).**

This court, along with the parties and counsel in this case, have waded – via various hearings on Motions to Dismiss and a Motion for Summary Judgment - through all possible exceptions and exemptions stated under the above-sited federal statutes and the court has ultimately found that none of the above-recited exceptions or exemptions are available/provide relief to Shawna Johnson.

III. Applicable Illinois Statutes

The Illinois Firearms Owner's Identification Act (FOID Act) is found at 430 ILCS 65/0.01 et.seq. The Illinois General Assembly amended Section 10 (c) of the FOID Act effective January 2013, adding language stating that a court may grant relief (the issuance of a FOID card) only where the granting of such relief would not be contrary to federal law.

430 ILCS 65/10

65/10. Appeal to director; hearing; relief from firearm prohibitions.

"§ 10. Appeal to director; hearing; relief from firearm prohibitions.

(a) Whenever an application for a Firearm Owner's Identification Card is denied, whenever the Department fails to act on an application within 30 days of its receipt, or whenever such a Card is revoked or seized as provided for in Section 8 of this Act, the aggrieved party may appeal to the Director of State Police for a hearing upon such denial, revocation or seizure, unless the denial, revocation, or seizure was based upon a forcible felony, stalking, aggravated stalking, domestic battery, any violation of the Illinois Controlled Substances Act, the Methamphetamine Control and Community Protection Act, or the Cannabis Control Act that is classified as a Class 2 or greater felony, any felony violation of Article 24 of the Criminal Code of 1961 or the Criminal Code of 2012, or any adjudication as a delinquent minor for the commission of an offense that if committed by an adult would be a felony, in which case the aggrieved party may petition the circuit court in writing in the county of his or her residence for a hearing upon such denial, revocation, or seizure.

(b) At least 30 days before any hearing in the circuit court, the petitioner shall serve the relevant State's Attorney with a copy of the petition. The State's Attorney may object to the petition and present evidence. At the hearing the court shall determine whether substantial justice has been done. Should the court determine that substantial justice has not been done, the court shall issue an order directing the Department of State Police to issue a Card. However, the court shall not issue the order if the petitioner is otherwise prohibited from obtaining, possessing, or using a firearm under federal law.

(c) Any person prohibited from possessing a firearm under Sections 24-1.1 or 24-3.1 of the Criminal Code of 2012 or acquiring a Firearm Owner's Identification Card under Section 8 of this Act may apply to the Director of State Police or petition the circuit court in the county where the petitioner resides, whichever is applicable in accordance with subsection (a) of this Section, requesting relief from such prohibition and the Director or court may grant such relief if it is established by the applicant to the court's or Director's satisfaction that:

(0.05) when in the circuit court, the State's Attorney has been served with a written copy of the petition at least 30 days before any such hearing in the circuit court and at the hearing the State's Attorney was afforded an opportunity to present evidence and object to the petition;
(1) the applicant has not been convicted of a forcible felony under the laws of this State or any other jurisdiction within 20 years of the applicant's application for a Firearm Owner's Identification Card, or at least 20 years have passed since the end of any period of imprisonment imposed in relation to that conviction;
(2) the circumstances regarding a criminal conviction, where applicable, the applicant's criminal history and his reputation are such that the applicant will not be likely to act in a manner dangerous to public safety;
(3) granting relief would not be contrary to the public interest; and
(4) granting relief would not be contrary to federal law." **See 430 ILCS 65/10.**

430 ILCS 65/8

65/8. Grounds for denial and revocation

"§ 8. Grounds for denial and revocation. The Department of State Police has authority to deny an application for or to revoke and seize a Firearm Owner's Identification Card previously issued under this Act only if the Department finds that the applicant or the person to whom such card was issued is or was at the time of issuance:

> (n) A person who is prohibited from acquiring or possessing firearms or firearm ammunition by any Illinois State statute or by federal law;

Upon revocation of a person's Firearm Owner's Identification Card, the Department of State Police shall provide notice to the person and the person shall comply with Section 9.5 of this Act." **See 430 ILCS 65/8.**

430 ILCS 65/13
65/13. Acquisition or possession prohibited by law

"§ 13. Nothing in this Act shall make lawful the acquisition or possession of firearms or firearm ammunition which is otherwise prohibited by law."

See 430 ILCS 65/13.

As this court has determined after consideration of the various motions in this case, relief is not available to Shawna Johnson under any of the above Illinois statutes.

Moreover, as established at the evidentiary hearing in January 2016, Shawna Johnson even sought and was denied a pardon by the Governor/Prison Review Board.

IV. Consideration of Applicable Legal Authorities

In the recent Illinois Appellate 5th District case of ***Odle v. Department of State Police, 2015 IL App (5th) 140274 (Ill. App. 5 Dist., November 18, 2015),*** the Illinois Appellate 5th District Court certainly left the door open (and even opined that the ***Coram*** court left the door open) for a potential "As-Applied" challenge to a perpetual firearm ban in an appropriate case.

The ***Odle*** court held that a petitioner in such an appropriate case would have to plead and show that he or she has led a law-abiding life for an extended period of time ***or*** that he or she could present other facts that would distinguish his/her circumstances from those of other persons who have been historically barred from Second Amendment protections due to having domestic violence convictions:

"Finally, we briefly address the petitioner's second amendment arguments. He contends that the interplay between the FOID Act and the federal Gun Control Act could lead to a permanent prohibition on gun ownership. This is because the Gun Control Act provides that the federal prohibition against acquiring or possessing a firearm as a result of a conviction for a "misdemeanor crime of domestic violence" ends when the person's civil rights are restored, if the state in which the conviction occurred provides for the restoration of civil rights after a conviction. 18 U.S.C. § 921(a)(33)(B)(ii) (2012). In Illinois, however, an individual convicted of a misdemeanor does not lose any civil rights as a result of the misdemeanor and, as such, cannot have any rights restored within the meaning of the Gun Control Act. See *Coram,* 2013 IL 113867, ¶ 18, 375 Ill.Dec. 1, 996 N.E.2d 1057. **The petitioner argues that this result violates his rights to keep and bear arms under the second amendment. As the State Police points out, the petitioner did not raise this constitutional claim before the circuit court. As such, he has forfeited consideration of the issue on appeal.** See *In re Liquidations of Reserve Insurance Co.,* 122 Ill.2d 555, 567–68, 120 Ill.Dec. 508, 524 N.E.2d 538 (1988); *People v. Myles,* 131 Ill.App.3d 1034, 1046, 87 Ill.Dec. 341, 476 N.E.2d 1333 (1985). **Moreover, even if we were to consider the constitutional challenge on its merits, we would reject the petitioner's claim. The rights to keep and bear arms, like other constitutional rights, are**

not unlimited. *District of Columbia v. Heller,* 554 U.S. 570, 626, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). The prohibition on firearm ownership and possession by people convicted of crimes of domestic violence has been upheld repeatedly. *United States v. Skoien,* 614 F.3d 638, 642–44 (7th Cir.2010); *Enos v. Holder,* 855 F.Supp.2d 1088, 1098–99 (E.D.Cal.2012). The rationale behind this prohibition is that people convicted of crimes based on acts of domestic violence pose a danger to members of their families due to a high rate of recidivism. See *Hayes,* 555 U.S. at 426–27; *Enos,* 855 F.Supp.2d at 1098–99. However, both federal and state courts have noted that a lifelong prohibition might raise constitutional questions. See, *e.g., O'Neill,* 2015 IL App (3d) 140011, ¶ 29, 390 Ill.Dec. 367; *Skoien,* 614 F.3d at 645. In *Coram,* our supreme court found it unnecessary to address the constitutional question (*Coram,* 2013 IL 113867, 375 Ill.Dec. 1, 996 N.E.2d 1057), but the court noted that "Congress obviously did not believe it reasonable or necessary to impose a perpetual firearm disability on anyone in the listed categories in section 922(g)." ...The rationale underlying these concerns is the notion that a domestic abuser who has led a law-abiding life for many years may no longer pose the risk to family members that justified the initial ban. See *Skoien,* 614 F.3d at 644. We note that while the petitioner in this case does not explicitly make these arguments, he does cite *Skoien* in support of his otherwise conclusory contention that a perpetual prohibition violates his rights under the second amendment. The petitioner contends that a perpetual or lifelong ban on firearm ownership is unconstitutional. He does not specify whether he is arguing that the statutes at issue are unconstitutional on their face or unconstitutional as applied to him. Courts that have considered similar arguments have treated them as challenges to the statutes as applied. See, *e.g., Skoien,* 614 F.3d at 645; *Enos,* 855 F.Supp.2d at 1099; see also *Coram,* 2013 IL 113867, ¶ 18, 375 Ill.Dec. 1, 996 N.E.2d 1057 (stating that the circuit court in that case found the FOID Act prohibition to be unconstitutional as applied to Coram). The petitioner in this case is not in a position to make such a claim. As discussed previously, the petitioner pled guilty late in 2011 to a charge based on events that took place earlier that year. He petitioned for review less than two years later, in March 2013. Thus, he is not someone "who has been law abiding *for an extended period* " of time after his conviction (emphasis added) (*Skoien,* 614 F.3d at 645). Nor has he alleged any other facts "that distinguish his circumstances from those of persons historically barred from Second Amendment protections" due to domestic violence convictions (*Enos,* 855 F.Supp.2d at 1099 (explaining that such allegations are necessary to sustain an as-applied constitutional challenge (citing *United States v. Barton,* 633 F.3d 168, 174 (3d Cir.2011)))). As such, he has not provided us with any basis to find that an otherwise constitutional statutory scheme is not constitutional as applied to him. See *Skoien,* 614 F.3d at 645 (explaining that an individual "to whom a statute properly applies can't obtain relief based on arguments that a differently situated person might present"). Thus, even if the petitioner had not forfeited his constitutional claim, we would reject it. For the foregoing reasons, we deny the petitioner's motions to correct misnomer and dismiss the appeal, and we reverse the order of the circuit court."

See ***Odle v. Department of State Police**, 2015 IL App (5th) 140274 (Ill.App. 5 Dist., November 18, 2015).*

Subsequent to its opinion in ***Odle***, in the case of ***Bailey v. The Department of State Police***, 2016 IL App (5th) 140586 (Appellate Court of Illinois, Fifth District)(March 3, 2016), the Illinois 5th District Appellate Court again made it clear that, post ***Coram*** and the 2013 amendments, Illinois courts can no longer order the issuance of a FOID Card under 430 ILCS 65/10 when the defendant/applicant was convicted of crime involving domestic violence and if the defendant/applicant possessing firearms would violate federal law. The 5th District Court stated:

> "Before concluding, we take this opportunity to discuss the FOID Act and the ramifications this court has observed as a result of the 2013 amendments. Members of the criminal justice system have failed to recognize that a trial court can no longer require the issuance of a FOID card, when faced with a conviction involving domestic violence. See 430 ILCS 65/10(b) (West 2012) (the circuit court "shall not" issue an order directing the Department to provide an applicant with a FOID card where the applicant is "otherwise prohibited from obtaining, possessing, or using a firearm under federal law"). It does not matter if a plea is involved or if the crime is a felony or a misdemeanor. The severity of the crime is irrelevant; rather, it is the nature of the crime that is germane. Further, it is not important whether the criminal conviction is for a misdemeanor that contains the words "domestic violence." A simple "battery" conviction may suffice for the decision to revoke a FOID card based on the underlying circumstances.
> See ***Odle,* 2015 IL App (5th) 140274, 398 Ill.Dec. 313, 43 N.E.3d 1223**. The Department has the obligation to investigate the circumstances of the crime, as it did in ***Odle,*** and determine whether the criminal actions involved violence of a domestic nature. "The rationale behind this prohibition is that people convicted of crimes based on acts of domestic violence pose a danger to members of their families ...." ***Odle,* 2015 IL App (5th) 140274, 398 Ill.Dec. 313, 43 N.E.3d 1223**. ... Perhaps our legislature should have considered requiring that the Department be named as a nominal party in a section 10 proceeding involving a request for the issuance of a FOID card. Alternatively, our lawmakers could have required that the Department be given notice of circuit court proceedings pursuant to section 10 of the FOID Act. Regardless of whether any action is taken to address the complexities brought about by the 2013 amendments to the FOID Act, it is now clear that the Act does not allow FOID cards to be issued to individuals who have been convicted of crimes that involve domestic violence."

See Bailey v. The Department of State Police, 2016 IL App (5th) 140586.

In another case decided after the ***Odle*** case (and after the evidence and briefs were concluded in the instant case), the 3rd District Appellate Court in ***People v. Heitmann, 2017 IL App (3d) 160527 (Ill. App. 3d Dist., October 2, 2017)*** again indicated that an "as applied" challenge might be granted in an appropriate case. However, the Court found that Joseph Lane Heitmann, the Petitioner who sought reinstatement of his FOID Card, was premature in presenting his "as applied" challenge because he had not yet sought a pardon from the Illinois Governor/Prison Review Board. Like Shawna Johnson, Mr. Heitmann had pleaded guilty to battery (in 1990) for grabbing the arm of his then-wife, dumping beer on here, and throwing two lit cigarettes at her. He was convicted and sentenced to a fine of $ 150. After his plea and conviction, Heitmann continued to possess a (valid) FOID Card. Then, 24 years later, in 2014, Heitmann applied for a concealed carry permit. In the process of investigating Heitmann for such permit, the State Police turned up Heitmann's (domestic violence) battery conviction, rejected his concealed carry permit and revoked Heitmann's FOID Card. Heitmann filed a petition in the Circuit Court of Bureau County seeking relief from the ISP's revocation of his FOID Card. Eventually, after the ISP was allowed to intervene, the trial court dismissed Heitmann's petition. Heitmann appealed to the 3rd District Appellate Court and argued that granting him a FOID card would not be contrary to federal law, and the FOID Card Act is unconstitutional as applied to him because it amounts to a perpetual firearm ban. The 3rd District Appellate Court affirmed the trial court's dismissal of Heitmann's petition and specifically held that: (1) Illinois circuit courts may no longer remove the federal ban on firearm ownership by those convicted of domestic battery; (2) gun rights do not fall under the rights covered by the civil rights restored language of the federal Gun Control Act of 1968 (Gun Control Act) (18 U.S.C. § 921(a)(33)(B)(ii) (2012));

(3) even if gun rights were civil rights, Illinois does not provide a mechanism for restoration of such rights; and (4) the "safety valve" provision of the Gun Control Act provides no remedy to petitioner. The 3rd District Appellate Court further held that that granting Mr. Heitmann a FOID card would be contrary to federal law. And, moreover, the Appellate Court found that Heitmann's "as-applied" challenge was premature because Heitmann had not yet availed himself of every remedy available to him. Specifically, Heitmann had not yet applied for a pardon. ***See People v. Heitmann, 2017 IL App (3d) 160527 (Ill. App. 3d Dist., October 2, 2017).***

In ***Baumgartner v. Greene County State's Attorney's Office and The Illinois State Police, 2016 IL App (4th) 150035 (Ill. App. 4th Dist., March 31, 2016),*** Appellant and FOID Card applicant, Kyle Baumgartner was denied a FOID Card by the Illinois State Police (ISP) based on his criminal record, which included misdemeanor conviction for domestic battery. Baumgartner filed petition for relief in the Circuit Court of Greene County, Illinois. The trial court initially granted Baumgartner relief, but subsequently granted the ISP's motion to intervene, vacated the order requiring the issuance of the FOID Card and ultimately denied/dismissed Baumgartner's petition. On appeal, the 4th District Appellate Court made holdings consistent with other post-***Coram*** appellate courts decisions Odle (5th), Bailey (5th), Heitmann (3rd), held that: (1) the Illinois Firearm Owners Identification Card Act bars relief where applicant is prohibited by federal law from possessing firearm; (2) Baumgartner did not lose any civil rights and, thus, he could not have had any restored to remove his federal firearm disability; and (3) Although Baumgartner had forfeited because he had not raised his "as applied" challenge, the Appellate court would nonetheless have denied Baumgartner's "as applied" challenge based up the facts of his case because Baumgartner (like Heitmann) had not availed himself of one potential avenue of relief – Baumgartner had not yet applied for a pardon.

In discussing Baugartner's "as–applied" constitutional challenge, as well as the facts, law and considerations a court should weigh to resolve such a challenge, the 4th District Appellate Court stated:

> "On appeal, plaintiff's final contention is that the FOID Act and the Gun Control Act are unconstitutional as applied to him. He maintains that, because he established himself before the circuit court as a law-abiding individual, interpreting section 10 of the FOID Act and section 922(g)(9) of the Gun Control Act as prohibiting him from possessing a firearm violates his second amendment rights to keep and bear arms (U.S. Const., amend. II). ISP responds that plaintiff forfeited his constitutional challenge on appeal by failing to raise the issue in the circuit court. Alternatively, it maintains plaintiff's claim is without merit because there is no certain lifetime ban preventing him from possessing a firearm. In its *amicus curiae* brief, the United States takes the same position as ISP. Whether a statute is unconstitutional is a question of law subject to *de novo* review." ***Lebron v. Gottlieb Memorial Hospital, 237 Ill.2d 217, 227, 341 Ill.Dec. 381, 930 N.E.2d 895, 902 (2010)***. However, when an appellant has failed to raise his constitutional claim before the circuit court, "he has forfeited consideration of the issue on appeal." ***Odle,* 2015 IL App (5th) 140274, ¶ 35, 398 Ill.Dec. 313, 43 N.E.3d 1223** (finding the appellant forfeited his constitutional claim that the interplay between the FOID Act and the federal Gun Control Act violated his rights to keep and bear arms under the second amendment). Additionally, "[a] court is not capable of making an 'as applied' determination of unconstitutionality when there has been no evidentiary

hearing and no findings of fact." ***In re Parentage of John M.**, 212 Ill.2d 253, 268, 288 Ill.Dec. 142, 817 N.E.2d 500, 508 (2004); see also **Lebron**, 237 Ill.2d at 228, 341 Ill.Dec. 381, 930 N.E.2d at 902* (holding that "when there has been no evidentiary hearing and no findings of fact, the constitutional challenge must be facial"). ***"By definition, an as-applied constitutional challenge is dependent on the particular circumstances and facts of the individual defendant or petitioner" and, "[t]herefore, it is paramount that the record be sufficiently developed in terms of those facts and circumstances for purposes of appellate review." People v. Thompson, 2015 IL 118151, 398 Ill.Dec. 74, 43 N.E.3d 984.*** Although plaintiff acknowledges that he failed to raise an as-applied constitutional challenge in the circuit court, he asks this court to excuse his forfeiture on the basis the circuit court heard and considered evidence in connection with his petition under section 10 of the FOID Act and because the State certainly could have presented evidence [during the hearing on his section 10 petition] but chose not to. Here, we decline to excuse plaintiff's forfeiture. As stated, the hearing before the circuit court concerned plaintiff's request for relief under section 10 of the FOID Act. ***At no time during the underlying proceedings did the court consider or make factual findings relative to an as-applied constitutional challenge to the FOID Act or the federal Gun Control Act.*** Moreover, the hearing at issue occurred prior to ISP's intervention in the underlying proceedings. ISP was ultimately allowed to intervene, in part, based on claims that the State's Attorney's office—the original respondent in the matter—was not sufficiently representing ISP's interests. Thus, although the State's Attorney's office was present at the hearing and could have presented contrary evidence to that presented by plaintiff, ISP did not have the same opportunity. Finally, even if we were inclined to excuse plaintiff's forfeiture, we question the appropriateness of reaching the merits of his as-applied constitutional claim under the circumstances presented by this case. In ***Coram*, *2013 IL 113867, 375 Ill.Dec. 1, 996 N.E.2d 1057***, the circuit court held section 922(g)(9) of the federal Gun Control Act was unconstitutional as applied to the appellee, an individual denied a FOID card by ISP, and ISP appealed. On review before the supreme court, the dissent noted the constitutional question presented by the appeal but found it to be premature. ***Coram, 2013 IL 113867, 375 Ill.Dec. 1, 996 N.E.2d 1057 (Theis, J., dissenting, joined by Garman, J.).*** We find the dissent's reasoning instructive. The dissent noted that under section 921(a)(33)(B)(ii) of the Gun Control Act (18 U.S.C. § 921(a)(33)(B)(ii) (2006)), "an individual convicted of misdemeanor domestic violence potentially has three avenues of relief from the federal [firearms] ban," *i.e.,* having their conviction expunged, being pardoned, or having their civil rights restored. ***Coram, 2013 IL 113867, 375 Ill.Dec. 1, 996 N.E.2d 1057 (Theis, J., dissenting, joined by Garman, J.).*** The dissent further stated that, "[i]n Illinois, the constitution gives the Governor the unfettered authority to 'grant … pardons, after conviction, for all offenses on such terms as he thinks proper' " and noted "[t]he pardon power is extremely broad." ***Coram, 2013 IL 113867, 375 Ill.Dec. 1, 996 N.E.2d 1057 (Theis, J., dissenting, joined by Garman, J.). (quoting Ill. Const.1970, art. V, § 12).*** It then determined as follows: "Where [the appellee] has not availed himself of a potential state remedy available to him under the statute, we need not and should not determine whether the statute is an unconstitutional perpetual ban which violates his second amendment rights. A remedy does not become unavailable merely because it is discretionary or resort to it may fail. It is not futile without ever being tried. Thus, where it is yet unknown whether [the appellee] can satisfy section 921(a)(33)(B)(ii), the question of '[w]hether a misdemeanant who has been law abiding for an extended period must be allowed to carry guns again, even if he cannot satisfy [section] 921(a)(33)(B)(ii), is a question not presented today.' [Citation]." ***Coram, 2013 IL 113867, 375 Ill.Dec. 1, 996 N.E.2d 1057 (Theis, J., dissenting, joined by Garman, J.).*** Like in ***Coram***, plaintiff in this case has a potential state remedy available to him, which could result in the removal of his federal firearm disability. Nothing in the record indicates he has attempted to avail himself of that potential remedy. As a result, his constitutional claim is premature. … On appeal, ISP argues plaintiff's felony conviction for unlawful possession with the intent to deliver cannabis also renders him ineligible for possession of a FOID card. However, given our resolution of the other issues presented for review in this case, we find it unnecessary to address this alternative claim. … For the reasons stated, we affirm the circuit court's judgment."

See Baumgartner v. Greene County State's Attorney's Office and The Illinois State Police, 2016 IL App (4th) 150035 (Ill. App. 4th Dist., March 31, 2016).

It is interesting, instructive and important to this court that Mr. Heitmann's case is very similar Shawna Johnson's case, at least in the fact that Heitmann essentially committed a

domestic battery but pled guilty to a battery charge. Also, Heitmann got to keep his FOID Card for a (long) period of time after he was convicted of a battery which involved his wife. The 3rd District acknowledges and leaves the door "wide open" to the possibility that, if Heitmann were to seek but be denied a pardon, his "as applied" constitutional claim would then be "ripe" and he would be in a position to pursue such as he would have then exhausted all remedies under Illinois law (as applied in concert with federal law) other than such "as applied" challenge. Indeed, had Heitmann pursued and been denied a pardon, he would be in the exact same legal position as this court finds Shawna Johnson in today.

Unlike the FOID Card applicants in *Odle*, *Heitmann* and *Baumgartner*, Shawna Johnson *did* seek a pardon from the Illinois Governor/Prison Review Board. Her request for a pardon was denied on December 23, 2015, just 5 days before she filed her Second Amended Petition – the petition at issue – on December 28, 2015. Shawna Johnson has pursued every other available statutory remedy or avenue for relief. All have led to a dead end. Her "as applied" challenge is not only "ripe," but, this court holds, it should bear fruit as her request to have her FOID Card reinstated must be granted.

V. Opinion and Analysis of Shawna Johnson's Second Amended Petition and Her Second Amendment "As Applied" Challenge

1. **This Court has subject matter jurisdiction.** As the Petitioner argues and as this court has previously found, 430 ILCS 65/10(a) granted/grants the Petitioner the right to petition the Circuit Court of Wabash County, Illinois to seek relief from the revocation of her F.O.I.D. card by the Respondent-ISP because of her battery conviction. In ruling on the various motions to date, including the motions for summary judgment, the court has determined that, "as-applied" to Petitioner, the state and federal statutory scheme prohibit the court from ordering ISP to re-issue Ms. Johnson's a F.O.I.D. card, short of a determination in her favor regarding her "as-applied" Constitutional challenge. The court previously granted the Petitioner leave to plead and pursue her "As-Applied" claim. The Respondent and the Wabash County State's Attorney have had more than adequate notice of such claim. And, this court has subject matter jurisdiction and the authority to hear such Constitutional claim. ***See: Coram v. State of Illinois, 2013 IL 113867, 375 Ill.Dec. 1, 996 N.E.2d 1057(Ill. 2013); O'Neill v. Director Of The Illinois Department Of State Police, 2015 IL App (3d) 140011 (Ill. App. 3d Dist., March 11, 2015); and, Odle v. Department of State Police, 2015 IL App (5th) 140274 (Ill.App. 5 Dist., November 18, 2015).***

2. **The Second Amended Petition sufficiently alleges a Constitutional Violation/"As Applied" challenge and a "Perpetual" Ban.** The Court has previously found and stated that the Petitioner's Second Amended Petition sufficiently alleges facts to support Petitioner's

Constitutional ("As-Applied") Claim, to put Respondent on notice of such claim and to make such claim cognizable.

3. **The Petitioner's "As-Applied" Constitutional Claim is Cognizable, "Ripe" and Must be Granted.** In its October 2015 Order Regarding The Motions For Summary Judgment, this court granted the Petitioner leave to re-plead her constitutional claim when and if such became necessary (i.e. if Petitioner is left with no other resort). In its December 16, 2015 Order, the court reconsidered a portion of that October 2015 Order and determined that Petitioner could not prevail under an argument that her "civil rights were restored" by her pretrial detention. **Thus, as the court then found and now restates, short of a Constitutional "As-Applied" challenge, Petitioner would be perpetually precluded under federal and state law from possessing a firearm. As indicated in both of the court's October 28, 2015 and December 16, 2015 Orders, in that event, this court would need to consider such constitutional ("as applied") challenge.** The Illinois Supreme Court (in ***Coram***), the Illinois Appellate 5th District Court (in ***Odle***) and other Illinois Appellate Courts (e.g. the 3rd District Court in ***O'Neill*** and ***Heitmann***) have all indicated that an "As-Applied" challenge should be considered in the appropriate case. As shown by the testimony and other evidence at the hearing, Petitioner Shawna Johnson has indeed pursued a pardon and has been denied. The denial of the requested pardon was just issued by the Governor/Prisoner Review Board on December 23, 2015 - in the midst of Petitioner being required to file/filing her Second Amended Petition. This court believes that, under the facts of this case, the Petitioner, Shawna Johnson and her counsel have presented a clear, convincing and strong case that supports the Petitioner's "As-Applied" challenge and convinces this court that Shawna Johnson's Second Amended Petition must be granted. ***See: Coram v. State of Illinois, 2013 IL 113867, 375 Ill.Dec. 1, 996 N.E.2d 1057(Ill. 2013); O'Neill v. Director Of The Illinois Department Of State Police, 2015 IL App (3d) 140011 (Ill. App. 3d Dist., March 11, 2015); People v. Heitmann, 2017 IL App (3d) 160527 (Ill. App. 3d Dist., October 2, 2017); and, Odle v. Department of State Police, 2015 IL App (5th) 140274 (Ill. App. 5 Dist., November 18, 2015).***

The Court fully adopts the analysis, including both the recitation of facts and the application of law, in Petitioner's Supplemental Briefing filed herein on March 24, 2016. The court will not here recite such Supplemental Briefing verbatim. But, the court does believe that the analysis of Petitioner's counsel in such Supplemental Briefing is "spot-on" with regard to the discussion about Shawna Johnson's situation considered in light of the factors under 430 ILCS 65/10(c) and especially with regard to the Petitioner's "as applied" challenge to the Federal and State statutes at issue.

A. The Court Finds that the statutory factors under 430 ILCS 65/10(c) strongly support granting Petitioner's requested relief and the reinstatement of her FOID Card and

that, but for 18 U.S.C. Sect. 922(g)(3), Petitioner, Shawna Johnson would be eligible to have her FOID Card reinstated under 430 ILCS 65/10(c):

(1) The circumstances regarding Shawna Johnson's conviction for battery (domestic violence): Petitioner was herself a victim domestic violence and in an abusive relationship with the alleged victim of her crime and her estranged husband Michael Korstick. Ms. Johnson married Korstick after she became pregnant with his child when she was 14 years old and Korstick was 24 years old. Shawna Johnson testified that she called the police to report physical abuse by Korstick some 4-5 times and that there were other incidents of domestic violence that she did not report to the police. The court strongly agrees with Petitioner's counsel that Shawna Johnson was the victim of domestic violence and not the aggressor. In fact, the court finds that this was true not only through Shawna Johnson's entire relationship and contacts with Michael Korstick but also and particularly on the night that she slapped him in the face - an event for which Shawna Johnson ultimately received a battery conviction and which resulted in the loss of her FOID Card.

Shawna Johnson was not represented by an attorney at the plea hearing. She felt pressured by her employer (where Korstick also worked at the time) to take the deal and "to make it go away." Petitioner agreed to and successfully completed a period of conditional discharge including completing counseling and paying a fine. The State's Attorney at that time, Terry Kaid, told Johnson that her plea to and conviction of simple battery would not prevent her from obtaining a FOID Card or possessing firearms after a period of time had passed. As the attorneys for Ms. Johnson argue, this statement by State's Attorney Kaid would have been arguably well-grounded in Illinois law at the time of the plea deal.

(2) Petitioner, Shawna Johnson's Criminal History: Shawna Johnson has no felony record. She has the two battery convictions (in 1991 and 2001) that have been discussed throughout this case and this order. And, she has a "couple of speeding tickets."

(3) Shawna Johnson's Reputation: Five (5) current and former local law enforcement officers – from all levels (City, County and State) - all testified Shawna Johnson's impeccable and impressive reputation in the community for her honesty, reasonable and agreeable disposition, good character, trustworthiness, dependability, and law-abiding nature. These are law enforcement officers who have lived in and served Mt. Carmel, Wabash County and the community where Shawna Johnson has lived, worked and raised her family.

(4) The Public Interest: Again, the court emphasizes that all FIVE (5) of the current and former local law enforcement officers testified in support of Shawna Johnson's efforts to have her FOID Card reinstated. Larry Blaize (retired ISP), Michael McWilliams (current Sergeant with MCPD), Joe Keeling (retired Wabash County Sheriff), D-Ray Etzkorn (current Wabash County Sheriff's Deputy) and John Lockhart (current Chief of MCPD) all testified that they had no concern about public safety or the safety of any individual if Shawna Johnson's FOID Card

was reinstated and she was once again able to possess and use firearms and ammunition. Shawna Johnson previously (even after her two battery convictions) and legally had a FOID Card and possessed and used firearms and ammunition. According to a number of witnesses, while she legally had her FOID Card, Shawna Johnson showed competency, knowledge, safe practices, skill and respect in her use of firearms and ammunition in the context of hunting and target practice. Moreover, there has never been any allegation nor any scintilla of evidence to even hint that Shawna Johnson has ever threatened any violence with or any other illegal or any inappropriate use of any firearm. The public at large would not be in any increased danger if Shawna Johnson had guns. Nor would any of Shawna Johnson's family members or "loved ones." This vast record shows that Shawna Johnson has never physically harmed or threatened any of her family members or "loved ones," with or without a gun. **Also, see the Court's discussion below in Part C.**

B. The Court Finds That Shawna Johnson Has Led A Law-Abiding Life For An Extended Period Of Time Such That ISP's Revocation of Her FOID Card and the State and Federal Statutes Upon Which Such Revocation is Based Are Unconstitutional A Applied to Shawna Johnson.

Shawna Johnson has never been charged with or convicted of a felony. She has no criminal charges or convictions since 2001. She successfully and perfectly completed the conditional discharge order entered as to the battery which still, 17 years after that battery, keeps her from having her FOID Card reinstated. Shawna and her husband have made great efforts to comply and they have complied with all laws in relation to and since the Director of the State Police revoked her FOID Card. Shawna Johnson's law-abiding life has not only been for an extended period of time and nearly the entire extent of her life, but, indeed, the only two blemishes on her record include 2 brief episodes on two different nights a decade apart from each other. **The Court adopts its recitation and analysis herein of all of the other evidence concerning Shawna Johnson's law-abiding life and tremendous reputation. And, the Court again fully adopts the analysis, including both the recitation of facts and the application of law, in Petitioner's Supplemental Briefing filed herein on March 24, 2016.**

C. The Court Finds That Shawna Johnson and Her Counsel Have Presented Other Important Facts Which Distinguish Shawna Johnson and Her Circumstances From Others Historically Barred From Second Amendment Protections Due To Domestic Violence Convictions Such That ISP's Revocation of Her FOID Card and the State and Federal Statutes Upon Which Such Revocation is Based Are Unconstitutional As Applied to Shawna Johnson.

The Court again fully adopts as part of its findings in this Section C, the analysis, including both the recitation of facts and the application of law, in Petitioner's Supplemental Briefing filed herein on March 24, 2016.

Shawna Johnson was not represented by an attorney when she pled guilty to and received a conviction and was sentenced to conditional discharge for battery. However, the court does acknowledge that the Wabash County Circuit Court apparently found that Ms. Johnson (then Ms. Korstick) made a knowing and voluntary waiver of her rights to counsel and to trial when she pled guilty to battery and received conditional discharge.

Terry Kaid, the State's Attorney who negotiated and agreed to Ms. Johnson's plea agreement for conditional discharge not only amended the charge/Information so that Shawna Johnson could plead guilty to and receive a conviction for battery rather than domestic battery, Kaid also told Johnson, when she specifically asked Kaid, that Johnson might lose her FOID Card for a period of time (5 years) but that she should be able to have her FOID Card restored thereafter. This statement by Kaid, which is unrebutted and which was made by the prosecutor and State's advocate in the criminal case that ISP claims forever bars Ms. Johnson from regaining her FOID Card, shows the uncertainty and fluctuation of the application of federal and state law to Ms. Johnson's situation. By this statement, even State's Attorney Kaid indicated he believed Shawna Johnson should be able to eventually get her FOID Card back! Admittedly, Shawna Johnson never petitioned the Wabash County Circuit Court to set-aside her guilty plea and vacate the judgment of conviction within 30 days, within two (2) years or otherwise. But, Ms. Johnson had no reason to believe that this statement by Kaid was potentially not accurate until ISP revoked her FOID Card by letter dated July 27, 2012 – more than eleven (11) years after Johnson pleaded guilty and received her conviction for battery.

It is important and instructive that Shawna Johnson previously (even after her two battery convictions) and legally had a FOID Card and possessed and used firearms and ammunition. According to a number of witnesses, while she legally had her FOID Card, Shawna Johnson showed competency, knowledge, safe practices, skill and respect in her use of firearms and ammunition in the context of hunting and target practice. She has also shown respect for the laws governing the possession and use of firearms. She returned her FOID Card in person to the Sheriff, Joe Keeling. She and her husband, Jimmy Johnson, have taken substantial measures to make sure that Shawna does not have access to firearms or ammunition. And, she has methodically, respectfully and patiently pursued her right to have her FOID Card returned and her right to possess and use firearms restored. Moreover, there has never been any allegation nor a scintilla of evidence to even hint that Shawna Johnson has ever threatened any violence with or any other illegal or any inappropriate use of any firearm.

The Wabash County State's Attorney has not objected to Shawna Johnson's petition.

The witnesses who support Shawna Johnson's petition include a former Illinois State Police Officer, a former Sheriff, a current and long-time Sheriff's Deputy, the current Chief of Police, and a current City Police Officer. Five (5) current and former local law enforcement officers – from all levels (City, County and State) - all testified in support of Shawna Johnson's efforts to have her FOID Card reinstated. Larry Blaize (retired ISP), Michael McWilliams (current Sergeant with MCPD), Joe Keeling (retired Wabash County Sheriff), D-Ray Etzkorn (current Wabash County Sheriff's Deputy) and John Lockhart (current Chief of MCPD) all testified that they had no concern about public safety or the safety of any individual if Shawna Johnson's FOID Card was reinstated and she was once again able to possess and use firearms and ammunition. These officers all discussed Shawna Johnson's impeccable and impressive reputation in the community for her honesty, reasonable and agreeable disposition, good character, trustworthiness, dependability, and law-abiding nature. These are law enforcement officers who have lived in and served Mt. Carmel, Wabash County and the community where Shawna Johnson has lived, worked, been the victim of a very abusive relationship and where she pleaded guilty to make a case "go away" so that she could keep her job and, essentially on her own her, support her daughters. Michael Korstick had abused and battered Shawna repeatedly prior to Shawna's March, 2001 battery of Korstick. In February 2001, one month before the battery in March, Shawna Johnson even obtained an Emergency Order of Protection (EOP) against Michael Korstick her abuser and the eventual "victim" of the (domestic) battery. Although the record clearly reflects that Shawna Johnson established and needed such protective order, she understandably folded to pressure put on her by her (and Mr. Korstick's common) employer, and she moved to vacate the EOP and dismissed her petition. More than 17 years have passed since Ms. Johnson's battery/domestic violence conviction. More than 27 years have passed since she slapped her ex-husband's babysitter. Ms. Johnson has never committed any offense involving a firearm. She is a law-abiding citizen. She and her husband have taken great pains and made great efforts to make sure she complies with revocation of her FOID card, even though she strenuously disagrees with the law's application to her.

Shawna Johnson and her attorneys, Ms. Blakeslee and Mr. Jenson have clearly and convincingly shown facts that certainly distinguish Shawna Johnson's "circumstances from those of persons historically barred from Second Amendment protections" due to domestic violence convictions. It is hard to imagine a case and a set of facts where a Petitioner convicted of a (domestic violence) battery would be more deserving than Shawna Johnson of having her FOID Card and her right to possess a firearm restored. In fact, in none of the many cases – from Illinois or elsewhere - that this court has reviewed over these past several years in its consideration of Shawna Johnson's petition and the many motions preceding this ruling, has this court found an applicant with such strong and unique facts and circumstances as Shawna Johnson and her counsel have presented herein.

Shawna Johnson has only once committed a crime of "domestic violence" and that was not with a firearm. Indeed, even in that ("domestic") battery, Shawna Johnson was not the

aggressor or the abuser. She was actually the victim in and of her own crime. She was the victim on that night in March of 2001. She was fighting-off and trying to flee from her abuser, Michael Korstick. She was also the victim of a cursory (at best) investigation following the incident. Shawna Johnson and other witnesses weren't even interviewed, and, the "victim" had even asked to have the charges dropped. Shawna Johnson was a victim of the court proceedings and pressures following the event which essentially forced her to "make it go away" under the belief that she would lose her job if she didn't plead guilty and that she might lose her FOID Card for a time but she would eventually get it back. **Finally, Shawna Johnson continues to be the victim of that crime and an intricate system of federal and state statutes that perpetually deny her a FOID Card and the use of firearms even though she – as a long-time domestic violence victim and not an abuser - is precisely NOT the type of person who those laws were meant to bar from owning and possessing firearms.**

After the 2013 amendments to the Illinois "FOID Act" (430 ILCS 65/10), and, even though her circumstances and all factors otherwise strongly support granting Shawna Johnson the relief she seeks, she is not eligible because her almost 18 year-old (domestic violence) battery conviction makes her ineligible under Federal law – specifically the 1996 amendments to the Federal Gun Control Act (18 U.S.C. § 922). See 430 ILCS 65/8(n) and 65/10. Her (domestic violence) battery conviction is not eligible for either expungement under Illinois law or the "civil rights restored" exception under Section 18 U.S.C. § 921(a)(33)B(ii). Finally, Shawna Johnson sought and was denied a pardon.

Having considered the facts, the applicable statutes and all other applicable legal authorities, as well as the arguments and recommendations of counsel, THE COURT FINDS AND ORDERS THAT:

SUBSTANTIAL JUSTICE HAS NOT BEEN DONE.

THE COURT FURTHER FINDS THAT, BECAUSE OF THE ISP'S REVOCATION OF AND REFUSAL TO REINSTATE PETITIONER, SHAWNA JOHNSON'S FOID CARD AND BECAUSE OF THE PERPETUAL DENIAL OF HER RIGHT TO POSSESS AND USE FIREARMS, THE FOLLOWING FEDERAL AND STATE LAWS AS APPLIED TO SHAWNA JOHNSON, EACH AND ALL VIOLATE SHAWNA JOHNSON'S RIGHTS UNDER THE SECOND AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES:

(A) 18 U.S.C. Sect. 922(g)(9);

(B) 430 ILCS 65/8(n);

(C) 430 ILCS 65/10(b) and (c)(4); and

(D) 20 Ill.Admin.Code Sect 1230.20 (the Illinois Administrative Code's authorizing provision regarding ISP's application, process and rules for the grant or denial of a request for a FOID Card).

THEREFORE, THE COURT REVERSES THE DECISION OF THE (DIRECTOR OF THE) ILLINOIS STATE POLICE IN ITS DENIAL OF PETITIONER'S REQUEST TO REINSTATE/REISSUE HER A FOID CARD.

FURTHERMORE, THE COURT ORDERS THE RESPONDENT, THE ILLINOIS STATE POLICE – SPECIFICALLY THE DIRECTOR OF THE ILLINOIS STATE POLICE - TO REINSTATE AND REISSUE TO PETITIONER, SHAWNA JOHNSON HER/A FOID CARD, INSTANTER.

THERE IS NO JUST CAUSE FOR DELAY IN THE APPEAL OR ENFORCEMENT OF THIS ORDER.

THE CIRCUIT CLERK IS ORDERED TO PROVIDE FILE-MARKED COPIES OF THIS ORDER TO ALL PARTIES AND COUNSEL OF RECORD.

OCT 01 2018

DATE

JUDGE

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FIFTH JUDICIAL DISTRICT

FROM THE CIRCUIT COURT OF THE SCOND JUDICIAL CIRCUIT
WABASH COUNTY, ILLINOIS

SHAWNA JOHNSON,	)	
	)	
Petitioner-Appellee,	)	
	)	No. 13 MR 15
v.	)	
	)	
ILLINOIS STATE POLICE,	)	The Honorable
	)	LARRY D. DUNN,
Respondent-Appellant.	)	Judge Presiding.

NOTICE OF APPEAL

Respondent-Appellant Illinois State Police, by its attorney, Lisa Madigan, Attorney General of the State of Illinois, hereby appeals to the Appellate Court of Illinois, Fifth Judicial District, from the final judgment order entered by the Honorable Larry D. Dunn of the Circuit Court of the Second Judicial Circuit, Wabash County, Illinois, on October 9, 2018, in which the circuit court, among other things, reversed the decision of the Director of the Illinois State Police to deny Petitioner-Appellee Shawna Johnson's request to reinstate/reissue her a FOID card. A copy of the circuit court order is attached hereto as Exhibit A.

By this appeal, Respondent-Appellant Illinois State Police asks that this court reverse and vacate the judgment and order of the circuit court, and grant

any other relief deemed appropriate.

Respectfully submitted,

LISA MADIGAN
Attorney General
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October 31, 2018

IN THE CIRCUIT COURT
FOR THE SECOND JUDICIAL CIRCUIT
WABASH COUNTY, MT. CARMEL, ILLINOIS

SHAWNA JOHNSON,	)	
Petitioner,	)	
	)	
-v-	)	**No. 13-MR-15** FILED
	)	OCT 09 2018
ILLINOIS STATE POLICE,	)	
Respondent.	)	Angela K. Crum WABASH CO. CIRCUIT CLERK

ORDER

This matter having come before the court for hearing on Petitioner, Shawna Johnson's Second Amended Petition For Review of Denial of Firearm Owner's Identification Card filed with leave of court on December 28, 2015, all parties and counsel all having been present, the court having heard, seen and considered the sworn testimony, the exhibits, the various stipulation of facts, the relevant pleadings and entire record herein as relevant to the matters and issues before the court, the arguments and authorities presented by counsel and all other applicable authorities, and the court having jurisdiction over the parties and subject matter and being fully advised, **HEREBY FINDS AND ORDERS AS FOLLOWS:**

I. Findings of Fact and History of the Proceedings

Most of the facts are undisputed. Although the court has previously in prior rulings recited factual findings, the court again believes it is helpful to recite the material facts and the history of the proceedings in this case.

On June 7, 2001, Petitioner, Shawna L. Johnson pled guilty and was convicted of Battery, a Class A Misdemeanor under Illinois law, in the Circuit Court of the Second Judicial Circuit, Wabash County, Illinois in Case No. 2001-CM-56. At that time, Shawna Johnson's surname (married name) was Korstick. Johnson's conviction was part of a negotiated plea whereby she pled guilty to an amended charge of Battery (under 720 ILCS 5/12-3(a)) and received a sentence of one year conditional discharge, along with a jail sentence of 2 days (time served) in jail, and a $ 150 fine and court costs. The original charge was filed as Domestic Battery (under 720 ILCS 5/12-3.2(a)(1)). As part of the negotiated plea, the original charge was amended by interlineation - striking the allegations with the regard to the fact that the victim of the battery was Johnson's husband at the time. The amended count to which Johnson pled guilty stated in pertinent part that Johnson, "... without legal justification, knowingly caused bodily harm to Michael A. Korstick, in that [she] hit [Korstick] on the face and head causing bruises and abrasions ... ." There is no

Exhibit A

indication that any firearm or firearm ammunition was used by Johnson in any way in the commission of this domestic battery/battery. Johnson successfully completed the term of conditional discharge and was discharged on November 18, 2008. Other than this battery conviction, and another 1991 Wabash County (non-domestic violence) battery conviction (with a $ 1 fine), Johnson has not been convicted of any felony or misdemeanor in Illinois or any other state. It is also undisputed that on March 25, 2001, the date of the alleged battery/domestic battery, Johnson was married to and had children in common with the alleged victim, Michael A. Korstick. **(See Respondent's Exhibit "H" - ISP's Request For Admission of Facts - attached to ISP's Memorandum of Law.)** Although Johnson never moved to withdraw her plea and never appealed her Battery conviction, in her answers to certain questions in the very same above- referenced "Request For Admission of Facts," she denies striking her husband. Johnson also alleges in an affidavit that she once had an Order of Protection against her husband, Michael Korstick. She claims this order of protection was in place prior to her pleading guilty in 2001-CM-56. And, she says that she dismissed her order of protection case due to pressure from her employer at that time indicating to her that such order of protection was creating problems at work. Johnson also claims that at the time she entered into the negotiated plea in question, she inquired about the impact of the negotiated plea on her FOID Card. Johnson claims the State's Attorney at that time told her that it would probably not impact her FOID card, and that, if it did, it would only be for a short time. **(See Affidavit of Shawna Johnson filed July 25, 2014.)**

On or about April 1, 2010, after Johnson's plea, conviction and successful discharge, Johnson sought and obtained a Firearms Owner's Identification Card (FOID card). However, the Illinois State Police (ISP) revoked Johnson's FOID card on the basis of the above-referenced Battery conviction and sent Johnson a letter dated July 27, 2012 informing Johnson that she was ineligible for a FOID card as a result of her Battery conviction. ISP's July 27, 2012 letter (Exhibit "D") states in pertinent parts:

> "[ISP] records reflect on June 7, 2001, you were convicted of Battery, as a result of an incident involving domestic violence. Pursuant to Federal and State law, The [ISP] is prohibited from issuing a [FOID] card to anyone convicted of any crime involving domestic violence. You are ineligible for a [FOID] card as result of your conviction. ... This action is in accordance with the Federal Gun Control Act of 1968, 18 USC 922(g)(9). This makes it unlawful for any person convicted of a 'misdemeanor crime of domestic violence' to ship, transport, possess or receive firearms or ammunition."

(See ISP's Exhibit "D" attached to its Memorandum of Law in support of ISP's Motion for Summary Judgment.)

Johnson claims she sent a letter dated August 16, 2012 to the Director of the Illinois State Police requesting a formal hearing regarding the revocation. Although Johnson claims under oath in an affidavit that she mailed such letter, she did not send such registered or certified mail. **(See documents filed by Petitioner on November 21, 2013.)** ISP claims that it did not receive

Johnson's letter and that they have no record of any such letter in a file that they maintain regarding Johnson's FOID Card application and revocation. **(See Respondent's Motion For Summary Judgment and Memorandum in Support. And, see Affidavit of ISP Sergeant Mark Bayless filed December 5, 2013.**) On or about April 9, 2013, Johnson received a letter from ISP indicating that she was required to turn over her revoked FOID card to a local law enforcement agency. Johnson turned her FOID card over to the Wabash County Sheriff on August 12, 2013. Johnson made no further contact or follow-up with ISP until she filed her petition in the instant case.

Shawna Johnson (pro se) filed the/her initial petition in this case, a petition entitled, "Petition For Review of Denial of Firearm Owner's Identification Card," back on August 15, 2013.

Ms. Johnson eventually obtained counsel and filed an amended petition. The Illinois Attorney General entered its appearance of behalf of ISP. The Wabash County State's Attorney, Cassandra Goldman, stepped aside indicating she did not object to the petition and that she would not participate in these proceedings.

Petitioner eventually raised her "as applied" challenge in her pleadings as she alleged and argued that the current federal and state framework which prohibits her from possessing firearms and ammunition, is unconstitutional and violates of her Second Amendment rights "as applied" to her. Petitioner's Amended Petition For Review filed on September 9, 2014 incorporated this "as applied" constitutional challenge. This Amended Petition was essentially identical to Ms. Johnson's original *pro se* Petition except that her Amended Petition added her constitutional "as applied" challenge in Paragraph (15). Johnson did further expound upon her constitutional ("as applied") challenge in her previously filed Memorandum of Law in Opposition to Respondent's Motion For Summary Judgment.

After various motions (Motion to Dismiss, Motion for Summary Judgment, etc.) were presented, argued and resolved, the Court ultimately granted Petitioner and her counsel leave to file and on December 28, 2015 Petitioner through her counsel did file her Second Amended Petition officially raising her claim that various applicable laws were unconstitutional "as applied" to the Petitioner, Shawna Johnson.

In its October 28, 2015 Order denying ISP's Motion For Summary Judgment, this Court specifically found and legally concluded that, the "civil rights restored" exemption under Section 18 U.S.C. § 921(a)(33)B(ii) and the fact that Shawna Johnson was incarcerated as part of her conditional discharge sentence removed the federal firearm bar for Ms. Johnson because, as part of her sentence of conditional discharge, she was sentenced to and did serve two (2) days (pre-trial detention) in the Wabash County Jail. Thus, the court found that Petitioner was entitled to the relief she requested (restoration of her F.O.I.D. card) without resorting to a resolution of her Constitutional claim. At that point, the court struck/dismissed Petitioner's Constitutional ("As-Applied") claim, with leave to re-instate such claim if it later became necessary to address such claim. Subsequently, however, in its Order dated December 16, 2015, the Court granted the Respondent's Motion To Reconsider such ruling and granted Respondent-ISP's Motion For

Summary Judgment on all requested relief except for Petitioner's previously pled Constitutional "As-Applied" challenge. As part of that December 16, 2015 Order Granting Respondent's Motion to Reconsider and Granting Summary Judgment, the court also granted Petitioner leave to re-plead her Constitutional ("As-Applied") challenge. ***See this Court's Orders dated October 28, 2015 and December 16, 2015.***

Then, on December 28, 2015, Petitioner, Shawna Johnson filed her Second Amended Petition For Review of Denial of Firearm Owner's Identification Card. And, this case proceeded to a final evidentiary hearing. On January 20, 2016, all participating parties and counsel took part in an evidentiary hearing where Petitioner, Shawna Johnson presented several witnesses. Although the ISP demanded such contested evidentiary hearing, the ISP presented no witnesses of its own. But, the Attorney General on behalf of the ISP did cross-examine Petitioner, Shawna Johnson and he other witnesses. Here is a summary of the testimony of Petitioner's witnesses:

Larry Blaize, a retired Illinois State Police trooper, testified on Shawna Johnson's behalf. Blaize was an ISP trooper for 21 years. He was also a City of Mt. Carmel police officer for 11 years. And, he further worked part-time for three years as an officer or deputy for the Edwards County Sheriff's Department, the Wabash County Sheriff's Department and the City of Albion Police Department. Blaize has known Shawna Johnson since about 1999. Blaize has even been present with and has observed Shawna Johnson and her husband (Jerry Johnson) use firearms several times when they had been shooting guns together (apparently when Shawna still had a valid FOID Card). As a former officer of course, Blaize has had training and experience in the handling and proper use of firearms. And, Blaize had also had experience, training and responsibility in determining whether and submitting a written report if someone might pose a (clear and present) danger in possessing/using a firearm. Blaize said Shawna Johnson exhibited no characteristics which would cause him concern about her being a threat to society or anyone else if she were to have a FOID Card. Blaize said he even allowed Shawna Johnson to shoot a couple of his own pistols and one of his rifles and that she "always exhibited good firearm safety and seemed very knowledgeable about firearms and was very competent in the use of a firearm." Blaize said that, based upon his observations and training, he had no reason to be concerned about Shawna Johnson's safety or qualifications to handle or use a firearm. Blaize said that he felt Shawna Johnson was actually better in her handling of firearms than a lot people he'd seen who carry guns for a living, such as security guards. Blaize even wrote a letter on behalf of Ms. Johnson at her request in 2009 or 2010 to try to help her get her conviction expunged or overturned or help her get a pardon. Blaize concluded his testimony by stating that he believes Shawna Johnson has "a very god character" and that she would be a "very good employee" and that he would "trust her to do his business."

Shawna Johnson testified on her own behalf and in support of her petition. Johnson has been married to her current husband, Jerry Johnson, since January, 2009. She was previously married to Michael Korstick, initially in August 1981 when Shawna Johnson was 14 years old and pregnant by Korstick. Michael Korstick was 24 years old at the time. Shawna Johnson has four daughters by Korstick and she has a step-daughter who is Jerry Johnson's daughter. Shawna Johnson testified that Michael Korstick was incarcerated and not present to help raise their children for a lot of their early marriage. When Michael Korstick was originally incarcerated for

"drinking and drugging" and stealing and slaughtering a hog, Shawna Johnson and her daughters were already living with Shawna's mother because Michael Korstick was "abusive" to Shawna. Shawna testified that Korstick first hit her right after they were married and while she was pregnant back in the summer of 1981. She said she had called the police about Korstick physically abusing her "maybe four or five times." But, she said she had did not always call the police after Korstick had abused her. In February, 2001, Johnson testified that she sought and obtained an order of protection against Korstick after he had punched her in the mouth. Johnson said that another one of Korstick's ex-wives also had got an order of protection against him. However, Johnson said that dropped her order of protection against Michael Korstick in March 2001 because of pressure from her employer, J. Wilderman's Autoplex. At the time, Shawna was the service manager and Michael Korstick was also working at J. Wilderman's. Shawna Johnson said she was told (by her employer) that she better drop the order of protection or she "wouldn't have a job."

Shortly after Shawna Johnson dropped her order of protection in March 2001, she was arrested for the "domestic violence" incident in question in the instant case. Concerning the offense which occurred later in March 2001 and which caused the ISP to revoked Shawna Johnson's FOID Card, Shawna Johnson testified that she went to a party. She and Korstick were not living together at the time. She said Korstick showed up at the party and that he was "getting abusive, verbally, physically, and that he shoved [Shawna] out of a trailer door." She said she asked another guy for a ride home. She got in the car. Korstick jumped into the car and other guys pulled him out of the car. Shawna said she went home. She said that, the next morning, a police officer came to her house and she was arrested for domestic (battery) for hitting Michael the night before. Shawna Johnson testified that she does not remember hitting Michael Korstick that night. When the officer took Shawna to the police station, Michael Korstick was there. Korstick was yelling at the officer that he (Korstick) didn't want Shawna to be arrested for the incident. He said he wanted to "take it back" and didn't want to press charges.

As a result of the March 2001 incident, Shawna Johnson was charged with domestic battery. She had four daughters at the time. She was working and making $ 700 per week. She said she had no money to pay for an attorney. She also said that she was not offered a public defender. Shawna thought that her only option was to talk to the State's Attorney, try to make a deal so she could keep her job. Once again, she was told, by her employer, that she "needed to make [the criminal charges] go away." So, she talked to the State's Attorney (Terry Kaid) and asked him what her options were. Kaid told her that he would amend the charge from domestic battery to "simple" battery, that she could plead guilty and that there may be the possibility of [getting] the FOID Card [back]." Kaid told her she wouldn't lose her FOID Card forever, "just maybe a short time because of a battery charge. Shawna received a conviction, she was sentenced to conditional discharge, and, she had to pay a fine and complete counseling. She was discharged successfully from the conditional discharge order, but not until 2008. ***See Wabash County Case No. 2001-CM-56 of which the court has taken judicial notice.***

Shawna Johnson testified that she had had a valid FOID Card since the early 1990's when the incident occurred and when was convicted of battery and received conditional discharge back in March, 2001. She said that, from her discussions with State's Attorney Terry

Kaid at the time of her plea, she understood that she would lose her FOID Card – for maybe five years – and that she would then be able to get it back.

Shawna and Michael Korstick were divorced in August, 2008. Michael Korstick died in January, 2011. Shawna had no further contact with Michael between the time of their divorce and his death.

In 2010, nine years after her battery conviction, Shawna Johnson applied for and received an Illinois FOID Card. When she filled out her application for such FOID Card, she went to visit Wabash County Sheriff, Joe Keeling to get help filling out the application. She said there was a question on the application about whether she'd had a domestic battery or domestic violence conviction. She said she answered the question "no," because she went and asked Sheriff Keeling specifically about her situation. She told him about the fact that she'd been charged with battery but she pleaded guilty to and was convicted of battery. Shawna testified that Sheriff Keeling told her that, "Shawna, if you were convicted of a battery, that's how you answer it." She completed the application and a FOID Card was issued. After she got her FOID Card, she purchased a handgun and a shotgun. She said she used the handgun for protection and target practice and that the shotgun was for hunting.

Shawna Johnson testified that she learned her FOID Card had been revoked in July 2012 when tried to purchase another handgun from a federally licensed firearm dealer in Indiana and she was advised that her FOID Card was revoked. She called the Illinois State Police (ISP) the next day. ISP informed her that she had a domestic battery and that she was prohibited from having a FOID Card. She did receive a revocation letter (dated July 27, 2012) shortly thereafter. ***See Petitioner's Exhibit # 1 from the January 20, 2016 hearing.*** Shawna Johnson said that, after she received the revocation letter, she put her FOID Card in an envelope to mail it back to ISP as instructed. She thought she had mailed the envelope at that time. But, according to Johnson's further testimony, which this court believes, she misplaced the envelope which contained the FOID Card along with some other important papers and indeed did not mail it back to ISP at that time (July 2012). On August 16, 2012, Shawna Johnson completed and mailed a letter to the ISP asking them to review the decision to revoke her FOID Card. Johnson said she never received a response to this letter. ISP denies they ever received it. The court believes Shawna Johnson's testimony that she mailed the letter to ISP shortly after she drafted it. ***See Petitioner's Exhibit # 2 from the January 20, 2016 hearing.***

Subsequently, Johnson received a letter from ISP, dated August 1, 2013, stating that they had not received her FOID card back as requested (in the July 27, 2012 letter) and that she must send it back or be charged with a misdemeanor. ***See Petitioner's Exhibit # 3 from the January 20, 2016 hearing.*** In response to this letter, Johnson searched her papers, found her FOID Card in the envelope she thought she'd mailed, and took the FOID Card to the Wabash Count Sheriff, so that it could be returned to ISP. At that time, she also filled out a form indicating that she herself did not possess any firearms. ***See Petitioner's Exhibit # 4 from the January 20, 2016 hearing.*** Shawna Johnson and her husband, Jerry Johnson, both testified about how Jerry owns/has title to all the guns in their home and that all guns and ammunition are locked up, with key or combination locks, and that only Jerry and not Shawna has access to and knowledge of the keys and combinations to the locks. Thus, Shawna Johnson testified that, if someone broke

into her home, she would be unable to use any of the guns to protect herself or her thirteen year-old step-daughter.

Shawna Johnson also testified about being hit by Michael Korstick in February, 2001 and her subsequent order of protection against him, which she later had dismissed in March 2001. Korstick was also charged and prosecuted for the February 2001 incident. ***See Wabash County Case No. 2001-CM-31 of which the court has taken judicial notice.***

Shawna Johnson also testified about her other efforts to remove her battery conviction and to have her FOID Card restored. Shawna Johnson filed for a pardon back in (March) 2012. In fact, she had applied for this pardon before she learned that her FOID Card had been revoked. Finally, almost four years later on January 2, 2016 – just a couple of weeks before the January 20, 2016 hearing - Shawna Johnson got a letter from the Governor/Prison Review Board of the State of Illinois, stating that her request for pardon had been denied. ***See Petitioner's Exhibit # 5 from the January 20, 2016 hearing.***

Shawna Johnson testified that she has not been arrested since the incident in question in March 2001 – over 17 years ago. As to the rest of her criminal history, she has had a couple of "seat belt tickets." And, in 1991, she was convicted of a battery and fined $ 1 in Wabash County Circuit Court, relating to an altercation with another (non-related) woman (babysitter). Johnson described the details of this 27 year old offense. **Other than the two battery convictions and the "couple of seat belt tickets," Shawna Johnson has led a law-abiding life.**

Apparently, Shawna and Michael Korstick were initially married, divorced and then got back together and re-married in 1998. Then, as indicated above, they were once and for all divorced and separated in 2010.

Shawna Johnson testified that she believes that she is a pretty responsible person. She said she went through actually two divorces with Michael Korstick and that she did not try to hurt him at any other time except the battery conviction. Shawna said she knows how to use a firearm. She does not want to hurt anyone. She said she learned a lot from her relationship with and being married to Michael Korstick. She does not want her daughters to have to go through any of the pain that she endured nor does she want to cause them pain by her own actions.

On cross-examination by the Attorney General, Shawna Johnson said that in her petition for a pardon, she presented letters of reference and explained the circumstances of her battery conviction much as she had to the court in the hearing on January 20, 2016. She said she didn't believe she left anything out of that petition for pardon.

Michael McWilliams, a Sergeant with the City of Mt. Carmel Police Department (MCPD) also testified on behalf of Petitioner. McWilliams had been with MCPD for 11 years. Just as Retired Trooper Larry Blaize had done, McWilliams talked about the "clear and present danger affidavit," which he said is a form provided by the State of Illinois and which is used by law enforcement officers and school officials to document and report threatening statements or actions of individuals whom such officers/officials believe might present a danger if they were allowed to have a firearm and to potentially convince the appropriate agency(ies) to revoke the

FOID card(s) of such individual(s). McWilliams said he'd known Shawna Johnson and her husband for approximately 7 years at the time of his testimony as the Johnson's had provided maintenance for the MCPD squad cars. And, he'd also known Ms. Johnson through her prior employment at "2Go's," a local gas station/convenience store. McWilliams testified that he'd also known and dealt with Shawna Johnson's ex-husband, Michael Korstick. McWilliams described Michael as "unreasonable" and "very difficult to deal with" as he would "get worked up and agitated over certain situations." As to McWilliams' many dealings with Shawna Johnson, however, McWilliams said that she had "never showed [him] any behavior whatsoever that would be concerning to [him]" and that [to his] knowledge, she has always been honest and truthful with [him]. ... and that he'd [n]ever seen anything out of the way with her behavior that would alarm [him] in any way, shape or form." McWilliams also testified that he believed Shawna Johnson has a fine reputation and is well-respected in the Mt. Carmel/Wabash County, Illinois community. McWilliams also said that, during his time on the MCPD, he is not aware of Ms. Johnson being arrested or law enforcement having any difficulty with her. McWilliams said that he was "without a doubt" comfortable with Shawna Johnson possessing a firearm.

Wabash County Sheriff's Deputy D-Ray Etzkorn testified on behalf of Shawna Johnson. Etzkorn had been a full-time deputy for 19 years. He had known Shawna Johnson for over 20 years. Etzkorn knew Shawna Johnson through her work with her various employers. Etzkorn actually worked with Johnson's ex-husband, Michael Korstick, in the "clean-up shop" of a local car dealership in the late 1970's and/or early 1980's. Etzkorn described Michael Korstick "fairly jovial" on a day-to-day basis. But, Etzkorn said that Korstick was "quite prone to temper tantrums," that Korstick could "become agitated and quite often he became very animated." Etzkorn said that if Korstick lost his temper Korstick was prone to throw things, curse, and that Korstick could actually become so irritated that he would start to shake.

Etzkorn said that over the 20 years he has known her, Shawna has always been a friendly and outgoing individual. Etzkorn testified that he'd never had any issues with Shawna. Etzkorn further testified that he would not have any concerns about Shawna Johnson possessing firearms or a FOID card. Etzkorn said Shawna has been a very family-oriented person and that she looks out for her family. Etzkorn testified that, as far as he knew, Ms. Johnson seems to be well-liked. And, Etzkorn said he consider Ms. Johnson to be well-respected in the community.

Etzkorn was a deputy at the time of Shawna Johnson's battery conviction in question in 2001. Etzkorn said he had reviewed the report form the 2001 incident. Etzkorn testified that, notwithstanding Shawna Johnson's 2001 battery and prior 1991 battery convictions, he would believe Ms. Johnson would be safe with a gun, he would trust her with a gun and that he had never seen any reason or had any reason to think that she would act in a manner dangerous to the public safety.

Former Wabash County Sheriff Arnold "Joe" Keeling also testified on behalf of Shawna Johnson. Keeling was a two-term sheriff of Wabash County, Illinois from 2006 to 2014. Keeling started in law enforcement in 1989 and even worked as a deputy assigned to the Illinois State Police Drug Task Force for a period of time. Keeling actually arrested Michael Korstick for drugs. Keeling said he'd dealt with Korstick 4-5 times, including seeing Korstick at

his employment location(s). Keeling said Korstick had "kind of a lack of respect for any kind of authority" and "he like had a chip on his shoulder" and he "got pretty hot tempered sometimes."

Keeling also discussed the "clear and present danger" forms consistent with testimony of the other officers. Keeling said that he had completed such a form 2 to 3 times regarding individuals whom he believed should not possess a firearm or FOID Card.

Keeling testified that he'd known Shawna Johnson for 20-25 years. Over the lengthy period of time, Keeling said that he has known Shawna to be "pretty easygoing, good to work with, good to talk to, seems like a pretty good person." Keeling said he'd "never had any other dealings with her other than good."

Keeling further testified about meeting with Shawna Johnson in his office in August of 2013 when she signed a firearm disposition record and turned over her FOID Card to then Sheriff Keeling. ***See Exhibit 4.*** Keeling testified that Shawna Johnson was "complying with the law 100 percent" but that she was "definitely upset about the process" of and the fact that she was losing her FOID Card.

As to Shawna Johnson's reputation, Keeling said that "Shawna has a good reputation ... [that] everybody likes her ... and no one has really had any problems with her." And, he said she is a "well-respected person." Keeling was aware of Shawna's 2001 and 1991 battery convictions. Nonetheless, Keeling said he would not have any concerns about Shawna Johnson having a firearm. Keeling said that during the 20-25 years he's known Shawna Johnson, he had never seen her do anything that was illegal, rude or disrespectful to anybody nor had she done anything that would make him believe that she would do anything to harm anyone.

Mt. Carmel Police Chief John Lockhart testified on behalf of Shawna Johnson. Lockhart had been with the MCPD for 19 years and he'd known Shawna Johnson for 15 years at the time of his testimony. Initially he'd met Johnson as she was neighbor to his parents. But, he also met Johnson professionally as he was the officer responding to the complaint which resulted in Ms. Johnson's arrest for domestic battery in February, 2001, and which eventually resulted in a conviction for battery for Ms. Johnson. The officer who arrested Shawna Johnson (the day after the incident (Corporal Johnson) was no longer with the MCPD. Lockhart reviewed, identified and referred to his own police report from the incident in question. ***See Exhibit 6.*** Michael Korstick was observed to have a bloody nose or otherwise appeared to be injured at the time.

Chief Lockhart also recalled numerous times when he'd had contact with Michael Korstick when Korstick was often intoxicated, agitated, animated, and hard to talk or reason with.

Lockhart testified at the hearing that he then had almost daily contact with Shawna Johnson at her place of employment. As had the other officers in their testimony, Lockhart discussed the "clear and present danger" report forms that he has used and completed during his law enforcement career. Lockhart testified that, based upon his experience in law enforcement, and his knowledge or opinion of Shawna Johnson and her reputation in the community, that

Shawna Johnson is "one of the few people that [he's] dealt with that [he would] have no hesitation whatsoever on her ability and common sense to own a firearm." Lockhart continued, "I find no reason why she should not. I have no indications, other than the one report, of her being violent or anything unlawful that I'm aware of. She's had a good record and a good rapport within the community. And to be honest with you, I have people out there now that have FOID cards and even concealed carry that I would be more concerned about than I would Mrs. [Johnson]." Lockhart said that he did not believe that Shawna Johnson is someone who would be likely to act in a manner dangerous to public safety if she were issued a FOID card. Lockhart said this was true even after he was made aware of and also considered Ms. Johnson's previous (1991) battery conviction related to the dispute with a babysitter.

Shawna Johnson's husband, James "Jimmy" Johnson, testified on Shawna's behalf. Shawna and Jimmy had been married for 7 years at the time of the hearing. But, they've known each other, through working at common employers, for several years before that. The Johnson's (Jimmy and Shawna) now run an auto maintenance business out of their residence where they service fleet vehicles, including squad cars for local law enforcement agencies.

Jimmy Johnson also knew Michael Korstick, he worked for a time with both Shawna and Michael Korstick and he testified that had observed them together and how Michael Korstick treated Shawna. Jimmy Johnson testified that Korstick would call Shawna an "F'ing bitch" and other demeaning things.

Jimmy Johnson testified that he himself has a FOID Card and even an Illinois "Concealed Carry" permit. He said he'd been a gun owner for over 20 years and that he'd gone through 16 hours of training to get his concealed carry permit. Mr. Johnson said named the several firearms that he has at his home under lock and key or combination lock and that Shawna did not have access to the key or the combination for the two gun safes at their home. He said that since Shawna lost her FOID card, she has "never" been allowed to possess a firearm or ammunition. Jimmy Johnson said that Shawna has never struck him or threatened to hit him. He said that he would have no fear if Shawna would again be allowed to have a FOID Card and a firearm.

II. Applicable Federal Statutes

The Federal Gun Control Act of 1968 prohibits possession of a firearm by any person convicted of a felony. 18 U.S.C. § 922. In 1996, Congress extended the prohibition to include individuals convicted of a misdemeanor crime of domestic violence. **18 U.S.C. § 922(g)(9).** The Federal Gun Control Act defines "a misdemeanor crime of domestic violence" as an offense that:

> (i) is a misdemeanor under Federal, State, or Tribal law; and
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim." **18 U.S.C. § 921(a)(33)(A).**

In ***U.S. v. Hayes, 555 U.S. 415 (2009)***, the U.S. Supreme Court held that misdemeanors, such as Ms. Johnson's conviction for Battery, can/do bar the possession of firearms and ammunition under the Federal Gun Act (**18 U.S.C. § 922(g)(9)**) even though the predicate offense does not include/allege the existence of a domestic relationship between the offender and the victim as a discrete element of the offense. ***Hayes, 555 U.S. at 421.***

As argued by the ISP, even as here in the instant case, where a charge of Domestic Battery was amended to Battery, and, where the discrete or specifically alleged element of the domestic relationship between the offender and the victim has been removed/amended-out of the charging document/Information, it appears that 18 U.S.C § 922(g)(9) still bars the offender from possessing a firearm or ammunition if, in reality, there was one of the domestic relationships as delineated in the federal statute in existence between the offender and the victim. ***See 18 U.S.C. § 922(g)(9) and 18 U.S.C. § 921(a)(33)(A).***

However, federal law also includes certain exceptions/exemptions which, if applicable to the specific facts of a certain case, would negate the conviction for a misdemeanor crime of domestic violence and remove the federal bar to possession of a firearm and ammunition. These exceptions, set-forth in section **921(a)(33)(B)(ii)** of Title 18 **(18 U.S.C. § 921(a)(33)(B)(ii))** (Supp. II 1996)), provide that:

> "... a person shall not be considered to have been convicted of misdemeanor domestic violence if the conviction has been expunged or set aside, if the person has been pardoned, or if the person's "civil rights" have been "restored." **See 18 U.S.C. § 921(a)(33)(B)(ii).**

This court, along with the parties and counsel in this case, have waded – via various hearings on Motions to Dismiss and a Motion for Summary Judgment - through all possible exceptions and exemptions stated under the above-sited federal statutes and the court has ultimately found that none of the above-recited exceptions or exemptions are available/provide relief to Shawna Johnson.

III. Applicable Illinois Statutes

The Illinois Firearms Owner's Identification Act (FOID Act) is found at 430 ILCS 65/0.01 et.seq. The Illinois General Assembly amended Section 10 (c) of the FOID Act effective January 2013, adding language stating that a court may grant relief (the issuance of a FOID card) only where the granting of such relief would not be contrary to federal law.

430 ILCS 65/10

65/10. Appeal to director; hearing; relief from firearm prohibitions.

"§ 10. Appeal to director; hearing; relief from firearm prohibitions.

(a) Whenever an application for a Firearm Owner's Identification Card is denied, whenever the Department fails to act on an application within 30 days of its receipt, or whenever such a Card is revoked or seized as provided for in Section 8 of this Act, the aggrieved party may appeal to the Director of State Police for a hearing upon such denial, revocation or seizure, unless the denial, revocation, or seizure was based upon a forcible felony, stalking, aggravated stalking, domestic battery, any violation of the Illinois Controlled Substances Act, the Methamphetamine Control and Community Protection Act, or the Cannabis Control Act that is classified as a Class 2 or greater felony, any felony violation of Article 24 of the Criminal Code of 1961 or the Criminal Code of 2012, or any adjudication as a delinquent minor for the commission of an offense that if committed by an adult would be a felony, in which case the aggrieved party may petition the circuit court in writing in the county of his or her residence for a hearing upon such denial, revocation, or seizure.

(b) At least 30 days before any hearing in the circuit court, the petitioner shall serve the relevant State's Attorney with a copy of the petition. The State's Attorney may object to the petition and present evidence. At the hearing the court shall determine whether substantial justice has been done. Should the court determine that substantial justice has not been done, the court shall issue an order directing the Department of State Police to issue a Card. However, the court shall not issue the order if the petitioner is otherwise prohibited from obtaining, possessing, or using a firearm under federal law.

(c) Any person prohibited from possessing a firearm under Sections 24-1.1 or 24-3.1 of the Criminal Code of 2012 or acquiring a Firearm Owner's Identification Card under Section 8 of this Act may apply to the Director of State Police or petition the circuit court in the county where the petitioner resides, whichever is applicable in accordance with subsection (a) of this Section, requesting relief from such prohibition and the Director or court may grant such relief if it is established by the applicant to the court's or Director's satisfaction that:

(0.05) when in the circuit court, the State's Attorney has been served with a written copy of the petition at least 30 days before any such hearing in the circuit court and at the hearing the State's Attorney was afforded an opportunity to present evidence and object to the petition;
(1) the applicant has not been convicted of a forcible felony under the laws of this State or any other jurisdiction within 20 years of the applicant's application for a Firearm Owner's Identification Card, or at least 20 years have passed since the end of any period of imprisonment imposed in relation to that conviction;
(2) the circumstances regarding a criminal conviction, where applicable, the applicant's criminal history and his reputation are such that the applicant will not be likely to act in a manner dangerous to public safety;
(3) granting relief would not be contrary to the public interest; and
(4) granting relief would not be contrary to federal law." **See 430 ILCS 65/10.**

430 ILCS 65/8

65/8. Grounds for denial and revocation

"§ 8. Grounds for denial and revocation. The Department of State Police has authority to deny an application for or to revoke and seize a Firearm Owner's Identification Card previously issued under this Act only if the Department finds that the applicant or the person to whom such card was issued is or was at the time of issuance:

> (n) A person who is prohibited from acquiring or possessing firearms or firearm ammunition by any Illinois State statute or by federal law;

Upon revocation of a person's Firearm Owner's Identification Card, the Department of State Police shall provide notice to the person and the person shall comply with Section 9.5 of this Act." **See 430 ILCS 65/8.**

430 ILCS 65/13
65/13. Acquisition or possession prohibited by law

"§ 13. Nothing in this Act shall make lawful the acquisition or possession of firearms or firearm ammunition which is otherwise prohibited by law."

See 430 ILCS 65/13.

As this court has determined after consideration of the various motions in this case, relief is not available to Shawna Johnson under any of the above Illinois statutes.

Moreover, as established at the evidentiary hearing in January 2016, Shawna Johnson even sought and was denied a pardon by the Governor/Prison Review Board.

IV. Consideration of Applicable Legal Authorities

In the recent Illinois Appellate 5th District case of ***Odle v. Department of State Police, 2015 IL App (5th) 140274 (Ill. App. 5 Dist., November 18, 2015),*** the Illinois Appellate 5th District Court certainly left the door open (and even opined that the *Coram* court left the door open) for a potential "As-Applied" challenge to a perpetual firearm ban in an appropriate case.

The ***Odle*** court held that a petitioner in such an appropriate case would have to plead and show that he or she has led a law-abiding life for an extended period of time ***or*** that he or she could present other facts that would distinguish his/her circumstances from those of other persons who have been historically barred from Second Amendment protections due to having domestic violence convictions:

"Finally, we briefly address the petitioner's second amendment arguments. He contends that the interplay between the FOID Act and the federal Gun Control Act could lead to a permanent prohibition on gun ownership. This is because the Gun Control Act provides that the federal prohibition against acquiring or possessing a firearm as a result of a conviction for a "misdemeanor crime of domestic violence" ends when the person's civil rights are restored, if the state in which the conviction occurred provides for the restoration of civil rights after a conviction. 18 U.S.C. § 921(a)(33)(B)(ii) (2012). In Illinois, however, an individual convicted of a misdemeanor does not lose any civil rights as a result of the misdemeanor and, as such, cannot have any rights restored within the meaning of the Gun Control Act. See *Coram,* 2013 IL 113867, ¶ 18, 375 Ill.Dec. 1, 996 N.E.2d 1057. **The petitioner argues that this result violates his rights to keep and bear arms under the second amendment. As the State Police points out, the petitioner did not raise this constitutional claim before the circuit court. As such, he has forfeited consideration of the issue on appeal.** See *In re Liquidations of Reserve Insurance Co.,* 122 Ill.2d 555, 567–68, 120 Ill.Dec. 508, 524 N.E.2d 538 (1988); *People v. Myles,* 131 Ill.App.3d 1034, 1046, 87 Ill.Dec. 341, 476 N.E.2d 1333 (1985). **Moreover, even if we were to consider the constitutional challenge on its merits, we would reject the petitioner's claim. The rights to keep and bear arms, like other constitutional rights, are**

not unlimited. *District of Columbia v. Heller,* 554 U.S. 570, 626, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). The prohibition on firearm ownership and possession by people convicted of crimes of domestic violence has been upheld repeatedly. *United States v. Skoien,* 614 F.3d 638, 642–44 (7th Cir.2010); *Enos v. Holder,* 855 F.Supp.2d 1088, 1098–99 (E.D.Cal.2012). The rationale behind this prohibition is that people convicted of crimes based on acts of domestic violence pose a danger to members of their families due to a high rate of recidivism. See *Hayes,* 555 U.S. at 426–27; *Enos,* 855 F.Supp.2d at 1098–99. However, both federal and state courts have noted that a lifelong prohibition might raise constitutional questions. See, *e.g., O'Neill,* 2015 IL App (3d) 140011, ¶ 29, 390 Ill.Dec. 367; *Skoien,* 614 F.3d at 645. In *Coram,* our supreme court found it unnecessary to address the constitutional question (*Coram,* 2013 IL 113867, 375 Ill.Dec. 1, 996 N.E.2d 1057), but the court noted that "Congress obviously did not believe it reasonable or necessary to impose a perpetual firearm disability on anyone in the listed categories in section 922(g)." ...The rationale underlying these concerns is the notion that a domestic abuser who has led a law-abiding life for many years may no longer pose the risk to family members that justified the initial ban. See *Skoien,* 614 F.3d at 644. We note that while the petitioner in this case does not explicitly make these arguments, he does cite *Skoien* in support of his otherwise conclusory contention that a perpetual prohibition violates his rights under the second amendment. The petitioner contends that a perpetual or lifelong ban on firearm ownership is unconstitutional. He does not specify whether he is arguing that the statutes at issue are unconstitutional on their face or unconstitutional as applied to him. Courts that have considered similar arguments have treated them as challenges to the statutes as applied. See, *e.g., Skoien,* 614 F.3d at 645; *Enos,* 855 F.Supp.2d at 1099; see also *Coram,* 2013 IL 113867, ¶ 18, 375 Ill.Dec. 1, 996 N.E.2d 1057 (stating that the circuit court in that case found the FOID Act prohibition to be unconstitutional as applied to Coram). The petitioner in this case is not in a position to make such a claim. As discussed previously, the petitioner pled guilty late in 2011 to a charge based on events that took place earlier that year. He petitioned for review less than two years later, in March 2013. Thus, he is not someone "who has been law abiding *for an extended period* " of time after his conviction (emphasis added) (*Skoien,* 614 F.3d at 645). Nor has he alleged any other facts "that distinguish his circumstances from those of persons historically barred from Second Amendment protections" due to domestic violence convictions (*Enos,* 855 F.Supp.2d at 1099 (explaining that such allegations are necessary to sustain an as-applied constitutional challenge (citing *United States v. Barton,* 633 F.3d 168, 174 (3d Cir.2011)))). As such, he has not provided us with any basis to find that an otherwise constitutional statutory scheme is not constitutional as applied to him. See *Skoien,* 614 F.3d at 645 (explaining that an individual "to whom a statute properly applies can't obtain relief based on arguments that a differently situated person might present"). Thus, even if the petitioner had not forfeited his constitutional claim, we would reject it. For the foregoing reasons, we deny the petitioner's motions to correct misnomer and dismiss the appeal, and we reverse the order of the circuit court."

See ***Odle v. Department of State Police**, 2015 IL App (5th) 140274 (Ill.App. 5 Dist., November 18, 2015).*

Subsequent to its opinion in ***Odle***, in the case of ***Bailey v. The Department of State Police***, 2016 IL App (5th) 140586 (Appellate Court of Illinois, Fifth District)(March 3, 2016), the Illinois 5th District Appellate Court again made it clear that, post ***Coram*** and the 2013 amendments, Illinois courts can no longer order the issuance of a FOID Card under 430 ILCS 65/10 when the defendant/applicant was convicted of crime involving domestic violence and if the defendant/applicant possessing firearms would violate federal law. The 5th District Court stated:

"Before concluding, we take this opportunity to discuss the FOID Act and the ramifications this court has observed as a result of the 2013 amendments. Members of the criminal justice system have failed to recognize that a trial court can no longer require the issuance of a FOID card, when faced with a conviction involving domestic violence. See 430 ILCS 65/10(b) (West 2012) (the circuit court "shall not" issue an order directing the Department to provide an applicant with a FOID card where the applicant is "otherwise prohibited from obtaining, possessing, or using a firearm under federal law"). It does not matter if a plea is involved or if the crime is a felony or a misdemeanor. The severity of the crime is irrelevant; rather, it is the nature of the crime that is germane. Further, it is not important whether the criminal conviction is for a misdemeanor that contains the words "domestic violence." A simple "battery" conviction may suffice for the decision to revoke a FOID card based on the underlying circumstances.
See ***Odle*, 2015 IL App (5th) 140274, 398 Ill.Dec. 313, 43 N.E.3d 1223.** The Department has the obligation to investigate the circumstances of the crime, as it did in ***Odle,*** and determine whether the criminal actions involved violence of a domestic nature. "The rationale behind this prohibition is that people convicted of crimes based on acts of domestic violence pose a danger to members of their families ...." ***Odle*, 2015 IL App (5th) 140274, 398 Ill.Dec. 313, 43 N.E.3d 1223.** ... Perhaps our legislature should have considered requiring that the Department be named as a nominal party in a section 10 proceeding involving a request for the issuance of a FOID card. Alternatively, our lawmakers could have required that the Department be given notice of circuit court proceedings pursuant to section 10 of the FOID Act. Regardless of whether any action is taken to address the complexities brought about by the 2013 amendments to the FOID Act, it is now clear that the Act does not allow FOID cards to be issued to individuals who have been convicted of crimes that involve domestic violence."

See Bailey v. The Department of State Police, 2016 IL App (5th) 140586.

In another case decided after the ***Odle*** case (and after the evidence and briefs were concluded in the instant case), the 3rd District Appellate Court in ***People v. Heitmann, 2017 IL App (3d) 160527 (Ill. App. 3d Dist., October 2, 2017)*** again indicated that an "as applied" challenge might be granted in an appropriate case. However, the Court found that Joseph Lane Heitmann, the Petitioner who sought reinstatement of his FOID Card, was premature in presenting his "as applied" challenge because he had not yet sought a pardon from the Illinois Governor/Prison Review Board. Like Shawna Johnson, Mr. Heitmann had pleaded guilty to battery (in 1990) for grabbing the arm of his then-wife, dumping beer on here, and throwing two lit cigarettes at her. He was convicted and sentenced to a fine of $ 150. After his plea and conviction, Heitmann continued to possess a (valid) FOID Card. Then, 24 years later, in 2014, Heitmann applied for a concealed carry permit. In the process of investigating Heitmann for such permit, the State Police turned up Heitmann's (domestic violence) battery conviction, rejected his concealed carry permit and revoked Heitmann's FOID Card. Heitmann filed a petition in the Circuit Court of Bureau County seeking relief from the ISP's revocation of his FOID Card. Eventually, after the ISP was allowed to intervene, the trial court dismissed Heitmann's petition. Heitmann appealed to the 3rd District Appellate Court and argued that granting him a FOID card would not be contrary to federal law, and the FOID Card Act is unconstitutional as applied to him because it amounts to a perpetual firearm ban. The 3rd District Appellate Court affirmed the trial court's dismissal of Heitmann's petition and specifically held that: (1) Illinois circuit courts may no longer remove the federal ban on firearm ownership by those convicted of domestic battery; (2) gun rights do not fall under the rights covered by the civil rights restored language of the federal Gun Control Act of 1968 (Gun Control Act) (18 U.S.C. § 921(a)(33)(B)(ii) (2012));

(3) even if gun rights were civil rights, Illinois does not provide a mechanism for restoration of such rights; and (4) the "safety valve" provision of the Gun Control Act provides no remedy to petitioner. The 3rd District Appellate Court further held that that granting Mr. Heitmann a FOID card would be contrary to federal law. And, moreover, the Appellate Court found that Heitmann's "as-applied" challenge was premature because Heitmann had not yet availed himself of every remedy available to him. Specifically, Heitmann had not yet applied for a pardon. ***See People v. Heitmann, 2017 IL App (3d) 160527 (Ill. App. 3d Dist., October 2, 2017).***

In ***Baumgartner v. Greene County State's Attorney's Office and The Illinois State Police, 2016 IL App (4th) 150035 (Ill. App. 4th Dist., March 31, 2016),*** Appellant and FOID Card applicant, Kyle Baumgartner was denied a FOID Card by the Illinois State Police (ISP) based on his criminal record, which included misdemeanor conviction for domestic battery. Baumgartner filed petition for relief in the Circuit Court of Greene County, Illinois. The trial court initially granted Baumgartner relief, but subsequently granted the ISP's motion to intervene, vacated the order requiring the issuance of the FOID Card and ultimately denied/dismissed Baumgartner's petition. On appeal, the 4th District Appellate Court made holdings consistent with other post-***Coram*** appellate courts decisions Odle (5th), Bailey (5th), Heitmann (3rd), held that: (1) the Illinois Firearm Owners Identification Card Act bars relief where applicant is prohibited by federal law from possessing firearm; (2) Baumgartner did not lose any civil rights and, thus, he could not have had any restored to remove his federal firearm disability; and (3) Although Baumgartner had forfeited because he had not raised his "as applied" challenge, the Appellate court would nonetheless have denied Baumgartner's "as applied" challenge based up the facts of his case because Baumgartner (like Heitmann) had not availed himself of one potential avenue of relief – Baumgartner had not yet applied for a pardon.

In discussing Baugartner's "as-applied" constitutional challenge, as well as the facts, law and considerations a court should weigh to resolve such a challenge, the 4th District Appellate Court stated:

> "On appeal, plaintiff's final contention is that the FOID Act and the Gun Control Act are unconstitutional as applied to him. He maintains that, because he established himself before the circuit court as a law-abiding individual, interpreting section 10 of the FOID Act and section 922(g)(9) of the Gun Control Act as prohibiting him from possessing a firearm violates his second amendment rights to keep and bear arms (U.S. Const., amend. II). ISP responds that plaintiff forfeited his constitutional challenge on appeal by failing to raise the issue in the circuit court. Alternatively, it maintains plaintiff's claim is without merit because there is no certain lifetime ban preventing him from possessing a firearm. In its *amicus curiae* brief, the United States takes the same position as ISP. Whether a statute is unconstitutional is a question of law subject to *de novo* review." ***Lebron v. Gottlieb Memorial Hospital, 237 Ill.2d 217, 227, 341 Ill.Dec. 381, 930 N.E.2d 895, 902 (2010).*** However, when an appellant has failed to raise his constitutional claim before the circuit court, "he has forfeited consideration of the issue on appeal." ***Odle,* 2015 IL App (5th) 140274, ¶ 35, 398 Ill.Dec. 313, 43 N.E.3d 1223** (finding the appellant forfeited his constitutional claim that the interplay between the FOID Act and the federal Gun Control Act violated his rights to keep and bear arms under the second amendment). Additionally, "[a] court is not capable of making an 'as applied' determination of unconstitutionality when there has been no evidentiary

hearing and no findings of fact." *In re Parentage of John M., 212 Ill.2d 253, 268, 288 Ill.Dec. 142, 817 N.E.2d 500, 508 (2004); see also Lebron, 237 Ill.2d at 228, 341 Ill.Dec. 381, 930 N.E.2d at 902* (holding that "when there has been no evidentiary hearing and no findings of fact, the constitutional challenge must be facial"). ***"By definition, an as-applied constitutional challenge is dependent on the particular circumstances and facts of the individual defendant or petitioner" and, "[t]herefore, it is paramount that the record be sufficiently developed in terms of those facts and circumstances for purposes of appellate review." People v. Thompson, 2015 IL 118151, 398 Ill.Dec. 74, 43 N.E.3d 984.*** Although plaintiff acknowledges that he failed to raise an as-applied constitutional challenge in the circuit court, he asks this court to excuse his forfeiture on the basis the circuit court heard and considered evidence in connection with his petition under section 10 of the FOID Act and because the State certainly could have presented evidence [during the hearing on his section 10 petition] but chose not to. Here, we decline to excuse plaintiff's forfeiture. As stated, the hearing before the circuit court concerned plaintiff's request for relief under section 10 of the FOID Act. ***At no time during the underlying proceedings did the court consider or make factual findings relative to an as-applied constitutional challenge to the FOID Act or the federal Gun Control Act.*** Moreover, the hearing at issue occurred prior to ISP's intervention in the underlying proceedings. ISP was ultimately allowed to intervene, in part, based on claims that the State's Attorney's office—the original respondent in the matter—was not sufficiently representing ISP's interests. Thus, although the State's Attorney's office was present at the hearing and could have presented contrary evidence to that presented by plaintiff, ISP did not have the same opportunity. Finally, even if we were inclined to excuse plaintiff's forfeiture, we question the appropriateness of reaching the merits of his as-applied constitutional claim under the circumstances presented by this case. In ***Coram, 2013 IL 113867, 375 Ill.Dec. 1, 996 N.E.2d 1057***, the circuit court held section 922(g)(9) of the federal Gun Control Act was unconstitutional as applied to the appellee, an individual denied a FOID card by ISP, and ISP appealed. On review before the supreme court, the dissent noted the constitutional question presented by the appeal but found it to be premature. ***Coram, 2013 IL 113867, 375 Ill.Dec. 1, 996 N.E.2d 1057 (Theis, J., dissenting, joined by Garman, J.).*** We find the dissent's reasoning instructive. The dissent noted that under section 921(a)(33)(B)(ii) of the Gun Control Act (18 U.S.C. § 921(a)(33)(B)(ii) (2006)), "an individual convicted of misdemeanor domestic violence potentially has three avenues of relief from the federal [firearms] ban," *i.e.,* having their conviction expunged, being pardoned, or having their civil rights restored. ***Coram, 2013 IL 113867, 375 Ill.Dec. 1, 996 N.E.2d 1057 (Theis, J., dissenting, joined by Garman, J.).*** The dissent further stated that, "[i]n Illinois, the constitution gives the Governor the unfettered authority to 'grant ... pardons, after conviction, for all offenses on such terms as he thinks proper' " and noted "[t]he pardon power is extremely broad." ***Coram, 2013 IL 113867, 375 Ill.Dec. 1, 996 N.E.2d 1057 (Theis, J., dissenting, joined by Garman, J.). (quoting Ill. Const.1970, art. V, § 12).*** It then determined as follows: "Where [the appellee] has not availed himself of a potential state remedy available to him under the statute, we need not and should not determine whether the statute is an unconstitutional perpetual ban which violates his second amendment rights. A remedy does not become unavailable merely because it is discretionary or resort to it may fail. It is not futile without ever being tried. Thus, where it is yet unknown whether [the appellee] can satisfy section 921(a)(33)(B)(ii), the question of '[w]hether a misdemeanant who has been law abiding for an extended period must be allowed to carry guns again, even if he cannot satisfy [section] 921(a)(33)(B)(ii), is a question not presented today.' [Citation]." ***Coram, 2013 IL 113867, 375 Ill.Dec. 1, 996 N.E.2d 1057 (Theis, J., dissenting, joined by Garman, J.).*** Like in ***Coram***, plaintiff in this case has a potential state remedy available to him, which could result in the removal of his federal firearm disability. Nothing in the record indicates he has attempted to avail himself of that potential remedy. As a result, his constitutional claim is premature. ... On appeal, ISP argues plaintiff's felony conviction for unlawful possession with the intent to deliver cannabis also renders him ineligible for possession of a FOID card. However, given our resolution of the other issues presented for review in this case, we find it unnecessary to address this alternative claim. ... For the reasons stated, we affirm the circuit court's judgment."

See Baumgartner v. Greene County State's Attorney's Office and The Illinois State Police, 2016 IL App (4th) 150035 (Ill. App. 4th Dist., March 31, 2016).

It is interesting, instructive and important to this court that Mr. Heitmann's case is very similar Shawna Johnson's case, at least in the fact that Heitmann essentially committed a

domestic battery but pled guilty to a battery charge. Also, Heitmann got to keep his FOID Card for a (long) period of time after he was convicted of a battery which involved his wife. The 3rd District acknowledges and leaves the door "wide open" to the possibility that, if Heitmann were to seek but be denied a pardon, his "as applied" constitutional claim would then be "ripe" and he would be in a position to pursue such as he would have then exhausted all remedies under Illinois law (as applied in concert with federal law) other than such "as applied" challenge. Indeed, had Heitmann pursued and been denied a pardon, he would be in the exact same legal position as this court finds Shawna Johnson in today.

Unlike the FOID Card applicants in *Odle*, *Heitmann* and *Baumgartner*, Shawna Johnson *did* seek a pardon from the Illinois Governor/Prison Review Board. Her request for a pardon was denied on December 23, 2015, just 5 days before she filed her Second Amended Petition – the petition at issue – on December 28, 2015. Shawna Johnson has pursued every other available statutory remedy or avenue for relief. All have led to a dead end. Her "as applied" challenge is not only "ripe," but, this court holds, it should bear fruit as her request to have her FOID Card reinstated must be granted.

V. Opinion and Analysis of Shawna Johnson's Second Amended Petition and Her Second Amendment "As Applied" Challenge

1. This Court has subject matter jurisdiction. As the Petitioner argues and as this court has previously found, 430 ILCS 65/10(a) granted/grants the Petitioner the right to petition the Circuit Court of Wabash County, Illinois to seek relief from the revocation of her F.O.I.D. card by the Respondent-ISP because of her battery conviction. In ruling on the various motions to date, including the motions for summary judgment, the court has determined that, "as-applied" to Petitioner, the state and federal statutory scheme prohibit the court from ordering ISP to re-issue Ms. Johnson's a F.O.I.D. card, short of a determination in her favor regarding her "as-applied" Constitutional challenge. The court previously granted the Petitioner leave to plead and pursue her "As-Applied" claim. The Respondent and the Wabash County State's Attorney have had more than adequate notice of such claim. And, this court has subject matter jurisdiction and the authority to hear such Constitutional claim. *See: Coram v. State of Illinois, 2013 IL 113867, 375 Ill.Dec. 1, 996 N.E.2d 1057(Ill. 2013); O'Neill v. Director Of The Illinois Department Of State Police, 2015 IL App (3d) 140011 (Ill. App. 3d Dist., March 11, 2015); and, Odle v. Department of State Police, 2015 IL App (5th) 140274 (Ill.App. 5 Dist., November 18, 2015).*

2. The Second Amended Petition sufficiently alleges a Constitutional Violation/"As Applied" challenge and a "Perpetual" Ban. The Court has previously found and stated that the Petitioner's Second Amended Petition sufficiently alleges facts to support Petitioner's

Constitutional ("As-Applied") Claim, to put Respondent on notice of such claim and to make such claim cognizable.

3. **The Petitioner's "As-Applied" Constitutional Claim is Cognizable, "Ripe" and Must be Granted.** In its October 2015 Order Regarding The Motions For Summary Judgment, this court granted the Petitioner leave to re-plead her constitutional claim when and if such became necessary (i.e. if Petitioner is left with no other resort). In its December 16, 2015 Order, the court reconsidered a portion of that October 2015 Order and determined that Petitioner could not prevail under an argument that her "civil rights were restored" by her pretrial detention. **Thus, as the court then found and now restates, short of a Constitutional "As-Applied" challenge, Petitioner would be perpetually precluded under federal and state law from possessing a firearm. As indicated in both of the court's October 28, 2015 and December 16, 2015 Orders, in that event, this court would need to consider such constitutional ("as applied") challenge.** The Illinois Supreme Court (in *Coram*), the Illinois Appellate 5th District Court (in *Odle*) and other Illinois Appellate Courts (e.g. the 3rd District Court in *O'Neill* and *Heitmann*) have all indicated that an "As-Applied" challenge should be considered in the appropriate case. As shown by the testimony and other evidence at the hearing, Petitioner Shawna Johnson has indeed pursued a pardon and has been denied. The denial of the requested pardon was just issued by the Governor/Prisoner Review Board on December 23, 2015 - in the midst of Petitioner being required to file/filing her Second Amended Petition. This court believes that, under the facts of this case, the Petitioner, Shawna Johnson and her counsel have presented a clear, convincing and strong case that supports the Petitioner's "As-Applied" challenge and convinces this court that Shawna Johnson's Second Amended Petition must be granted. ***See: Coram v. State of Illinois, 2013 IL 113867, 375 Ill.Dec. 1, 996 N.E.2d 1057(Ill. 2013); O'Neill v. Director Of The Illinois Department Of State Police, 2015 IL App (3d) 140011 (Ill. App. 3d Dist., March 11, 2015); People v. Heitmann, 2017 IL App (3d) 160527 (Ill. App. 3d Dist., October 2, 2017); and, Odle v. Department of State Police, 2015 IL App (5th) 140274 (Ill. App. 5 Dist., November 18, 2015).***

The Court fully adopts the analysis, including both the recitation of facts and the application of law, in Petitioner's Supplemental Briefing filed herein on March 24, 2016. The court will not here recite such Supplemental Briefing verbatim. But, the court does believe that the analysis of Petitioner's counsel in such Supplemental Briefing is "spot-on" with regard to the discussion about Shawna Johnson's situation considered in light of the factors under 430 ILCS 65/10(c) and especially with regard to the Petitioner's "as applied" challenge to the Federal and State statutes at issue.

A. **The Court Finds that the statutory factors under 430 ILCS 65/10(c) strongly support granting Petitioner's requested relief and the reinstatement of her FOID Card and**

that, but for 18 U.S.C. Sect. 922(g)(3), Petitioner, Shawna Johnson would be eligible to have her FOID Card reinstated under 430 ILCS 65/10(c):

(1) **The circumstances regarding Shawna Johnson's conviction for battery (domestic violence):** Petitioner was herself a victim domestic violence and in an abusive relationship with the alleged victim of her crime and her estranged husband Michael Korstick. Ms. Johnson married Korstick after she became pregnant with his child when she was 14 years old and Korstick was 24 years old. Shawna Johnson testified that she called the police to report physical abuse by Korstick some 4-5 times and that there were other incidents of domestic violence that she did not report to the police. The court strongly agrees with Petitioner's counsel that Shawna Johnson was the victim of domestic violence and not the aggressor. In fact, the court finds that this was true not only through Shawna Johnson's entire relationship and contacts with Michael Korstick but also and particularly on the night that she slapped him in the face - an event for which Shawna Johnson ultimately received a battery conviction and which resulted in the loss of her FOID Card.

Shawna Johnson was not represented by an attorney at the plea hearing. She felt pressured by her employer (where Korstick also worked at the time) to take the deal and "to make it go away." Petitioner agreed to and successfully completed a period of conditional discharge including completing counseling and paying a fine. The State's Attorney at that time, Terry Kaid, told Johnson that her plea to and conviction of simple battery would not prevent her from obtaining a FOID Card or possessing firearms after a period of time had passed. As the attorneys for Ms. Johnson argue, this statement by State's Attorney Kaid would have been arguably well-grounded in Illinois law at the time of the plea deal.

(2) **Petitioner, Shawna Johnson's Criminal History:** Shawna Johnson has no felony record. She has the two battery convictions (in 1991 and 2001) that have been discussed throughout this case and this order. And, she has a "couple of speeding tickets."

(3) **Shawna Johnson's Reputation:** Five (5) current and former local law enforcement officers – from all levels (City, County and State) - all testified Shawna Johnson's impeccable and impressive reputation in the community for her honesty, reasonable and agreeable disposition, good character, trustworthiness, dependability, and law-abiding nature. These are law enforcement officers who have lived in and served Mt. Carmel, Wabash County and the community where Shawna Johnson has lived, worked and raised her family.

(4) **The Public Interest:** Again, the court emphasizes that all FIVE (5) of the current and former local law enforcement officers testified in support of Shawna Johnson's efforts to have her FOID Card reinstated. Larry Blaize (retired ISP), Michael McWilliams (current Sergeant with MCPD), Joe Keeling (retired Wabash County Sheriff), D-Ray Etzkorn (current Wabash County Sheriff's Deputy) and John Lockhart (current Chief of MCPD) all testified that they had no concern about public safety or the safety of any individual if Shawna Johnson's FOID Card

was reinstated and she was once again able to possess and use firearms and ammunition. Shawna Johnson previously (even after her two battery convictions) and legally had a FOID Card and possessed and used firearms and ammunition. According to a number of witnesses, while she legally had her FOID Card, Shawna Johnson showed competency, knowledge, safe practices, skill and respect in her use of firearms and ammunition in the context of hunting and target practice. Moreover, there has never been any allegation nor any scintilla of evidence to even hint that Shawna Johnson has ever threatened any violence with or any other illegal or any inappropriate use of any firearm. The public at large would not be in any increased danger if Shawna Johnson had guns. Nor would any of Shawna Johnson's family members or "loved ones." This vast record shows that Shawna Johnson has never physically harmed or threatened any of her family members or "loved ones," with or without a gun. **Also, see the Court's discussion below in Part C.**

B. <u>The Court Finds That Shawna Johnson Has Led A Law-Abiding Life For An Extended Period Of Time Such That ISP's Revocation of Her FOID Card and the State and Federal Statutes Upon Which Such Revocation is Based Are Unconstitutional A Applied to Shawna Johnson</u>.

Shawna Johnson has never been charged with or convicted of a felony. She has no criminal charges or convictions since 2001. She successfully and perfectly completed the conditional discharge order entered as to the battery which still, 17 years after that battery, keeps her from having her FOID Card reinstated. Shawna and her husband have made great efforts to comply and they have complied with all laws in relation to and since the Director of the State Police revoked her FOID Card. Shawna Johnson's law-abiding life has not only been for an extended period of time and nearly the entire extent of her life, but, indeed, the only two blemishes on her record include 2 brief episodes on two different nights a decade apart from each other. **The Court adopts its recitation and analysis herein of all of the other evidence concerning Shawna Johnson's law-abiding life and tremendous reputation. And, the Court again fully adopts the analysis, including both the recitation of facts and the application of law, in Petitioner's Supplemental Briefing filed herein on March 24, 2016.**

C. <u>The Court Finds That Shawna Johnson and Her Counsel Have Presented Other Important Facts Which Distinguish Shawna Johnson and Her Circumstances From Others Historically Barred From Second Amendment Protections Due To Domestic Violence Convictions Such That ISP's Revocation of Her FOID Card and the State and Federal Statutes Upon Which Such Revocation is Based Are Unconstitutional As Applied to Shawna Johnson</u>.

The Court again fully adopts as part of its findings in this Section C, the analysis, including both the recitation of facts and the application of law, in Petitioner's Supplemental Briefing filed herein on March 24, 2016.

Shawna Johnson was not represented by an attorney when she pled guilty to and received a conviction and was sentenced to conditional discharge for battery. However, the court does acknowledge that the Wabash County Circuit Court apparently found that Ms. Johnson (then Ms. Korstick) made a knowing and voluntary waiver of her rights to counsel and to trial when she pled guilty to battery and received conditional discharge.

Terry Kaid, the State's Attorney who negotiated and agreed to Ms. Johnson's plea agreement for conditional discharge not only amended the charge/Information so that Shawna Johnson could plead guilty to and receive a conviction for battery rather than domestic battery, Kaid also told Johnson, when she specifically asked Kaid, that Johnson might lose her FOID Card for a period of time (5 years) but that she should be able to have her FOID Card restored thereafter. This statement by Kaid, which is unrebutted and which was made by the prosecutor and State's advocate in the criminal case that ISP claims forever bars Ms. Johnson from regaining her FOID Card, shows the uncertainty and fluctuation of the application of federal and state law to Ms. Johnson's situation. By this statement, even State's Attorney Kaid indicated he believed Shawna Johnson should be able to eventually get her FOID Card back! Admittedly, Shawna Johnson never petitioned the Wabash County Circuit Court to set-aside her guilty plea and vacate the judgment of conviction within 30 days, within two (2) years or otherwise. But, Ms. Johnson had no reason to believe that this statement by Kaid was potentially not accurate until ISP revoked her FOID Card by letter dated July 27, 2012 – more than eleven (11) years after Johnson pleaded guilty and received her conviction for battery.

It is important and instructive that Shawna Johnson previously (even after her two battery convictions) and legally had a FOID Card and possessed and used firearms and ammunition. According to a number of witnesses, while she legally had her FOID Card, Shawna Johnson showed competency, knowledge, safe practices, skill and respect in her use of firearms and ammunition in the context of hunting and target practice. She has also shown respect for the laws governing the possession and use of firearms. She returned her FOID Card in person to the Sheriff, Joe Keeling. She and her husband, Jimmy Johnson, have taken substantial measures to make sure that Shawna does not have access to firearms or ammunition. And, she has methodically, respectfully and patiently pursued her right to have her FOID Card returned and her right to possess and use firearms restored. Moreover, there has never been any allegation nor a scintilla of evidence to even hint that Shawna Johnson has ever threatened any violence with or any other illegal or any inappropriate use of any firearm.

The Wabash County State's Attorney has not objected to Shawna Johnson's petition.

The witnesses who support Shawna Johnson's petition include a former Illinois State Police Officer, a former Sheriff, a current and long-time Sheriff's Deputy, the current Chief of Police, and a current City Police Officer. Five (5) current and former local law enforcement officers – from all levels (City, County and State) - all testified in support of Shawna Johnson's efforts to have her FOID Card reinstated. Larry Blaize (retired ISP), Michael McWilliams (current Sergeant with MCPD), Joe Keeling (retired Wabash County Sheriff), D-Ray Etzkorn (current Wabash County Sheriff's Deputy) and John Lockhart (current Chief of MCPD) all testified that they had no concern about public safety or the safety of any individual if Shawna Johnson's FOID Card was reinstated and she was once again able to possess and use firearms and ammunition. These officers all discussed Shawna Johnson's impeccable and impressive reputation in the community for her honesty, reasonable and agreeable disposition, good character, trustworthiness, dependability, and law-abiding nature. These are law enforcement officers who have lived in and served Mt. Carmel, Wabash County and the community where Shawna Johnson has lived, worked, been the victim of a very abusive relationship and where she pleaded guilty to make a case "go away" so that she could keep her job and, essentially on her own her, support her daughters. Michael Korstick had abused and battered Shawna repeatedly prior to Shawna's March, 2001 battery of Korstick. In February 2001, one month before the battery in March, Shawna Johnson even obtained an Emergency Order of Protection (EOP) against Michael Korstick her abuser and the eventual "victim" of the (domestic) battery. Although the record clearly reflects that Shawna Johnson established and needed such protective order, she understandably folded to pressure put on her by her (and Mr. Korstick's common) employer, and she moved to vacate the EOP and dismissed her petition. More than 17 years have passed since Ms. Johnson's battery/domestic violence conviction. More than 27 years have passed since she slapped her ex-husband's babysitter. Ms. Johnson has never committed any offense involving a firearm. She is a law-abiding citizen. She and her husband have taken great pains and made great efforts to make sure she complies with revocation of her FOID card, even though she strenuously disagrees with the law's application to her.

Shawna Johnson and her attorneys, Ms. Blakeslee and Mr. Jenson have clearly and convincingly shown facts that certainly distinguish Shawna Johnson's "circumstances from those of persons historically barred from Second Amendment protections" due to domestic violence convictions. It is hard to imagine a case and a set of facts where a Petitioner convicted of a (domestic violence) battery would be more deserving than Shawna Johnson of having her FOID Card and her right to possess a firearm restored. In fact, in none of the many cases – from Illinois or elsewhere - that this court has reviewed over these past several years in its consideration of Shawna Johnson's petition and the many motions preceding this ruling, has this court found an applicant with such strong and unique facts and circumstances as Shawna Johnson and her counsel have presented herein.

Shawna Johnson has only once committed a crime of "domestic violence" and that was not with a firearm. Indeed, even in that ("domestic") battery, Shawna Johnson was not the

aggressor or the abuser. She was actually the victim in and of her own crime. She was the victim on that night in March of 2001. She was fighting-off and trying to flee from her abuser, Michael Korstick. She was also the victim of a cursory (at best) investigation following the incident. Shawna Johnson and other witnesses weren't even interviewed, and, the "victim" had even asked to have the charges dropped. Shawna Johnson was a victim of the court proceedings and pressures following the event which essentially forced her to "make it go away" under the belief that she would lose her job if she didn't plead guilty and that she might lose her FOID Card for a time but she would eventually get it back. **Finally, Shawna Johnson continues to be the victim of that crime and an intricate system of federal and state statutes that perpetually deny her a FOID Card and the use of firearms even though she – as a long-time domestic violence victim and not an abuser - is precisely NOT the type of person who those laws were meant to bar from owning and possessing firearms.**

After the 2013 amendments to the Illinois "FOID Act" (430 ILCS 65/10), and, even though her circumstances and all factors otherwise strongly support granting Shawna Johnson the relief she seeks, she is not eligible because her almost 18 year-old (domestic violence) battery conviction makes her ineligible under Federal law – specifically the 1996 amendments to the Federal Gun Control Act (18 U.S.C. § 922). See 430 ILCS 65/8(n) and 65/10. Her (domestic violence) battery conviction is not eligible for either expungement under Illinois law or the "civil rights restored" exception under Section 18 U.S.C. § 921(a)(33)B(ii). Finally, Shawna Johnson sought and was denied a pardon.

Having considered the facts, the applicable statutes and all other applicable legal authorities, as well as the arguments and recommendations of counsel, THE COURT FINDS AND ORDERS THAT:

SUBSTANTIAL JUSTICE HAS NOT BEEN DONE.

THE COURT FURTHER FINDS THAT, BECAUSE OF THE ISP'S REVOCATION OF AND REFUSAL TO REINSTATE PETITIONER, SHAWNA JOHNSON'S FOID CARD AND BECAUSE OF THE PERPETUAL DENIAL OF HER RIGHT TO POSSESS AND USE FIREARMS, THE FOLLOWING FEDERAL AND STATE LAWS AS APPLIED TO SHAWNA JOHNSON, EACH AND ALL VIOLATE SHAWNA JOHNSON'S RIGHTS UNDER THE SECOND AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES:

(A) 18 U.S.C. Sect. 922(g)(9);

(B) 430 ILCS 65/8(n);

(C) 430 ILCS 65/10(b) and (c)(4); and

(D) 20 Ill.Admin.Code Sect 1230.20 (the Illinois Administrative Code's authorizing provision regarding ISP's application, process and rules for the grant or denial of a request for a FOID Card).

THEREFORE, THE COURT REVERSES THE DECISION OF THE (DIRECTOR OF THE) ILLINOIS STATE POLICE IN ITS DENIAL OF PETITIONER'S REQUEST TO REINSTATE/REISSUE HER A FOID CARD.

FURTHERMORE, THE COURT ORDERS THE RESPONDENT, THE ILLINOIS STATE POLICE – SPECIFICALLY THE DIRECTOR OF THE ILLINOIS STATE POLICE - TO REINSTATE AND REISSUE TO PETITIONER, SHAWNA JOHNSON HER/A FOID CARD, INSTANTER.

THERE IS NO JUST CAUSE FOR DELAY IN THE APPEAL OR ENFORCEMENT OF THIS ORDER.

THE CIRCUIT CLERK IS ORDERED TO PROVIDE FILE-MARKED COPIES OF THIS ORDER TO ALL PARTIES AND COUNSEL OF RECORD.

OCT 0 1 2018

DATE

JUDGE

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on October 31, 2018, I electronically filed the foregoing Notice of Appeal with the Clerk of the Court for the Circuit Court of the Second Judicial Circuit, Wabash County, Illinois by using the Odyssey eFileIL system.

I further certify that the other participants in this appeal, named below, are not registered service contacts on the Odyssey eFileIL system, and thus were served by transmitting a copy from my e-mail address to all primary and secondary e-mail addresses of record designated by those participants on October 31, 2018.

Rebecca M. Blakeslee
rblakeslee2@frontier.com

David D. Jensen
david@djensenpllc.com

Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

/s/ Nadine J. Wichern
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November 19, 2018

Honorable Angela K. Crum
Clerk of the Circuit Court of Wabash County
401 Market Street
P.O. Box 997
Mt. Carmel, Illinois 62863

In re: Johnson v. Illinois State Police
124213

Dear Clerk of Circuit Court:

Enclosed is a certified order entered November 19, 2018, by the Supreme Court of Illinois in the above-captioned cause.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

cc: Nadine Jean Wichern
Rebecca Berg Blakeslee

State of Illinois
Supreme Court

I, Carolyn Taft Grosboll, Clerk of the Supreme Court of the State of Illinois, and keeper of the records, files and Seal thereof do hereby certify the following to be a true copy of an order entered November 19, 2018, in a certain cause entitled:

124213

Shawna Johnson,

Appellee

v.

Illinois State Police,

Appellant

Appeal from
Wabash County Circuit Court
13MR15

Filed in this office on the 14th day of November A.D. 2018.

SEAL OF THE SUPREME COURT
STATE OF ILLINOIS
AUG. 26, 1818

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Supreme Court, in Springfield, in said State, this 19th day of November, 2018.

Carolyn Taft Grosboll *Clerk,*
Supreme Court of the State of Illinois

SUP C 5

124213

IN THE

SUPREME COURT OF ILLINOIS

Shawna Johnson,	)	
	)	
Appellee	)	
	)	Appeal from
v.	)	Wabash County Circuit Court
	)	13MR15
Illinois State Police,	)	
	)	
Appellant	)	
	)	
	)	
	)	
	)	
	)	
	)	

ORDER

This Court retains jurisdiction and this matter is remanded to the circuit court of Wabash County for the limited purpose of making and recording findings in compliance with Supreme Court Rule 18. The findings and any attendant record shall be filed with the clerk of this Court in Springfield on or before December 19, 2018.

Order entered by the Court.

FILED
November 19, 2018
SUPREME COURT
CLERK

IN THE CIRCUIT COURT
FOR THE SECOND JUDICIAL CIRCUIT
WABASH COUNTY, MT. CARMEL, ILLINOIS

SHAWNA JOHNSON,	)	
Petitioner,	)	
	)	
-v-	)	**No. 13-MR-15**
	)	
ILLINOIS STATE POLICE,	)	
Respondent.	)	

COURT'S FINDINGS IN COMPLIANCE WITH SUPREME COURT RULE 18

Pursuant to the direction of the Illinois Supreme Court, and in compliance with Illinois Supreme Court Rule 18 (ILCS S. Ct. Rule 18), this Court references and certifies its findings in this court's Order filed herein on October 9, 2018 which found certain statutes, regulations and laws unconstitutional "as applied" to Petitioner, and, this court further finds and certifies that:

(a) This court made its findings with regard to unconstitutionality in writing in its Order filed herein on October 9, 2018. Such Order has been or will be filed with the Illinois Supreme Court by the Wabash County Circuit Clerk along with the appellate record.

(b) Such Order filed herein on October 9, 2018, and this court's opinion recited therein, clearly identifies what portion(s) of the statutes, regulations and/or laws are being held unconstitutional.

(c) Such Order filed herein on October 9, 2018, and this court's opinion recited therein, clearly sets forth the specific ground(s) for this Court's finding of unconstitutionality, including:

(1) The constitutional provision(s) upon which the finding of unconstitutionality is based;

(2) That the statutes, regulations and/or laws were found by this court to be unconstitutional *as applied* to this case and to this Petitioner *sub justice*;

(3) That the statutes, regulations and/or laws being found unconstitutional can reasonably be construed in a manner that would preserve its/their validity as to other cases and other parties but cannot be reasonably construed to be constitutional *as applied* to this case or to this Petitioner;

(4) That the finding of unconstitutionality is necessary to the decision or judgment rendered, and that such decision or judgment cannot rest upon alternative ground(s); and

(5) That the notice required by Illinois Supreme Court 19 (ILS S. Ct. Rule 19) has been served, and that those served such notice have been given adequate time and opportunity under the circumstances to defend the statute(s), ordinance(s), regulation(s) or other law(s) challenged. In this regard, the Petitioner, Shawna Johnson and her Attorneys, as well as the Illinois Attorney General, actively participated throughout this entire case. The Wabash County State's Attorney was given appropriate notice and opportunity to be heard and defend but chose not to participate.

The Wabash County Circuit Clerk shall file this certification and provide file-marked copies to the Illinois Supreme Court along with the appellate record herein, and, the Wabash County Circuit Clerk shall also provide file-marked copies to all counsel of record including the Petitioner's Attorneys, the Illinois Attorney General, and the Wabash County State's Attorney.

December 19, 2018
DATE

JUDGE

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RELEVANT STATUTORY PROVISIONS

Section 8 of the Act provides, in relevant part:

> § 8. Grounds for denial and revocation. The Department of State Police has authority to deny an application for or to revoke and seize a Firearm Owner's Identification Card previously issued under this Act only if the Department finds that the applicant or the person to whom such card was issued is or was at the time of issuance:
>
> (n) A person who is prohibited from acquiring or possessing firearms or firearm ammunition by any Illinois State statute or by federal law;

430 ILCS 65/8(n) (2016).

Section 10 of the Act provides, in relevant part:

> (a) Whenever an application for a Firearm Owner's Identification Card is denied, whenever the Department fails to act on an application within 30 days of its receipt, or whenever such a Card is revoked or seized as provided for in Section 8 of this Act, the aggrieved party may appeal to the Director of State Police for a hearing upon such denial, revocation or seizure, unless the denial, revocation, or seizure was based upon a forcible felony, stalking, aggravated stalking, domestic battery, any violation of the Illinois Controlled Substances Act, the Methamphetamine Control and Community Protection Act, or the Cannabis Control Act that is classified as a Class 2 or greater felony, any felony violation of Article 24 of the Criminal Code of 1961, or any adjudication as a delinquent minor for the commission of an offense that if committed by an adult would be a felony, in which case the aggrieved party may petition the circuit court in writing in the county of his or her residence for a hearing upon such denial, revocation, or seizure.
>
> (b) At least 30 days before any hearing in the circuit court, the petitioner shall serve the relevant State's Attorney with a copy of the petition. The State's Attorney may object to the petition and present evidence. At the hearing the court shall determine whether substantial justice has been done. Should the court determine that substantial justice has not been done, the court shall issue an order directing the Department of State Police to issue a Card. However, the court shall not issue the order if the petitioner is otherwise prohibited from obtaining, possessing, or using a firearm under federal law.
>
> (c) Any person prohibited from possessing a firearm under Sections 24-1.1 or 24-3.1 of the Criminal Code of 1961 or acquiring a Firearm Owner's

Identification Card under Section 8 of this Act may apply to the Director of State Police or petition the circuit court in the county where the petitioner resides, whichever is applicable in accordance with subsection (a) of this Section, requesting relief from such prohibition and the Director or court may grant such relief if it is established by the applicant to the court's or Director's satisfaction that:

> (0.05) when in the circuit court, the State's Attorney has been served with a written copy of the petition at least 30 days before any such hearing in the circuit court and at the hearing the State's Attorney was afforded an opportunity to present evidence and object to the petition;
>
> (1) the applicant has not been convicted of a forcible felony under the laws of this State or any other jurisdiction within 20 years of the applicant's application for a Firearm Owner's Identification Card, or at least 20 years have passed since the end of any period of imprisonment imposed in relation to that conviction;
>
> (2) the circumstances regarding a criminal conviction, where applicable, the applicant's criminal history and his reputation are such that the applicant will not be likely to act in a manner dangerous to public safety;
>
> (3) granting relief would not be contrary to the public interest; and
>
> (4) granting relief would not be contrary to federal law.

430 ILCS 65/10(a)–(c) (2016).

Title 20, Section 1230.20 of the Illinois Administrative Code provides, in relevant part:

> a) Application for a FOID Card shall be made by completing an application form provided by the Department. These forms will be made available through the Department's website (www.isp.state.il.us/foid/foidapp.cfm).
>
> b) All application forms shall be completed accurately and in their entirety, accompanied by the correct fee (see Section 5 of the Act) and a photograph, and submitted as indicated on the application form.
>
> c) Any application form that is not completed accurately and in its entirety, including the correct fee and a photograph, will be denied.

d) Except as provided in subsection (e), any requirement for an Illinois driver's license number or Illinois identification card number shall mean a valid Illinois driver's license number or valid Illinois identification card number. A temporary visitor's driver's license (TVDL) will not be accepted.

e) In regard to an applicant who is employed as a law enforcement officer, an armed security officer in Illinois or by the United States military permanently assigned in Illinois and who is not an Illinois resident, any requirement for a driver's license number or State identification card number shall mean the valid driver's license number or valid state identification card number from his or her state of residence.

f) In regard to an applicant who is employed by the United States military permanently assigned in Illinois, the applicant shall also provide valid military identification and assignment orders establishing permanent assignment in Illinois. Only persons with a permanent duty assignment in Illinois qualify for a FOID Card if they are not otherwise an Illinois resident. Military personnel in Illinois on temporary duty assignment are not eligible and do not need a FOID Card.

g) In regard to an applicant who is applying under a non-immigrant visa exception, the applicant shall provide a letter from his or her foreign government stating the purpose for travel to Illinois and the date the applicant's non-immigrant visa expires. The applicant shall also explain the need for the FOID Card or submit a waiver from this Part granted by the U.S. Attorney General. Persons in Illinois on a non-immigrant visa must have permission from their government and the U.S. Attorney General to possess or transport firearms.

h) The Department shall, as part of the application process, ask any questions necessary to determine eligibility under State and federal law to possess or receive a firearm, and deny a FOID application of any applicant who is prohibited under federal law from possessing or receiving a firearm.

i) All FOID Cards issued shall remain the property of the Department.

20 Ill. Admin. Code 1230.20(a)-(i) (2016).

Section 921 of the Federal Gun Control Act provides, in relevant part:

(a) As used in this chapter --

(33)(A) Except as provided in subparagraph (C), the term "misdemeanor crime of domestic violence" means an offense that--

(i) is a misdemeanor under Federal, State, or Tribal[3] law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

(B)(i) A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless--

(I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and

(II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either

(aa) the case was tried by a jury, or

(bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

(ii) A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 921(a)(33)(B)(ii) (West 2019).

Section 922 of the Gun Control Act provides, in relevant part:

(g) It shall be unlawful for any person-- . . .

> (9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(9) (West 2019).

Section 925 of the Gun Control Act provides, in relevant part:

> (c) A person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition may make application to the Attorney General for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms, and the Attorney General may grant such relief if it is established to his satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. Any person whose application for relief from disabilities is denied by the Attorney General may file a petition with the United States district court for the district in which he resides for a judicial review of such denial. The court may in its discretion admit additional evidence where failure to do so would result in a miscarriage of justice. A licensed importer, licensed manufacturer, licensed dealer, or licensed collector conducting operations under this chapter, who makes application for relief from the disabilities incurred under this chapter, shall not be barred by such disability from further operations under his license pending final action on an application for relief filed pursuant to this section. Whenever the Attorney General grants relief to any person pursuant to this section he shall promptly publish in the Federal Register notice of such action, together with the reasons therefor.

18 U.S.C. § 925(c) (West 2019).

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on May 8, 2019, I electronically filed the foregoing Brief and Appendix of Respondent-Appellant with the Clerk of the Illinois Supreme Court, by using the Odyssey eFileIL system.

I further certify that the other participant in this appeal, named below, is a registered service contact on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system.

Rebecca M. Blakeslee, rblakeslee2@frontier.com

I further certify that another participant in this appeal, named below, is not a registered service contact on the Odyssey eFileIL system, and thus was served by transmitting a copy from my e-mail address to all primary and secondary e-mail addresses of record designated by that participant on May 8, 2019.

David D. Jensen, david@djensenpllc.com

I further certify that another participant in this appeal, named below, is not a registered service contact on the Odyssey eFileIL system, and has not designated an e-mail address of record for service, and thus was served by placing a copy in an envelope bearing proper prepaid postage and directed to the address indicated below, and depositing the envelope in the United States mail at 100 West Randolph Street, Chicago, Illinois, 60601, before 5:00 p.m. on May 8, 2019.

Wabash County State's Attorney
Wabash County State's Attorney Office
401 N Market Street
Mount Carmel, Illinois 62863

Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

/s/ Katelin B. Buell
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