No. 129906

IN THE SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	**On leave to appeal from the Illinois Appellate Court, Fifth District,**
Plaintiff-Appellee,	)	**No. 5-22-0048**
vs.	)	**There on appeal from the Circuit Court of Madison**
JOSEPH C. ROTHE,	)	**County, Illinois,**
Defendant-Appellant.	)	**No. 05-CF-1433**
	)	**Hon. Janet L. Heflin, presiding**

DEFENDANT-APPELLANT'S OPENING BRIEF

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NATURE OF CASE

In 2005, the defendant, Joseph Rothe, was indicted for using a "bludgeon," that is, a pipe wrench during an armed robbery. Rothe was then convicted of armed robbery by a jury. Because of two prior qualifying felonies, Rothe was deemed a habitual criminal and sentenced to life in prison.

In 2016, Rothe petitioned for relief from his judgment arguing that his sentence was void because it violated the proportionate penalties clause of the Illinois Constitution. The circuit court denied his petition and the appellate court affirmed. *People v. Rothe*, 2023 IL App (5th) 220048-U. (A-13.)

Rothe filed a pro se petition for leave to appeal. The Court granted that petition and appointed the undersigned as counsel. No issues are raised on the pleadings.

ISSUE PRESENTED FOR REVIEW

Based on this Court's precedent, when Rothe committed his crime, the armed robbery and armed violence statutes had identical elements for a proportionate penalties analysis—assuming that the weapon used to commit the crime fit the definition of a "dangerous weapon" for armed violence. As a result, this appeal presents one issue:

Was Rothe's pipe wrench a "bludgeon" or weapon "of like character" under the armed violence statute?"

JURISDICTION

The circuit court entered its judgment dismissing Rothe's petition for relief from judgment on January 14, 2022. (C. 438) Rothe timely filed his notice of appeal on January 26, 2022. (C. 440; A-18.) The appellate court had jurisdiction under Sup. Ct. R. 301 and 304(b)(3).

The appellate court issued its unpublished decision and order affirming the circuit court on May 2, 2023. Rothe filed a timely pro se petition for rehearing on May 16, 2023. Sup. Ct. R. 367(a). The petition was denied on July 17, 2023. Rothe then filed a timely pro se petition for leave to appeal on July 31, 2023. The Court has jurisdiction under Sup. Ct. R. 315(b)(2).

STATUTES INVOLVED

Armed Robbery Statute

Rothe was indicted under the armed robbery statute, 720 ILCS 5/18-2 (West 2006), which states in relevant part:

> § 18-2. Armed robbery.
>
> (a) A person commits armed robbery when he or she violates Section 18-1; and
>
> (1) he or she carries on or about his or her person or is otherwise armed with a dangerous weapon other than a firearm. . .

Penalty for Armed Robbery

Under 720 ILCS 5/18-2(b) (West 2006), "Armed robbery in violation of subsection (a)(1) is a Class X felony." As stated in 730 ILCS 5-8-1(a)(3),

the sentence for a Class X felony "shall be not less than 6 years and not more than 30 years."

Armed Violence Statute

The armed violence statute in effect when Rothe committed his crime, 720 ILCS 5/33A-2(a)(West 2006), states in relevant part:

> § 33A-2. Armed violence—Elements of the offense
>
> (a) A person commits armed violence when, while armed with a dangerous weapon, he commits any felony defined by Illinois Law, except [certain enumerated exceptions that include "armed robbery," but not "robbery"].

The same statute at 720 ILCS 5/33A-1(c) (West 2006) defines a "dangerous weapon" as follows:

> § 33A-1(c) Definitions
>
> (1) "Armed with a dangerous weapon." A person is considered armed with a dangerous weapon for the purpose of this Article, when, he or she carries on or about his or her person or is otherwise armed with a Category I, Category II, or Category III weapon…
>
> (3) A Category III weapon is a *bludgeon*, black-jack, slungshot, sandbag, sand-club, metal knuckles, billy, or other dangerous weapon of like character. (emphasis added).

Penalty for Armed Violence

Under 720 ILCS 5/33A-3(b)(West 2006), using a Category III weapon is a Class 2 felony:

> (b) Violation of Section 33A-2(a) with a Category III weapon is a Class 2 felony or the felony classification provided for the same act while unarmed, whichever permits the greater penalty…

The sentence for a Class 2 felony under 730 ILCS 5-8-1(a)(5)(West 2006) is "not less than 3 years and not more than 7 years."

STATEMENT OF FACTS

A. Rothe is indicted for armed robbery with a "bludgeon," that is, a pipe wrench, and convicted.

In June 2005, Rothe was indicted for committing armed robbery "with a dangerous weapon, a bludgeon" and taking approximately $30 from the victim. (C. 48). The evidence at trial showed that on June 6, 2005, Rothe approached Shawn Woodruff near a downtown bar in Edwardsville, Illinois at around midnight or 12:30 a.m. and demanded money from Woodruff. He then struck him in the face with a pipe wrench, breaking his jaw. (R. 197-200, 202, 207, 212, 216, 220, 232, 249). In August 2007, a jury found Rothe guilty of armed robbery. (R. 619).

B. Rothe is sentenced to life in prison.

Rothe's conviction for armed robbery was a Class X felony. 720 ILCS 5/18-2(b) (West 2006). At his sentencing, the state introduced copies Rothe's convictions for two earlier Class X felonies. (R. 630-631). As a result, the court found that Rothe was eligible to be sentenced as habitual criminal and sentenced him to life in prison. (C. 185, R. 634-

50).[1] Rothe appealed his conviction and sentence and the appellate court affirmed. *People v. Rothe*, No. 5-07-0683, Rule 23 order (5th Dist. June 26, 2009).

In July 2010, Rothe filed a pro se petition for post-conviction relief raising ineffective assistance of counsel. The circuit court denied that petition and the appellate court affirmed. *People v. Rothe*, 2014 IL App (5th) 120552-U.

C. Rothe argues that his sentence violates the proportionate penalties clause.

In October 2016, Rothe filed a pro se petition for relief from judgment under 735 ILCS 5/2-1401. (C. 365). His petition argued that his armed robbery conviction violated the proportionate penalties clause of the Illinois Constitution because the armed robbery and armed violence statute contained identical elements, but the penalties for armed robbery were greater. (C. 369-71). Because his armed robbery was unconstitutional, he asserted that he should be resentenced for a Class 2 felony under the armed violence statute. (C. 373).

Rothe also pointed out that under settled law, a statute that violates the proportionate penalties clause is void and may be challenged at any time and need not brought within the two-year limitation of § 2-1401.

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[1] A person who commits a Class X felony after committing two prior Class X felonies, "shall be adjudged a habitual criminal" and "anyone adjudged a habitual criminal shall be sentenced to life imprisonment." 720 ILCS 5/33B-1(a) and (c) (West 2006).

(C. 369). Despite that, the State moved to dismiss his petition as untimely. The circuit court ruled that the petition was untimely and granted the motion to dismiss. (C. 438).

D. The appellate court rules that the two statutes did not have identical elements.

The appellate court affirmed, but did so on other grounds. First, it rejected the circuit court's ruling that Rothe's petition was untimely, since a challenge under the proportionate penalties clause that a statute is void "may be raised at any time" and such a challenge may be raised in a petition under § 2-1401. *People v. Rothe*, 2023 IL App (5th) 220048-U, ¶ 10.

Turning to the merits, the appellate court relied primarily on *People v. Hernandez,* 2016 IL 118672. *Rothe*, 2023 IL App (5th) 220048-U, ¶¶ 14-17. The court noted that *Hernandez* drew a distinction between how the term "dangerous weapon" was treated under the armed robbery and armed violence statutes. *Id.* ¶¶ 14-15. A "dangerous weapon" under the armed robbery statute is undefined and has a common-law meaning that includes any object that could "cause a victim serious injury"—known as "*per se* dangerous." *Id.* ¶ 14. The common law definition also includes any weapon "could be used in a dangerous manner." *Id.*

A "dangerous weapon" under the armed violence statute is defined by those objects listed in Category III, including a "bludgeon" and a variety of other weapons, as well as those "of like character." *Id.* ¶ 15. The court

observed that *Hernandez* concluded that even though the weapon at issue, "tin snips," had some characteristics of a bludgeon or weapon "of like character" and was used as a bludgeon, it was not within Category III as "it was not inherently dangerous and had a legitimate use." *Id.*

The appellate court relied on *Hernandez* to conclude that because armed robbery had a common law definition of a "dangerous weapon," and armed violence defined the same term by statute in Category III, "the definitions were not the same," and they did not have identical elements. *Id.* ¶ 16. As a result, it held there was not a violation of the proportionate penalties clause. *Id.* ¶ 17.

ARGUMENT

A. Introduction

If Rothe had used a "black-jack" or other dangerous weapon specifically listed in Category III of the armed violence statute, his sentence would have been vacated and he would have been resentenced to 3 to 7 years in prison. But because he used a pipe wrench, he was convicted of a Class X felony, with a range of 6 to 30 years, which resulted in a life sentence. When using a black-jack results in 3 to 7 years, but using a pipe wrench results in life in prison, then something is wrong. The proportionate penalties clause guards against such disparities. The remainder of this brief shows a better way to interpret the law to prevent such absurd and unjust results.

The problem here has two sources. First, the appellate court misinterpreted *Hernandez* to mean that because the armed robbery statute relies on a common law definition of a "dangerous weapon" and the armed violence statute defines it by statute, the elements of the two statutes are not identical. But that interpretation is directly contrary to this Court's precedent that squarely holds the opposite—namely, that before the armed violence statute was amended in 2007, the elements of the two statutes were identical.

Second, the appellate court never analyzed whether Rothe's wrench was a "bludgeon" or weapon "of like character." And its decision depends on the idea that even if a weapon has a bludgeon-like character, and even if that weapon causes harm, it still cannot be a bludgeon if it also has a legitimate use. Yet *Hernandez* cannot read to have endorsed such a proposition.

"Bludgeon" is a term that goes back over a century in Illinois law. It has no obvious meaning. Here, the disparity in Rothe's sentence hinges on one question: "What is a "bludgeon?" While a dictionary may be a place to begin answering that question, it is not the place to end. The answer also requires asking whether an object is "of like character." That means considering not only an object's physical characteristics, but also how it was actually used, that is, to cause harm—and not simply whether it might have a possible lawful use.

If Category III is properly interpreted to reflect whether an object is "of like character," and whether it caused harm, then Rothe's wrench fits the definition: (1) it is bludgeon-like in character and (2) while it might have been used for plumbing, it is undisputed that it was used to cause injury. And if Rothe's wrench was a bludgeon or weapon of like character under Category III, then his armed robbery sentence should be vacated and he should be resentenced under the armed violence statute.

B. The standard of review is *de novo*.

When considering a challenge under the proportionate penalties clause, the Court's review is *de novo*: "Thus, where identical offenses do not yield identical penalties, this court has held that the penalties were unconstitutionality disproportionate and the greater penalty could not stand. As the constitutionality of a statute is purely a matter of law, we review the question de novo." *People v. Hernandez*, 2016 IL 118672, ¶ 10 (citations omitted).

At the same time, the Court has recognized that statutes are presumed to be constitutional. And "if reasonably possible, this court must construe the statute so as to affirm its constitutionality and validity." *Id.* (citations omitted).

C. The identical-elements test has long been part of the proportionate penalties clause.

The proportionate penalties clause of the Illinois Constitution of 1970 states at Article I, § 11: "All penalties shall be determined both according

to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." The Court has explained that a penalty may violate the proportionate penalties clause in one of two ways: "(1) if it is so cruel, degrading, or disproportionate to the offense that the sentence shocks the moral sense of the community; or (2) if it is greater than the sentence for an offense with identical elements."[2] *People v. Ligon*, 2016 IL 118023, ¶ 10.

The Court first applied the identical elements test in *People v. Christy*, 139 Ill. 2d 172 (1990). There, the Court considered a defendant's convictions for armed violence predicated on kidnapping with a Category I weapon, a Class X felony. *Id.* at 173. It compared that to the offense aggravated kidnapping, a Class 1 felony. *Id.* at 174. The Court found that the elements for both crimes were identical, but that the punishment for armed violence was 6 to 30 years and that for aggravated kidnapping was 4 to 15 years. *Id.* at 181. As a result, the Court concluded that "common sense and sound logic would seemingly dictate that their penalties be identical." *Id.* Since they were not, the Court held that their penalties were "unconstitutionally disproportionate." *Id.*

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[2] A third way that a penalty might violate the proportionate penalties clause, the cross-comparison analysis, was abandoned in *People v. Sharpe*, 216 Ill.2d 481, 517-18 (2005), as too "subjective."

In *People v. Sharpe,* 216 Ill. 2d 481, 522 (2005), the Court defended the ongoing validity of the identical elements test and explained its purpose: "[T]his clause requires the legislature to set penalties 'according to the seriousness of the offense.' If the legislature determines that the exact same elements merits two different penalties, then one of the penalties has not been set in accordance with the seriousness of the offense." *Id.* at 517. The Court pointed out that if identical offenses did not yield identical penalties, then "the greater penalty could not stand." *Id*. at 504 (citing *Christy*, 139 Ill.2d at 181).

D. At the time of Rothe's crime, armed robbery and armed violence had identical elements, but different penalties.

On three separate occasions, the Court has made plain that the armed robbery and armed violence statutes have the identical elements and one statute had greater penalties than the other. Each time, the Court has held that the statute with the greater penalty was unconstitutional under the proportionate penalty clause. These three decisions are discussed below.

People v. Lewis

In *People v. Lewis*, 175 Ill.2d 412 (1996), the defendant was charged with armed violence based on robbery with a firearm. *Id.* at 414. The defendant argued that the armed violence charge violated the proportionate penalties clause because that crime and armed robbery had identical elements and armed violence imposed a greater penalty of

15-30 years, while the penalty for armed robbery was 6 to 30 years.[3] *Id.* at 418.

The Court observed that it was "presented with two substantially identical offenses which, illogically, are punished with disparate penalties." *Id.* It then concluded that armed violence predicated on robbery with a Category I weapon, in that case a handgun, violated the proportionate penalties clause. *Id.*

The State argued that the Court should overrule *Christy*. *Id.* at 419. The Court rejected that argument because the proportionate penalties clause was a constitutional restriction on how the legislature may establish criminal penalties and the Court could not alter that. *Id.* at 419-20. The State also argued that a prosecutor has discretion as to which crime to charge and therefore charging armed violence did not violate the proportionate penalties clause. *Id.* at 421. The Court rejected this argument as well, since it had already been rejected in *Christy*. *Id.* at 422-23.

People v. Hauschild

In *People v. Hauschild*, 226 Ill. 2d 63, 69 (2007), the defendant was convicted of armed robbery among other crimes. But based on a change

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[3] At the time of the *Lewis* decision, armed violence, not armed robbery, had the greater penalty, unlike this case, in which armed robbery has the greater penalty.

in the law after *Lewis* was decided, the penalty for armed robbery with a firearm was now greater than that for armed violence based on armed robbery with a firearm. *Id.* at 85. In addition, the law had also changed since *Lewis* so that "armed robbery" was deleted as a predicate felony for armed violence. That did not change the analysis, however, since "robbery" itself remained a predicate offence for armed violence and "[i]t therefore follows that every charge of armed violence predicated on robbery would also be an armed robbery." *Id.*

The Court then addressed the defendant's argument that his armed robbery conviction violated the proportionate penalties clause and analyzed the elements of the two statutes. It concluded that the elements of armed robbery and armed violence were identical: "Clearly, the statutory elements of these offenses are identical, and proportionate penalties analysis is therefore appropriate." *Id.* at 86.

The Court noted that the penalty for armed robbery, as enhanced by using a firearm, was 21 to 45 years, while the penalty for armed violence with a firearm was 15 to 30 years. *Id.* Following *Christy* and *Lewis*, the Court held that the conviction for armed robbery with a firearm violated the proportionate penalties clause. *Id.* at 86-87.

The Court also followed *Lewis* and rejected an argument that the prosecution had the discretion to charge the offense with the greater penalty and stated that "it is impermissible to allow the constitutional

prohibition against disproportionate penalties for identical crimes to be relaxed where the State decides to proceed only with the crime carrying a greater penalty." *Id.* at 87. Further, "the State had no authority, discretionary or otherwise, to charge the offense because it violated the proportionate penalties clause." *Id.*

People v. Clemons

In *People v. Clemons*, 2012 IL 107821 (2012), the Court once again considered whether a conviction for armed robbery with a firearm violated the proportionate penalties clause. At the outset, the Court considered whether it should overrule *Hauschild*. *Id.* ¶ 1. The State argued that *Hauschild* should be overruled because shortly after it was decided, the General Assembly amended the armed violence statute with Public Act 95-688 to delete "armed robbery" as a predicate felony. *Id.* ¶ 15. The Court agreed with the State that the amendment meant that "simple robbery may no longer serve as a predicate felony for armed violence." *Id.* ¶ 17. But it disagreed the amendment meant that it should overrule *Hauschild* because the amendment "was adopted after this court's interpretation of that statute in *Hauschild*. In other words, our interpretation was a part of the armed violence statute at the time Public Act 95-688 was enacted." *Id.* at ¶ 18. Therefore, the Court concluded that "*Hauschild* remains the law as to the meaning of the armed violence statute prior to its amendment by Public Act 95-688." *Id.* ¶ 19.

The State also argued that *Hauschild* should be overruled because "only robbery may satisfy the robbery element of armed robbery," but "armed violence may be predicated on any number of felonies while armed with any number of weapons." *Id.* at ¶ 21. The Court agreed that "armed violence, however, may encompass conduct more varied than that required for armed robbery with a firearm." *Id.* at ¶22. Yet it rejected the State's argument, since "[t]he point of *Hauschild*, however, is that when armed violence is based on robbery with a category I or II weapon, it is punished less severely than the identical conduct when charged as armed robbery with a firearm." *Id.*

The Court also stated that "*Hauschild* was not the first case to find a proportionate penalty clause violation based on a comparison of the armed robbery and armed violence statutes." *Id.* ¶ 23 (discussing *Lewis* and *Christy*). It also explained that "the identical elements test has never required that the two offenses be equally specific." *Id.* ¶ 23. Finally, the Court rejected the State's argument to abandon the identical elements altogether after an in-depth discussion of its history, text, and purpose. *Id.* ¶¶ at 28-53.

After declining to overrule *Hauschild* or abandon the identical elements test, the Court affirmed the decision of the appellate court holding the conviction for armed robbery was unconstitutional because

its elements were identical to those of armed violence and its penalties were greater. *Id.* ¶¶ 62-63.

E. The central question here: Was Rothe's wrench a Category III weapon?

The Court has made clear that the armed robbery and armed violence statues shared identical elements at the time Roche committed his crime—assuming the weapon met the definition in the armed violence statute. That leaves one question to be answered here: Was Rothe's wrench a Category III weapon? If it was, then his armed robbery sentence violates the proportionate penalties clause. But before discussing what constitutes a bludgeon under Category III and why Rothe's wrench is such a weapon, it is first necessary to address the appellate court's reading of *Hernandez* that the elements of the two statutes are not identical.

1) The appellate court misconstrues *Hernandez*.

The appellate court relies on a statement in *Hernandez* that armed robbery has a common law definition of a "dangerous weapon," while armed violence defines that term by statute, in this case, Category III. *Rothe*, 2023 IL App (5th) 220048-U, ¶ 15 (citing *People v. Hernandez*, 2016 IL 118672, ¶16). From that, the court concludes that *Hernandez* held that the elements of the two statutes could not be the identical: "Because the definitions were not the same, [*Hernandez*] found that the

elements of armed robbery were not identical to the elements of armed violence with a Category III." *Id.* ¶ 16 (citing *Hernandez* at ¶ 16).

To reach this conclusion, the appellate court relies on one sentence in paragraph 16 of *Hernandez,* but overlooks the wider context of the discussion in the two paragraphs immediately before it. To be sure, paragraph 16 of *Hernandez* does state: "[T]he elements of armed robbery, which require, *inter alia*, proof that defendant was 'armed with a dangerous weapon' in violation of [the armed robbery statute] *are not* identical to the elements of armed violence, which require, *inter alia*, proof that defendant committed a qualifying felony while armed with a Category III weapon in violation of [the armed violence statute]." (emphasis in text).

But *Hernandez* cannot be read to hold that the two statutes never had identical elements. To do that, would have meant overruling *Lewis*, *Hauschild*, and *Clemons*. And it made no suggestion it was doing that. Yet if *Hernandez* did not overrule these three cases, what did it mean?

The meaning of paragraph 16 in *Hernandez* should, as noted, be read together in the context of the discussion immediately before in Paragraphs 14 and 15. In Paragraph 14, the Court explained that the weapon used by the defendant, "tin snips," was not a "bludgeon" or weapon of "like character" under Category III. At Paragraph 15, the Court

pointed out that the tin snips did, however, come within the broader common law definition of a "dangerous weapon."

Reading Paragraphs 14, 15, and 16 together, rather than Paragraph 16 by itself, the Court's meaning becomes clearer: tins snips came within the common law definition of a dangerous weapon, but not the definition for armed violence. But simply because the common law definition is potentially broader than the armed violence definition does not mean that the two statutes never had identical elements. The identical elements test must always look to the actual weapon used. Again, as *Clemons* pointed out, the analysis depends on whether armed violence based on robbery was committed "with a category I or category II [or here, category III] weapon." *Clemons*, 2012 IL 107821, ¶ 22. But "the identical elements test has never required that two offenses be equally specific." *Id.* at ¶ 23.

If a weapon fits the Category III definition, then the elements were identical when Rothe committed his crime. If it did not—as in *Hernandez*—the elements were not identical. Yet *Hernandez* cannot be read to mean that even if another weapon *did* in fact qualify as a Category III weapon, the elements still would not be identical. Again, that would be directly contrary to *Lewis*, *Hauschild*, and *Clemons*.

2) What is a "bludgeon"?

(a) History and dictionaries.

Unlike *Hernandez*, which explained why the tin snips were not a bludgeon or weapon "of like character," here, the appellate court never addressed that question when it came to Rothe's wrench. That question will be addressed next.

Category III contains a list of seven "dangerous weapons" as follows: "bludgeon, black-jack, slungshot, sand-bag, sand-club, metal knuckles, billy." The list ends with "or other dangerous weapons *of like character*."[4] (emphasis added). If this list sounds like it comes from another era, that is because it does. In *People v. Borgeson*, 335 Ill. 136 (1929), the Court described the Illinois criminal code from 1919 and 1925 as making it unlawful to "possess or sell, loan or give" six of the seven weapons listed in Category III, including a "bludgeon" (only a "billy" is not listed). This same list goes back even earlier. New York's penal code from 1915 lists all of the same seven weapons contained in Category III. *People v. McPherson*, 220 N.Y. 123, 124 (1917).

Over 100 years later, the average person would need a dictionary to understand the meaning of most weapons in Category III, including "bludgeon." Since its meaning is not obvious, courts have first looked to

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[4] Category II, covering blade-like weapons, also includes the same "of like character" language. But Category I covering firearms does not. 720 ILCS 5/33-A-1(c).

dictionaries to discern the meaning of a "bludgeon." For instance, in *People v. Cummings*, 2016 IL App (1st) 143948-U, ¶ 25, the court, when applying the identical elements test, held that a baseball bat was a bludgeon under Category III and considered dictionary definitions of the word, including: "A short stout stick or club, with one end loaded or thicker and heavier than the other, used as a weapon." *Id.* at ¶ 25 (quoting *The Oxford English Dictionary*, 942 (1933)).[5] In *People v. Westmoreland*, 2013 IL App (2d) 120082, the court, also applied the identical elements test and held that a belt did not qualify as a bludgeon under the armed violence statute and considered a similar dictionary definition: "a short stick used as a weapon usually having one thick or loaded ended." *Id.* at ¶ 21 (quoting *Webster's Third New International Dictionary* 240 (1993)). Yet while a dictionary may be a place to begin, it is not the place to end.

(b) How have Illinois courts construed "bludgeon?"

Courts recognize that "the task of interpreting the language of a statute cannot always be reduced to the mechanical application of the dictionary definitions of individual words and phrases involved so courts must take care not to read statutory language in an overly literal

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[5] Rothe recognizes that under Sup. Ct. R. 23(e)(1), only non-precedential orders after January 1, 2021 constitute persuasive authority. Any such orders before that date cited here are only to illustrate how courts and the State have addressed what meets the statutory definition of a "dangerous weapon."

manner." *People v. Smith*, 2013 IL App (2d) 121164, ¶ 9 (citing cases, internal quotation marks omitted). The Court has also recognized that after considering a dictionary to ascertain the "plain and ordinary" meaning of an undefined term, "[w]e may also rely on prior cases construing those terms." *People v. Whitehead*, 2023 IL 128051, ¶ 18.

Illinois courts have considered the meaning of "bludgeon" under the armed violence statute in a number of cases. Courts have also considered its meaning under the unlawful use of weapons statute. 720 ILCS 5/24-1(a)(1)(listing "bludgeon"); *see also* 720 ILCS 5/24–1.1(a)(use or possession by a felon incorporates § 24-1). Courts construing bludgeon under these statutes illustrate a basic principle: weapons of like character that cause harm come within the definitions, even if those same weapons also have a lawful use.

(i) Objects deemed to be "bludgeons."

***People v. Jones:* tire iron**

In a case similar to this one, *People v. Jones*, 2017 IL App (1st) 161344-U, the defendant argued that his conviction for armed robbery with a "tire iron" was void under the identical elements test because it was a "bludgeon" under Category III. *Id.* at ¶ 9. The court noted "in light of" *People v. Ligon*, 2016 IL 118023, the State had conceded that the armed robbery conviction should be vacated and the defendant resentenced under the armed violence statute. *Id.* at ¶¶ 10, 23. The State

also conceded that the tire iron "qualifies as a Category III bludgeon-type weapon." *Id.* ¶ 21. The court concluded that it was "compelled by the *Ligon* decision" to find that the elements of the two statutes are identical *Id.* ¶ 22. Finally, the State conceded, and the court agreed, that the defendant should be resentenced under the armed violence statute. *Id.* ¶ 23.

***People v. Cummings:* baseball bat**

In another post-*Ligon* decision, involving an armed robbery conviction and the identical elements test, *People v. Cummings,* 2016 IL App (1st) 143948-U, the State conceded that a "baseball bat" was a bludgeon under Category III. *Id.* ¶ 29. The State also conceded that "*Ligon* compels the conclusion" that the armed robbery conviction was "unconstitutionally disproportionate." *Id.* The court agreed and vacated the conviction and remanded for resentencing under the armed violence statute. *Id.* ¶ 30.

***People v. Gonzales:* crow bar**

In *People v. Gonzales*, 2014 IL App (1st) 120710-U, the issue was whether a crowbar that the defendant used in a chase was a "bludgeon" under the unlawful use of weapons statute. *Id.* ¶¶ 1, 25. The court first consulted a dictionary as to the meaning of a "bludgeon," and stated that such definitions should not be reduced to "mechanical application." *Id.* ¶ 13. The court then focused on the intent of the statute, and stressed that

since the crowbar had been used as a weapon (*id.* ¶ 22), "to exclude the defendant's crowbar [from the definition] would be contrary to the purposes of the statute for which the unlawful use a weapons statute was enacted and lead to absurd results." *Id.* ¶18.

***People v. Span:* "appeared to be a pipe wrench."**

In *People v. Span*, 2011 IL App (1st) 083037, the defendant was convicted of attempted armed robbery and argued that his sentence violated the proportionate penalties clause. *Id.* ¶ 94. The police officer viewing a surveillance video of the crime testified that the defendant used "what appeared to be a pipe wrench." *Id.* at ¶ 14. While the court was uncertain as to the "actual object," the video "showed clearly that it was a bludgeon of some kind." *Id.* at ¶ 20. Relying on the defendant using "bludgeon" (*id*. at ¶ 100 n. 1), the court concluded that attempted armed robbery and attempted armed violence had identical elements and armed violence had a lesser sentence. It then vacated the attempted armed robbery sentence. *Id*. at ¶¶ 106-09.

(ii) Objects deemed not to be "bludgeons."

People v. Hernandez: tin snips

As discussed, *Hernandez* found that tin snips "cannot be considered a bludgeon or other dangerous weapon of like character." 2016 IL 118672, ¶ 14. But what the Court did not state is just as important. As discussed above, it did not state that every object "of like character" that

also had a legitimate use, could never be classed under Category III, even if it was used to cause harm.

Recently, in *People v. Villagran*, 2023 IL App (2d) 220186-U, the court explained that neither *Hernandez* nor *Ligon* can be read to mean that how a defendant uses a "particular object" is "irrelevant:"

> *Hernandez* and *Ligon* do not support the proposition that using a particular object as a weapon is irrelevant to its status as a dangerous weapon under the armed-violence statute. Rather, *Hernandez* teaches that if an object is not "of like character" to one of the weapons listed in the armed-violence statute, it does not become a dangerous weapon for the purposes of that statute simply because it is capable of being used as such a weapon.

Villagran, 2023 IL App (2d) 220186-U, ¶ 16. The court then pointed out that while Category II lists a knife "with a blade of at least three inches," a knife with a shorter blade could still be "of like character," if "used in a manner dangerous to the physical well-being of the individual threatened." *Id.* (quoting *People v. Hall*, 117 Ill. App. 3d 788, 803 (1st Dist. 1983)).

***People v. Ligon and People v. Davis:* BB guns**

In *People v. Ligon*, 2016 IL 118023, the defendant was convicted of aggravated vehicular hijacking for threatening a driver with a BB gun. *Id.* ¶ 3. The defendant raised a proportionate penalties challenge arguing that the hijacking offense and the armed violence statute had identical elements. *Id.* ¶ 7. The Court rejected that argument and held that the BB gun was not a bludgeon or weapon of like character. *Id.* ¶ 24.

But as *Villagran* pointed out, *Ligon*, like *Hernandez*, does not stand for the proposition that how a weapon was used is "irrelevant" to whether it is a Category III weapon. *Villagran*, 2023 IL App (2d) 220186-U, ¶16. Further, the State in *Jones* and *Cummings* did not read *Ligon* to mean that how a weapon was actually used is irrelevant, since it conceded that a tire iron and baseball bat were used as bludgeons under Category III. In contrast, the BB gun in *Ligon* was never used as a bludgeon to hit someone, but as a gun to threaten a driver. 2016 IL 118023, ¶ 3.

The Court in *Ligon* noted that in *People v. Davis*, 199 Ill.2d 130 (2002), it also held that a BB gun was not a bludgeon or "of like character" under the armed violence statute. *Id.* ¶ 23. But in *Davis,* like *Ligon*, the BB gun was not used as bludgeon, but to shoot two victims. 199 Ill. 2d at 132-33. The Court also ruled that the BB gun was not a Category I firearm. *Id.* at 135-36.

People v. Vue: flashlight

In *People v. Vue*, 353 Ill. App.3d 774, 777 (2d Dist. 2004), the defendant was convicted of armed violence for striking a victim with a Category III weapon, a flashlight, during a home invasion. The defendant argued that a flashlight could not be a bludgeon under Category III because an object had to be "inherently a weapon" and a flashlight was not inherently a weapon, nor was it "of like character" to any of the weapons listed in Category III. *Id.* at 779. The State disagreed and

contended that in *Davis*, 199 Ill.2d 130 (2002), the Court "acknowledged that where an item that is not inherently a weapon but is of like character and is used like one of the listed weapons [in Category III], it may properly be considered a 'dangerous weapon' within the meaning of the armed violence statute." *Vue*, 353 Ill. App.3d at 779-80.

The court rejected the State's interpretation of *Davis* and maintained that the armed violence statute cannot be read to mean that "an item qualifies as a bludgeon if it shares physical characteristics with a bludgeon and is used in a bludgeon-like manner to harm the victim." *Id.* at 780. It concluded that "we believe that the legislature intended" that for an object to come within Category III, it must be "inherently dangerous." *Id.* But the court in *Vue* never mentioned what was clear in *Davis* (and later in *Ligon*): the BB gun was never used as a bludgeon-like weapon.

People v. Demus: hammer

In *People v. Demus*, 2020 IL App (1st) 172503-U, the defendant was convicted of aggravated kidnapping for using a Category III weapon, a hammer, to hit the victim. *Id.* ¶¶ 2, 8. The defendant claimed that the hammer was not a bludgeon under Category III. *Id.* ¶ 19. The State disagreed and argued that the hammer was a bludgeon because of how the defendant "used the hammer was dangerous." *Id.* ¶ 31. The appellate court, agreed with the defendant and ruled that the hammer could not be

bludgeon based on "the reasoning" in *Hernandez*. *Id.* ¶ 23. The court also relied on *Vue* to maintain that a hammer could never be a bludgeon because Category III was limited to items that could only be "exclusively used as a weapon" (*id.* ¶ 29) and a hammer "is designed to be used as a tool." *Id.* at ¶ 30. As a result, the court reduced the conviction to kidnapping and remanded. *Id.* at ¶¶ 32, 48.

3) Like-character weapons causing using harm fit the definition, even if also used for sports or as tools.

One fact stands out among the cases discussed in the last section: the number of times the State has either conceded or argued that a weapon was a bludgeon when was used to cause harm, even if it also had a possible legitimate use. The State did so five times: a tire iron in *Jones*, a baseball bat in *Cummings,* a crowbar in *Gonzales*, a flashlight in *Vue*, and a hammer in *Demus*. Moreover, only in *Vue* and *Demus* did the courts rule that Category III excludes any weapon causing harm that might also have a lawful use. But such a reading of Category III is not only overly literal, it cannot be reconciled with an essential part of the definition—weapons "of like character"—and the purpose of the statute.

First, it is familiar that courts "are not bound by the literal language of a statute if that language produces absurd or unjust results not contemplated by the legislature." *People ex rel. Illinois Dept. of Corrections v. Hawkins,* 2011 IL 110792, ¶ 23; *see also People v. Whitehead,* 2023 IL 128051, ¶ 18 (courts "assume that the legislature did not intend to

produce absurd or unjust results"). Second, courts may also consider "the reason for the statute, the problems it seeks to remedy, the purposes to be achieved, and the consequences of interpreting the statute one way or another." *Sperl v. Henry*, 2018 IL 123132, ¶ 23.

Consistent with these principles, Illinois courts have long recognized that the list of weapons specifically identified in Categories I, II, or III of the armed violence statute is not exhaustive. For example, in *People v. Hall*, 117 Ill.App.3d 788 (1st Dist. 1983), the court addressed an almost identical argument to that raised in *Villagran* 40 years later. In *Hall*, the defendant argued that his armed violence conviction with a knife required that his indictment show that the blade was at least three inches. *Id.* at 802. The court noted that "the State correctly points out" the defendant "conveniently overlooked" that the statute includes weapons "of like character." *Id.* And it concluded, just as in *Villagran*, that weapons "of like character" are included "when used in a manner dangerous to the physical well-being of the individual threatened." *Id.* at 803.

Similarly, in *People v. Weger*, 154 Ill.App.3d 706, 712 (4th Dist. 1987), the court followed *Hall* and stated that while weapons "specifically listed" in the armed violence definition may be considered a "*per se* dangerous weapon," those *not* listed may still be included, when "used" in a dangerous manner. (citing *Hall, People v. Chriso* 142 Ill. App.3d 747

(5th Dist. 1986) and *People v. Van*, 136 Ill.App.3d 382 (4th Dist. 1985)).[6] In *Chriso*, the court affirmed an armed violence conviction for using a piece of glass to cause injury when the State argued that it was "of like character" and did not claim that it was "a knife with blade of at least three inches." 142 Ill.App.3d at 752.

Again, in *People v. Ptak*, 193 Ill.App.3d 782 (2d Dist. 1990), the court affirmed a conviction for armed violence by agreeing with the State that though a broken beer bottle was not "specifically listed" in the armed violence definition, it would still fit the definition if used in a dangerous manner and was also "of like character." *Id.* at 784-85 (citing *Weger*, 154 Ill.App.3d at 712). The court also noted that *Weger* ruled that since the straight razor at issue there might have a legitimate purpose for shaving, the State was "required to show that the defendant used the razor as a weapon." *Id.* at 785 (citing *Weger*, 154 Ill.App.3d at 714).

Finally, in *Davis*, the Court cited a line of cases, including *Ptak, Chriso*, and *Hall*, and recognized that for defendants who were "armed with a weapon which was not specifically listed in the [armed violence] statute," courts have still upheld convictions if the weapons caused harm and were "of like nature." 199 Ill.2d at 140. (citing cases).

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[6] In *Van*, the court dealt with the common law definition of a dangerous weapon for an aggravated assault that does not apply here. 136 Ill.App.3d at 383.

In short, from *Hall* in 1983 to *Villagran* in 2023, courts have recognized that a weapon "of like character" that causes harm, even if it also has a legitimate use, still comes with the statute's definition. For this reason, cases such as *Vue* and *Demus* are against the weight of authority. And based on that weight of authority, it follows that a weapon causing harm, such as a knife with a blade less than the statutory three inches, can be Category II weapon. By the same logic, a tire iron, crow bar, or pipe wrench used as a bludgeon can be a Category III weapon.

4) Excluding like-character weapons also used for sports or as tools defeats the statute's purpose.

The purpose of the armed violence statute is straightforward: to "discourage those who contemplate a felonious act beforehand from carrying a weapon when they set forth to perform the act." *Davis*, 199 Ill.2d at 139. Excluding weapons of like-character that have actually caused harm because they might have a possible lawful use, would undermine the statute's purpose and produce absurd and unjust results.

For example, should the State be able to charge a defendant with armed violence for using a "black-jack" (specifically mentioned in Category III), but not for a baseball bat—because a bat might be used to play baseball? Other examples are plentiful: a golf club, tire iron, crow bar, or pipe wrench. Category III was never intended to exclude such

objects when they cause harm, simply because they might be used for a sport or as a tool.[7]

5) The purpose of the unlawful use of weapons statutes would also be defeated.

As noted, two other statutes include a statutory definition including a "bludgeon" and other weapons listed in Category III. The first is the general unlawful use of weapon statute. 720 ILCS 5/24-1(a)(1)(West 2023). The second is the unlawful use or possession of weapons by felon statute that incorporates the definitions from the general statute. 720 ILCS 5/24-1.1(a)(2023).[8] The purpose of these statute is similar to the armed violence statute. For the general statute it is "to protect the police and public from dangerous weapons." *Gonzales*, 2014 IL App (1st) 120710-U at ¶ 18 For the felon-in-possession statute it is "to keep dangerous weapons. . . out of the hands of convicted felons." *Id.* (internal quotation and citation omitted). Since both statutes rely on the same definition, they are referred to here as the "unlawful use statutes."

---

[7] The idea that the legislature enacted a definition excluding any weapon that might have a legitimate use is at odds with including "axe and hatchet" in Category II. 720 ILCS 5/33A-1(c)(West 2006).

[8] Section 5/24.1.1 incorporates § 24-1 of the Criminal Code:

(a) A person commits the offense of unlawful use of weapons when he knowingly:

(1) Sells, manufactures, purchases, possesses or carries any bludgeon, black-jack, slung-shot, sand-club, sand-bag, metal knuckles. . . .

Though the subsection including a "bludgeon" at § 24-1(a)(1) does not have the same "of like character" term as Category III, courts have applied a "common-sense" approach to the statute recognizing that a lawfully-used object should *not* be classed as a "bludgeon," but that the same object used in an unlawful way should be:

> Common sense must be the guide. Such an approach acknowledges the character of the device and its potential for harm, while not being oblivious to the article's everyday use, the circumstances of its discovery, and in certain cases, the person's explanation as to its presence or possession. If it were otherwise, a baseball bat, rolling pin, and perhaps a golf club could qualify as bludgeons if a strict definition of that word is employed. [citation] This would lead to obviously absurd results.

Gonzales, 2014 IL App (1st) 120710-U, ¶ 20 (quoting *City of Pekin v. Shindledecker*, 99 Ill.App.3d 571, 574 (3d Dist. 1981)). *See also People v. Fields*, 2011 IL App (3d) 100121-U, ¶¶ 20-24 (rejecting that a toy bat used to hit a victim could not be "bludgeon" under § 24-1(a)(1) because it also had a "legitimate purpose").

Like the armed violence statute, courts have rejected that every object "of like character" causing harm cannot be bludgeon if it might be used lawfully. Otherwise, the same absurd and unjust results would arise: the State can charge someone for using a black-jack to cause harm, but not a baseball bat.

Finally, the same definitions in the armed violence and unlawful use statutes should be construed in the same way. Both statutes include

"bludgeon" in their definitions and have similar purposes. Not giving the same meaning to the same word was never intended.

6) Excluding Rothe's wrench from Category III produces the same absurd and unjust results.

Rothe's wrench shares the same basic characteristics of a dictionary definition of a "bludgeon": "a short, heavy club with one end weighted or thicker and heavier than the other." *Cummings*, 2016 IL App (1st) 143948-U, ¶ 25 (quoting *Random House Dictionary*, 161 (unbridged ed. 1971)). While a pipe wrench might be used for plumbing, it is undisputed that Rothe never used the wrench in that way, but to cause harm. His wrench is "of like character."

Excluding Rothe's wrench from Category III would create the same sort of absurd result: if he had used a black-jack, his sentence would be vacated and he would be resentenced to 3 to 7 years in prison. But because he used a wrench, his armed robbery conviction remains. The proportionate penalties clause stands as a constitutional safeguard against such unjust disparities.

F. Rothe should be resentenced under the armed violence statute.

Under settled law, Rothe's armed robbery sentence should be vacated and he should be resentenced under the armed violence statute. *People v. Span*, 2011 IL App (1st) 083037, ¶¶ 109-10 (attempted armed robbery sentence vacated and remanded for resentencing for attempted armed

violence, citing *People v. Christy*, 188 Ill.App.3d 330, 334 (3d. Dist. 1989), *aff'd* 139 Ill.2d at 181)).

CONCLUSION

Rothe's armed robbery sentence should be vacated and the case remanded for resentencing under the armed violence statute.

Respectfully submitted,

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RULE 341 CERTIFICATE OF COMPLIANCE
FOR DEFENDANT-APPELLANT'S OPENING BRIEF

I, E. King Poor, certifies 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)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 34 pages.

/s/E. King Poor

No. 129906

IN THE SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, **Plaintiff-Appellee,** **vs.** **JOSEPH C. ROTHE,** **Defendant-Appellant.**	**On leave to appeal from the Illinois Appellate Court, Fifth District, No. 5-22-0048** **There on appeal from the Circuit Court of Madison County, Illinois, No. 05-CF-1433 Hon. Janet R. Heflin, presiding**

NOTICE OF FILING AND CERTIFICATE OF SERVICE FOR DEFENDANT-APPELLANT'S OPENING BRIEF

Under penalties as provided under Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth below are true and correct.

I, E. King Poor, an attorney, certify that I have this day caused the Defendant-Appellant's Opening Brief to be filed electronically with the Clerk of the Court and served via EFileIL to all counsel of record to their email addresses on file with the Court:

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Dated: February 21, 2024

By: */s/ E. King Poor*
E. King Poor

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129906

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
FIFTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS
Plaintiff/Petitioner

Reviewing Court No: 5-22-0048
Circuit Court/Agency No: 2005CF001433
Trial Judge/Hearing Officer: HONORABLE JUDGE HEFLIN

v.

JOSEPH ROTHE
Defendant/Respondent

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2023 IL App (5th) 220048-U

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

NOTICE This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

Appellate Court of Illinois, Fifth District.

The PEOPLE of the State of Illinois, Plaintiff-Appellee,
v.
Joseph C. ROTHE, Defendant-Appellant.

NO. 5-22-0048
|
May 2, 2023

Appeal from the Circuit Court of Madison County. No. 05-CF-1433, Honorable Janet R. Heflin, Judge, presiding.

ORDER

JUSTICE WELCH delivered the judgment of the court.

***1** ¶ 1 *Held*: The trial court's denial of the defendant's petition for relief from judgment filed pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401(West 2020)) is affirmed where his sentence for armed robbery did not violate the proportionate penalties clause of the Illinois Constitution.

¶ 2 The defendant, Joseph C. Rothe, appeals the dismissal of his petition for relief from judgment filed pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2020)), arguing that his Class X armed robbery conviction violates the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11) in that the identical offense of armed violence predicated on robbery with a Category III weapon is punished less severely than armed robbery, as charged in this case. For the reasons that follow, we affirm the order of the circuit court of Madison County.

¶ 3 I. BACKGROUND

¶ 4 As we have sufficiently detailed the facts of this case in our previous decision in the defendant's direct appeal (*People v. Rothe*, No. 5-07-0683 (2009) (unpublished order under Illinois Supreme Court Rule 23)), and in our decision following the denial of his amended petition for postconviction relief (*People v. Rothe*, No. 2014 IL App (5th) 120552-U), we will recite only those facts necessary to dispose of the issue raised here.

¶ 5 The evidence at trial established that, on June 6, 2005, at approximately 12:40 a.m., Shawn Woodruff was walking north on Main Street in Edwardsville,

Illinois, after leaving a downtown bar. The defendant approached Woodruff, demanded money from him, and struck him in the face with a large red pipe wrench, which severely damaged his jaw. Based on the evidence presented at the jury trial, the defendant was convicted of armed robbery. Since the armed robbery was his third Class X conviction, the trial court subsequently sentenced him to natural life imprisonment as a habitual criminal under section 33B-1 of the Criminal Code of 1961 (720 ILCS 5/33B-1 (West 2006) (now enacted at 730 ILCS 5/5-4.5-95(a) (West 2022))). His conviction was then affirmed on direct appeal. *People v. Rothe*, No. 5-07-0683 (2009) (unpublished order under Illinois Supreme Court Rule 23).

¶ 6 In July 2010, the defendant filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2008)), in which he argued, among other things, that his sentence for armed robbery violated the proportionate penalties clause of the Illinois Constitution. However, the proportionate penalties argument was not included in his August 2011 amended petition filed by appointed counsel. Subsequently, the State filed a motion to dismiss the amended petition, which the trial court granted with respect to all issues except for the defendant's alibi-defense claim. After the evidentiary hearing on the alibi-defense claim, the court entered an order denying the claim. This decision was also affirmed on appeal. *People v. Rothe*, No. 2014 IL App (5th) 120552-U.

***2** ¶ 7 Subsequently, on October 31, 2016, the defendant *pro se* filed a petition pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2014)). In this petition, he argued that his natural life sentence based on his conviction for the Class X offense of armed robbery with a dangerous weapon, other than a firearm, violated the proportionate penalties clause because the identical offense of armed violence predicated on a robbery with a Category III weapon was punishable as a Class 2 felony. Although the defendant did not file his section 2-1401 petition within the required two-year time limit, he argued that a voidness challenge based on the unconstitutionality of a criminal statute under the proportionate penalties clause could be raised at any time. In response, on August 25, 2017, the State filed a motion to dismiss the section 2-1401 petition because the petition was untimely in that it was filed more than two years after entry of the judgment. Following a hearing on the motion to dismiss, on January 14, 2022, the trial court granted the State's motion to dismiss, finding that the petition for relief was not timely filed. This appeal followed.

¶ 8 II. ANALYSIS

¶ 9 On appeal, the defendant argues that his armed robbery conviction and natural life sentence must be vacated because the proportionate penalties clause of the Illinois Constitution (Ill Const.

1970, art. I, § 11) was violated in that the identical offense of armed violence predicated on robbery with a Category III weapon would have received a lesser sentence. Armed violence predicated on robbery with a Category III weapon was a Class 2 felony, punishable with a sentence of three to seven years' imprisonment. See 720 ILCS 5/33A-2(a), 33A-3(b) (West 2006); 730 ILCS 5/5-8-1(a)(5) (West 2006). By contrast, armed robbery with a dangerous weapon was a Class X offense, which was generally punishable with a sentence between 6 and 30 years. See 720 ILCS 5/18-2(b) (West 2006); 730 ILCS 5/5-8-1(a)(3) (West 2006). However, the defendant, having previously been twice convicted of Class X felonies, received a natural life sentence as a habitual criminal under section 33B-1 of the Criminal Code of 1961 (720 ILCS 5/33B-1 (West 2006) (now enacted at 730 ILCS 5/5-4.5-95 (West 2022))).

¶ 10 As noted above, the defendant brought this issue in a section 2-1401 petition, and the trial court found that it was untimely filed. Generally, a section 2-1401 petition must be filed no later than two years after entry of the order of judgment. 735 ILCS 5/2-1401(c) (West 2014). However, voidness challenges based on the unconstitutionality of a criminal statute under the proportionate penalties clause may be raised at any time. *People v. Ligon*, 2016 IL 118023, ¶ 9. Also, a motion to vacate a void judgment is properly raised in a section 2-1401 petition. *Id.* Thus, we will address the merits of the defendant's argument.

¶ 11 The proportionate penalties clause of the Illinois Constitution provides that all penalties must be determined according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. Ill. Const. 1970, art. I, § 11. When analyzing whether a statute violates the proportionate penalties clause, our ultimate inquiry is whether the legislature has set the sentence in accord with the seriousness of the offense. *People v. Hernandez*, 2016 IL 118672, ¶ 9.

¶ 12 A sentence violates the proportionate penalties clause if: (1) it is cruel, degrading, or so wholly disproportionate to the offense that it shocks the moral sense of the community or (2) it is greater than the sentence for an offense with identical elements. *Ligon*, 2016 IL 118023, ¶ 10. The defendant in the present case based his proportionate penalties challenge on the identical elements test. Under that test, our supreme court has consistently held that, if the legislature determines the exact same elements merit two different penalties, then one of those penalties has not been set in accordance with the seriousness of the offense. *Id.* ¶ 11. Thus, where the identical offenses do not yield identical penalties, the penalties are unconstitutionally disproportionate, and the greater penalty cannot stand. *Id.* Because the constitutionality of a statute is purely a matter of law, we review the question *de novo*. *Id.*

***3** ¶ 13 A person committed armed robbery when he took property from the

person or presence of another by the use of force or threat of force while armed with a dangerous weapon other than a firearm. 720 ILCS 5/18-1(a), 18-2(a)(1) (West 2006). In comparison, a person committed armed violence when, armed with a dangerous weapon, he committed any felony defined by Illinois law, with the exception of certain enumerated felonies; robbery was not included in the enumerated exceptions. 720 ILCS 5/33A-2(a) (West 2006). A person was considered armed with a dangerous weapon for purposes of armed violence when he carried on or about his person or was otherwise armed with a Category I, Category II, or Category III weapon. *Id.* § 33A-1(c)(1). Category III weapons were defined as a "bludgeon, black-jack, slungshot, sand-bag, sand-club, metal knuckles, billy, or other dangerous weapon of like character." *Id.* § 33A-1(c)(3).

¶ 14 In *Hernandez*, defendant was convicted of armed robbery while armed with a dangerous weapon, *i.e.*, a bludgeon. *Hernandez*, 2016 IL 118672, ¶¶ 3-7. He subsequently argued that the armed robbery statute was facially unconstitutional because it carried a harsher penalty than that imposed for armed violence with a Category III weapon. *Id.* ¶¶ 1, 6-7. After comparing the elements of the two offenses, our supreme court determined that the elements of armed robbery with a dangerous weapon were not identical to the elements of armed violence with a Category III weapon. *Id.* ¶¶ 12-16. In making this decision, the court noted that the relevant armed robbery statute required that defendant be armed with a dangerous weapon but did not define "dangerous weapon." *Id.* ¶ 12. Thus, the common law definition of that term applied. *Id.* Under the common law, determining what constituted a dangerous weapon presented a factual question and included any object sufficiently subject to be used in a manner likely to cause a victim serious injury, *i.e.*, objects that were *per se* dangerous as well as objects that could be used in a dangerous manner. *Id.*

¶ 15 However, in contrast, and as explained above, the relevant armed violence statute required defendant be armed with a dangerous weapon as defined by section 33A-1(c)(1) of the Criminal Code of 1961 (720 ILCS 5/33A-1(c)(1) (West 2006)). *Id.* § 33A-2(a); *Hernandez*, 2016 IL 118672, ¶ 13. Thus, Category III dangerous weapons for purposes of the armed violence statute are defined by statute and are limited to the weapons identified by the statute. *Hernandez*, 2016 IL 118672, ¶ 13. The court then noted that, although the weapon used by defendant in the armed robbery, *i.e.*, tin snips, qualified under the common-law definition applicable to the statutory offense of armed robbery, it did not fall within the meaning of a Category III dangerous weapon (a bludgeon or bludgeon-like weapon) as defined by the armed violence statute. *Id.* ¶¶ 14-15. Specifically, the court concluded that tin snips would not be considered a bludgeon or other dangerous weapon of

like character where, notwithstanding any shared characteristics to a bludgeon and that it was used like a bludgeon, it was not inherently dangerous and had a legitimate use. *Id.* Consequently, the court determined that the common-law definition of dangerous weapon for the purposes of the armed robbery statute was broader than the definition of dangerous weapon in the armed violence statute. *Id.* ¶ 16.

¶ 16 Because the definitions were not the same, the supreme court found that the elements of armed robbery were not identical to the elements of armed violence with a Category III weapon. *Id.* Therefore, the court concluded that the two offenses did not violate the identical elements test of the proportionate penalties clause. *Id.*

¶ 17 Following *Hernandez*, we conclude that the armed robbery statute that the defendant was convicted under did not violate the proportionate penalties clause under the identical elements test because the general, broader class of dangerous weapons under the armed robbery statute was distinct from the specific, statutorily defined list of dangerous weapons under the armed violence statute. Consequently, we affirm the trial court's denial of the defendant's section 2-1401 petition for relief from judgment. See *People v. White*, 2017 IL App (1st) 130882, ¶ 26 (the appellate court may affirm a decision of the circuit court on any basis that appears in the record on appeal).

¶ 18 III. CONCLUSION

***4** ¶ 19 For the foregoing reasons, we affirm the judgment of the circuit court of Madison County.

¶ 20 Affirmed.

Justices Cates and Barberis concurred in the judgment.

All Citations

Not Reported in N.E. Rptr., 2023 IL App (5th) 220048-U, 2023 WL 3198822

In the Circuit Court of the Third Judicial Circuit
Madison County, Illinois
(Or in the Circuit Court of Cook County).

THE PEOPLE OF THE STATE OF ILLINOIS)
v.)
Joseph C. Rothe)
Defendant/Appellant

No. 05-CF-1433

Notice of Appeal

An appeal is taken from the order or judgment described below:

(1) Court to which appeal is taken: Illinois Appellate Court, Fifth District, 14th & Main Sts., Mount Vernon, IL 62864

(2) Name of appellant and address to which notices shall be sent:
Name: Joseph C. Rothe N98200
Address: Menard C.C., P.O. Box 1000, Menard, IL 62259

(3) Name and address of appellant's attorney on appeal:
Name:
Address:
If appellant is indigent and has no attorney, does he want one appointed?
YES

(4) Date of judgment or order: January 13, 2022

(5) Offense of which convicted: Armed Robbery / No Firearm

(6) Sentence: Natural Life

(7) If appeal is not from a conviction, nature of order appealed from:
Petition For Relief From Judgement under Section 2-1401

Signed C Rothe
(May be signed by appellant, attorney for appellant, or clerk of circuit court)