No. 129906

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	On Appeal from the Appellate
	)	Court of Illinois, Fifth Judicial
Respondent-Appellee,	)	District, No. 5-22-0048
	)	
	)	There on Appeal from the
v.	)	the Circuit Court of the Third
	)	Judicial, Madison County,
	)	Illinois, No. 05 CF 1433
	)	
JOSEPH C. ROTHE,	)	The Honorable
	)	Janet L. Heflin,
Petitioner-Appellant.	)	Judge Presiding.

BRIEF OF RESPONDENT-APPELLEE
PEOPLE OF THE STATE OF ILLINOIS

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NATURE OF THE ACTION

Following a 2007 Madison County jury trial, petitioner was convicted of armed robbery with a dangerous weapon other than a firearm, shown to have four prior Class X convictions for armed robbery, and sentenced as a habitual criminal to life in prison. In 2016, petitioner filed a petition for relief from judgment, claiming that his sentence violated the proportionate penalties clause under the identical elements test. The circuit court denied relief, and the appellate court affirmed. Petitioner appeals. A question is raised on the pleadings: whether the petition stated a meritorious claim that the statutory penalty for armed robbery with a dangerous weapon other than a firearm was facially unconstitutional under the identical elements test.

ISSUE PRESENTED FOR REVIEW

When petitioner robbed his victim in 2005, the offense of armed robbery with a "dangerous weapon other than a firearm" carried a Class X felony penalty. 720 ILCS 5/18-2(a)(1), (b) (2005). The offense of armed violence predicated on robbery committed with a Category III weapon — defined as "a bludgeon, black-jack, slungshot, sandbag, sand-club, metal knuckles, billy, or other dangerous weapon of like character," 720 ILCS 5/33A-1(c)(3) (2005) — carried a Class 1 or 2 felony penalty, depending on whether it was a first or second offense. 720 ILCS 5/33A-2 (2005); 720 ILCS 5/33A-3(b) (2005). The issue presented is:

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Whether the Class X felony penalty for armed robbery under section 18-2(a)(1) comports with the proportionate penalties clause under the identical elements test because the elements of that offense — (1) committing robbery (2) while armed with a "dangerous weapon other than a firearm" — are not identical to the elements of the offense of armed violence predicated on robbery committed with a Class III weapon — (1) committing robbery (2) while armed with "a bludgeon, black-jack, slungshot, sandbag, sand-club, metal knuckles, billy, or other dangerous weapon of like character."

JURISDICTION

On September 27, 2023, this Court allowed petitioner's petition for leave to appeal. Accordingly, this Court has jurisdiction under Supreme Court Rules 315 and 612(b).

STATUTES INVOLVED

At the time of petitioner's offense, the armed robbery statute provided (as it does today):

> Sec. 18-2. Armed Robbery.
>
> (a) A person commits armed robbery when he or she violates Section 18-1 [*i.e.*, commits robbery]; 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 or;
> >
> > (2) he or she carries on or about his or her person or is otherwise armed with a firearm;
>
> * * *

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> (b) Sentence.
>
> Armed robbery in violation of subsection (a)(1) is a Class X felony. A violation of subsection (a)(2) is a Class X felony for which 15 years shall be added to the term of imprisonment imposed by the court. . . .

720 ILCS 5/18-2 (2005).

The armed violence statute provided in relevant part:

> Sec. 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, which include armed robbery but not robbery].

720 ILCS 5/33A-2(a) (2005).

Section 33A-1(c) defined "armed with a dangerous weapon" for purposes of the armed violence statute, providing in relevant part:

> (c) Definitions.
>
>> (1) "Armed with a dangerous weapon." A person is considered armed with a dangerous weapon for purposes 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.
>>
>> (2) A Category I weapon is a handgun, sawed-off shotgun, sawed-off rifle, any other firearm small enough to be concealed upon the person, semiautomatic firearm, or machine gun. A Category II weapon is any other rifle, shotgun, spring gun, other firearm, stun gun or taser as defined in paragraph (a) of Section 24-1 of this Code, knife with a blade of at least 3 inches in length, dagger, dirk, switchblade knife, stiletto, axe, hatchet, or other deadly or dangerous weapon or instrument of like character. . . .
>>
>> (3) A Category III weapon is a bludgeon, black-jack, slungshot, sand-bag, sand-club, metal knuckles, billy, or other dangerous weapon of like character.

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720 ILCS 5/33A-1(c) (2005).

And section 33A-3 provided the penalties for armed violence:

> Sec. 33A-3. Sentence.
>
> (a) Violation of Section 33A-(2) with a Category I weapon is a Class X felony for which the defendant shall be sentenced to a minimum term of imprisonment of 15 years.
>
> (b) Violation of Section 33A-2(a) with a Category II weapon is a Class X felony for which the defendant shall be sentenced to a minimum term of imprisonment of 10 years.
>
> (c) 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. A second or subsequent violation of Section 33A-2(a) with a Category III weapon is a Class 1 felony or the felony classification provided for the same act while unarmed, whichever permits the greater penalty.

720 ILCS 5/33A-2 (2005)

STATEMENT OF FACTS

The evidence at petitioner's trial for armed robbery with a dangerous weapon other than a firearm, C48; *see* 720 ILCS 5/18-2(a)(1) (2005), showed that around midnight on June 5, 2005, the victim, Shawn Woodruff, and two of his friends were walking home from a bar when petitioner approached Woodruff, demanded his money, and struck him in the face with a metal object, knocking Woodruff to the ground. R196-200, 202-03, 207, 212, 216, 220, 232-33, 235, 248-50.[1] Petitioner then rolled Woodruff over, took the

[1] Citations to the report of proceedings appear as "R__," to the common law record as "C__," and to the impounded common law record as "IC__." Petitioner's brief and appendix are cited as "Pet. Br. __" and "A__," respectively.

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wallet from Woodruff's back pocket, and left him lying bleeding on the pavement with a broken jaw. R203-04, 211-12, 226. Woodruff had surgery to repair his jaw and spent the following two months with his jaw wired shut. R207-08, 228.

Woodruff "didn't see the weapon until [he] was struck with it," R214, but he described it as a wrench or a crowbar when he reported the attack to the 911 dispatcher, R211, and as a "pipe wrench" at trial, R202-03. His two friends were unsure what the weapon was. R234, 253, 264. One of them testified that petitioner hit Woodruff with "an object," R234; petitioner "swung it like a baseball bat," *id.*, and the friend thought it was a bottle from the cracking sound when it hit Woodruff's face, R234, 238. The other friend could describe the object only as a "metal object." R253-54, 263-64, 272. He had started calling the object a "pipe wrench" after someone told him that was what it sounded like from his description, but he did not actually know what it was. R264 ("Maybe it wasn't. Maybe it was a big pipe. I don't know.").

In closing, the prosecutor argued that whatever the metal object was, it was a dangerous weapon under the armed robbery statute. R556 (arguing that the "metal object described as a huge economy-size pipe wrench or a pipe or a crowbar, that metal object was a dangerous weapon"). The circuit court instructed the jury that "[a]n object or instrument which is not inherently dangerous may be a dangerous weapon depending on the manner of its use

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and the circumstances of the case," R612; *see* Illinois Pattern Jury Instruction (IPI) 4.17; and, after deliberating, the jury found petitioner guilty of armed robbery, R619.

At sentencing, the court considered petitioner's four prior Class X felony convictions for armed robbery, R630-32, 634-37; IC6, and the fact that he was on parole for felony theft when he robbed the victim in this case, R637; IC9. Petitioner presented no evidence in mitigation, *see* R632, and claimed in allocution that the charges were the result of police corruption, R643-47. Based on petitioner's multiple prior Class X felony convictions, the court adjudged him a habitual criminal and sentenced him to the mandated term of natural life in prison. R649-50; C184-85; *see* 730 ILCS 5/33B-1(a), (e) (2005) (mandating natural life sentence for habitual criminals); 730 ILCS 5/5-8-1(a)(2) (2005) (same).

Nearly nine years later, after pursuing an unsuccessful direct appeal and postconviction petition, petitioner filed a *pro se* petition for relief from judgment, *see* 735 ILCS 5/2-1401, arguing that the sentence he received for armed robbery with a dangerous weapon other than a firearm violates the proportionate penalties clause of the Illinois Constitution because that offense had identical elements to armed violence predicated on robbery with a Category III weapon, which carried a Class 2 felony penalty. C365-71. Petitioner argued that the two offenses had identical elements because the weapon he used to commit his offense was both a dangerous weapon under

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the armed robbery statute and a Category III weapon under the armed violence statute. C370-71. The circuit court granted the People's motion to dismiss the petition as untimely because it was filed more than two years after the judgment from which it sought relief. C438; *see* C384 (motion to dismiss).

The appellate court affirmed, but on different grounds. The appellate court held that the petition was not untimely because "voidness challenges based on the unconstitutionality of a statute under the proportionate penalties clause" are exempt from the two-year limitations period. A15, ¶ 10. But the appellate court also held that armed robbery under section 18-2(a)(1) and armed violence predicated on robbery with a Category III weapon did not have identical elements because the two offenses' weapon-category elements were different. A17, ¶ 17. Specifically, the court held that the weapon-category element of armed robbery under section 18-2(a)(1) — "dangerous weapons other than firearms," which under the common law definition employed by the armed robbery statute included any non-weapon object that was used as a weapon — was broader than the weapon-category element of armed violence predicated on robbery with a Category III weapon, which was defined under section 33A-1(c)(3) as a "bludgeon, black-jack, slung-shot, sand-bag, metal knuckles, or other dangerous weapon of like character." A16-17, ¶¶ 13-17.

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STANDARD OF REVIEW

Whether the Class X felony penalty for armed robbery with a dangerous weapon other than a firearm is constitutional under the identical elements test of the proportionate penalties clause is a question of law that this Court reviews *de novo*. *People v. Johanson*, 2024 IL 129425, ¶ 9.

ARGUMENT

This Court should affirm the appellate court's judgment because the elements of armed robbery with a dangerous weapon other than a firearm are not identical to those of armed violence predicated on robbery with a Category III weapon. The weapon-category element of armed robbery under section 18-2(a)(1) — "dangerous weapon[s] other than a firearm," 720 ILCS 5/18-2(a)(1) (2005) — is different from the weapon-category element of Category III weapons under the armed violence statute. The former are defined by common law to include any weapon that is not a firearm — including all projectile, stun, bladed, and blunt-force weapons and any other objects that might be used as weapons — whereas the latter are defined by statute to include only specified blunt-force weapons and other "weapons of like character," 720 ILCS 5/33A-1(c)(3) (2005). Because it is possible to commit armed robbery with a dangerous weapon other than a firearm without committing armed violence predicated on robbery with a Category III weapon — such as by committing a robbery with a stun gun or knife — the two offenses do not have identical elements and the Class X felony penalty for

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armed robbery with a dangerous weapon other than a firearm does not violate the proportionate penalties clause merely because it is greater than the Class 2 felony penalty for armed violence predicated on robbery with a Category III weapon.

I. Petitioner's Proportionate Penalties Claim Fails Because the Elements of Armed Robbery with a Dangerous Weapon Other than a Firearm Are Not Identical to Those of Armed Violence Predicated on Robbery with a Category III Weapon.

The legislature's "discretion in setting criminal penalties is broad," *People v. Sharpe*, 216 Ill. 2d 481, 487 (2005), but is limited by the proportionate penalties clause's requirement that when the legislature creates an offense, it must set the penalty "'in accord with the seriousness of the offense,'" *Johanson*, 2024 IL 1447885, ¶ 10 (quoting *People v. Guevara*, 216 Ill. 2d 533, 543 (2005)); *see* Ill. Const. 1970, art. 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."). One of the ways that the legislature may fail to set a penalty in accord with the seriousness of an offense is by providing two different penalties for a single offense, *Johanson*, 2024 IL 129425, ¶ 10, for in that circumstance, logic dictates that "one of these penalties has not been set in accordance with the seriousness of the offense," *Sharpe*, 216 Ill. 2d at 522. In that circumstance, the greater of the two penalties for the same offense is deemed

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disproportionate. *Johanson*, 2024 IL 129425, ¶ 11; *People v. Blair*, 2013 IL 114122, ¶ 32.[2]

The identical elements test diagnoses this form of proportionate penalties problem, *Johanson*, 2024 IL 129425, ¶ 10, which usually arises when the legislature, purporting to create a new offense, inadvertently reenacts an existing offense under a new name and statutory citation. In that case, the new and old offenses are "different" only in the sense that they are called by different names and codified in different places; substantively, they are not different offenses but a single offense that carries a different penalty depending on which codification is cited in the charging instrument.

To determine whether two nominally different offenses are in fact a single offense, the identical elements test focuses solely on the elements of the offenses. *Id.* ¶ 11 ("This objective test compares the elements of the two offenses to determine if the offenses are the same."); *People v. Williams*, 2015 IL 117470, ¶ 19 ("The identical elements test simply compares the elements of the two offenses to determine if the offenses are the same."). If the two sets of elements are identical — that is, if it is impossible to commit an

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[2] The greater of two penalties provided by the legislature for a single offense is not disproportionate in any objective sense, however, for "unlike other constitutional violations which are based on the manner in which a single statute operates," when the legislature provides two penalties for a single offense, the unconstitutionality of the greater penalty "arises out of the relationship between" the two penalties — that is, the greater of two penalties for a single offense is only disproportionate to that offense *because* it is the greater of two penalties for the offense. *Blair*, 2013 IL 114122, ¶ 32.

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offense under one statute without also committing an offense under the other and *vice versa*, *Johanson*, 2024 IL 129425, ¶ 14 — then the two offenses are in fact a single offense, for which the legislature could not set two different penalties. *See People v. Sroga*, 2022 IL 126978, ¶ 12 (if "the statutes under review contain the same elements" then proportionate penalties clause is violated "if the penalties are not the same"). If the two sets of elements are not identical, then the offenses are different, and may be punished differently. *See id.* ¶ 47.

A. The relevant armed robbery and armed violence offenses have different elements.

The first step in evaluating petitioner's claim that "armed robbery and armed violence had identical elements" in 2006, Pet. Br. 1, 17, is to identify the offenses being compared, for in 2006 (like today) there was not merely one offense of armed robbery and one offense of armed violence, but multiple different armed robbery and armed violence offenses. There were four different armed robbery offenses, with two defined by the type of weapon carried — armed robbery while armed with a firearm, 720 ILCS 5/18-2(a)(2) (2005); and armed robbery while armed with a "dangerous weapon other than a firearm," 720 ILCS 5/18-2(a)(1) (2005) — and two defined by the way that a firearm was used during the robbery, *see* 720 ILCS 5/18-2(a)(3) (personally discharged a firearm), (4) (personally discharged a firearm causing great bodily harm, permanent disability, permanent disfigurement, or death) (2005). And there were a host of armed violence offenses, with five for each

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possible predicate felony. *See* 720 ILCS 5/33A-2 (2005). For each predicate felony, there were three armed violence offenses defined by the type of weapon carried: one for committing the felony while armed with a Category I weapon, another for committing the felony while armed with a Category II weapon, and a third for committing the felony while armed with a Category III weapon, *id.*; 720 ILCS 5/33A-3(a), (a-5), (b) (2005) (providing different penalties depending on weapon category). Each predicate felony had another two armed violence offenses defined by the way that a firearm was used during the commission of the predicate felony. *See* 720 ILCS 5/33A-2(b) (personally discharged a firearm), (c) (personally discharged a firearm causing great bodily harm, permanent disability, permanent disfigurement, or death) (2005).

The particular armed robbery and armed violence offenses relevant to petitioner's claim here are armed robbery under section 18-2(a)(1) — robbery while armed with a "dangerous weapon other than a firearm," 720 ILCS 5/18-2(a)(1) — and armed violence predicated on robbery while armed with a Category III weapon — robbery while armed with a "bludgeon, black-jack, slungshot, sand-bag, metal knuckles, billy, or other dangerous weapon of like character," 720 ILCS 5/33A-1(c)(3) (2005); *see* 720 ILCS 5/33A-2(a) (2005). Each of these offenses had two elements: (1) that the defendant committed a robbery, and (2) that he did so while armed with a particular category of

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weapon. Accordingly, whether the offenses were identical turns on whether their weapon-category elements were identical. They were not.

These two offenses did not have identical elements because the weapon-category element of armed robbery with a dangerous weapon other than a firearm was broader than the weapon-category element of armed violence predicated on robbery with a Category III weapon. *See People v. Ligon*, 2016 IL 118023, ¶ 25 (elements of being armed with a dangerous weapon other than a firearm and being armed with a Category III weapon are not identical because former includes "many objects" excluded from latter); *see also People v. Cherry*, 2016 IL 118728, ¶ 20 (two offenses not identical where first had element of causing "great bodily harm" and second had broader element of causing "any injury").

As this Court explained in *People v. Hernandez*, the term "dangerous weapon" used in the armed robbery statute "is derived from common law," and includes not only objects designed to be used as weapons, but "'any object sufficiently susceptible to use in a manner likely to cause serious injury.'" 2016 IL 118672, ¶ 12 (quoting *Ligon*, 2016 IL 118023, ¶ 21); *see id.* ¶ 16 ("[T]he definition of dangerous weapon for the purposes of the armed robbery statute includes not only objects that are *per se* dangerous, but objects that are used or may be used in a dangerous manner.").[3] Thus, under section 18-

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[3] *Hernandez* construed the pe-2000 version of the armed robbery statute, which prohibited robbery while armed with a "dangerous weapon" without distinguishing whether the weapon was a firearm or a dangerous weapon

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2(a)(1) of the armed robbery statute, the term "dangerous weapon other than a firearm" includes all non-firearm projectile weapons,[4] shock weapons, bladed weapons, and blunt-force weapons, as well as all instruments of like character (that is, all objects that, though not designed or commonly used as weapons, nonetheless may be used to shoot, shock, cut, stab, or beat someone). *See Hernandez*, 2016 IL 118672, ¶ 12.

In contrast, Category III weapons are defined by statute as only blunt-force weapons. The statutory definition begins by listing specific blunt-force

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other than a firearm. *See* 2016 IL 118672, ¶ 1; 720 ILCS 5/18-2 (1998). But the Court recognized that the armed robbery statute employed the same meaning of "dangerous weapon" as the aggravated vehicular hijacking statute that the Court construed in *Ligon*, which, like the 2006 armed robbery statute at issue here, used the term "dangerous weapon[ ] other than a firearm." *Hernandez*, 2016 IL 118023, ¶¶ 11-12 (holding that meaning of "dangerous weapon" in armed robbery statute was identical to that of "dangerous weapon" in aggravated vehicular hijacking statute's term "dangerous weapon, other than a firearm"); *compare* 720 ILCS 5/18-4(a)(3) (2000) (prohibiting vehicular hijacking while armed with "a dangerous weapon, other than a firearm"), *with* 720 ILCS 5/18-2(a)(1) (2005) (prohibiting robbery while armed with "a dangerous weapon other than a firearm").

[4] "Firearm" is defined by statute as excluding a variety of projectile weapons, as well as instruments that, though not designed or commonly used as weapons, also fire projectiles. *See* 720 ILCS 5/2-7.5 (2005) ("Except as otherwise provided in a specific section, 'firearm' has the meaning ascribed to it in Section 1.1 of the Firearm Owner's Identification Act [430 ILCS 65/1.1]."); 430 ILCS 65/1.1 (2005) (defining firearm as "any device . . . which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas; excluding," among others, "any pneumatic gun, spring gun, paint ball gun, or B-B gun" that fires single projectiles under a certain size at less than a certain muzzle velocity, "any device used exclusively for signaling or safety" (*e.g.*, flare guns), and "any device used exclusively for the firing stud cartridges, explosive rivets or similar industrial ammunition" (*e.g.*, nail guns)).

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weapons: "bludgeon, black-jack, slungshot, sand-bag, metal knuckles, [and] billy." 720 ILCS 5/33A-1(c)(3) (2005). And it concludes with a catch-all term — "other dangerous weapon of like character," *id.* — to include any other blunt-force weapons, such as unusual martial arts weapons or novel weapons like knuckle weapons made of a carbon fiber or other non-metallic materials. Category III weapons do not include any projectile weapons, shock weapons, or bladed weapons. *Compare id.*, *with* 720 ILCS 5/33A-1(c)(2) (2005) (defining Category II weapons to include shock weapons, bladed weapons, and "other deadly or dangerous weapon[s] or instrument[s] of like character"). Nor do Category III weapons include instruments that, though they may be used to beat someone, are not designed or commonly used as blunt-force weapons. *Hernandez*, 2016 IL 118672, ¶ 14 (instruments that "'might be capable of being used as a bludgeon'" are not bludgeons under Category III if "'not typically identified as such'" (quoting *People v. Davis*, 199 Ill. 2d 130, 141 (2002)); *see also* Ill. Pattern Jury Instructions (IPI), Criminal, No. 4.17 & Committee Note (directing that jury should be instructed that "[a]n object or instrument which is not inherently dangerous may be a dangerous weapon depending on the manner in of its use and the circumstances of the case," but noting that this instruction should not be given "in armed violence cases, aggravated kidnapping cases, or in other cases where the term 'dangerous weapon' is expressly defined by statute").

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Because the definition of "dangerous weapon other than a firearm" is broader than the definition of Category III weapon, it is possible to commit armed robbery with a dangerous weapon other than a firearm without also committing armed violence predicated on robbery with a Category III weapon. For example, a defendant who robs someone while armed with a knife, stun gun, or non-firearm projectile weapon has committed armed robbery with a dangerous weapon other than a firearm, but not armed violence predicated on robbery with a Category III weapon. *See Ligon*, 2016 IL 118023, ¶¶ 24-25 (BB gun is example of objects that are dangerous weapons other than a firearm but not Category III weapons). Similarly, a defendant who robs someone while armed with a heavy craftsman's tool has committed armed robbery with a dangerous weapon other than a firearm, but not armed violence predicated on robbery with a Category III weapon. *See Hernandez*, 2016 IL 118672, ¶¶ 15-16 (tin snips are example of objects that are dangerous weapons under the armed robbery statute but not Category III weapons under the armed violence statute). The fact that a person may commit one offense without committing the other proves that the elements of the two offenses are not identical. *Johanson*, 2024 IL 129425, ¶ 14; *Williams*, 2015 IL 117470, ¶ 18.

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B. This Court has never held that the elements of armed robbery with a dangerous weapon other than a firearm are identical to those of armed violence predicated on robbery with a Category III weapon.

Contrary to petitioner's assertion, Pet. Br. 11, 16, this Court has never held that armed robbery with a dangerous weapon other than a firearm and armed violence predicated on robbery with a Category III weapon have identical elements. Petitioner's reliance on *Lewis*, *Hauschild*, and *Clemons* is misplaced, *see id.* at 11-16, for those cases considered whether *other* pairs of offenses had identical elements. *Lewis* considered whether armed robbery under the pre-2000 armed robbery statute, which defined a single offense of robbery while armed with a "dangerous weapon," *see* 720 ILCS 5/18-2(a) (1994), shared identical elements with "armed violence predicated on robbery committed with a category I weapon." *People v. Lewis*, 175 Ill. 2d 412, 415-16 (1996). And *Hauschild* and *Clemons* considered whether "armed robbery while armed with a firearm" under section 18-2(a)(2) shared identical elements with "armed violence predicated on robbery with a category I or category II weapon." *People v. Clemons*, 2012 IL 107821, ¶¶ 12, 22; *People v. Hauschild*, 226 Ill. 2d 63, 85-86 (2007). Because none of *Hauschild*, *Clemons*, or *Lewis* construed either of the two offenses at issue here, much less compared their elements, their holdings are inapposite. *See Ligon*, 2016 IL 118023, ¶ 27 (distinguishing *Hauschild* and *Clemons* as "deal[ing] with the offense of armed robbery with a firearm," which did not include relevant element of being armed with "a dangerous weapon, other than a firearm"); *cf.*

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People v. Carey, 2018 IL 121371, ¶ 24 (armed robbery with a firearm under section 18-2(a)(2) and armed robbery with a dangerous weapon other than a firearm under section 18-2(a)(1) "'are substantively distinct offenses'" (quoting *People v. Washington*, 2012 IL 107993, ¶ 6)).

For the same reason, there is no conflict between *Hernandez*, on the one hand, and *Lewis*, *Hauschild*, and *Clemons*, on the other: *Hernandez* compared different offenses than did *Lewis*, *Hauschild*, and *Clemons*. Petitioner argues that *Hernandez*'s holding that the armed robbery and armed violences offenses that it compared did not have identical elements "cannot be read to hold that the two statutes never had identical elements" without overruling *Lewis*, *Hauschild*, and *Clemons*. Pet. Br. 17. But this argument overlooks that "the two statutes" compared in *Hernandez* were not the same two statutes compared in *Lewis*, *Hauschild*, or *Clemons*. *Hernandez* compared the pre-2000 version of the armed robbery statute — robbery while armed with a "dangerous weapon" — with the armed violence statute defining the offense of armed violence predicated on robbery with a Category III weapon. 2016 IL 118672, ¶¶ 1, 16. As explained, *see supra* p. 17, none of *Lewis*, *Hauschild*, and *Clemons* compared those same two statutes, and so *Hernandez*'s holding that the two offenses defined by *those* statutes did not have identical elements did not disturb the holdings in *Lewis*, *Hauschild*, or *Clemons* that *other* pairs of offenses defined by *other* statutes had identical elements.

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Therefore, the holdings in *Lewis*, *Hauschild*, and *Clemons* that pairs of armed robbery and armed violence offenses other than those at issue here had identical elements does not establish that armed robbery with a dangerous weapon other than a firearm and armed violence predicated on robbery with a Category III weapon have identical elements.

C. Because a constitutional challenge under the identical elements test is a facial challenge, petitioner's own conduct is irrelevant.

Petitioner similarly misconstrues this Court's precedent when he argues that, regardless of whether the dangerous weapon definition under section 18-2(a)(1) of the armed robbery statute is broader (and therefore different) than the Category III weapon definition under the armed violence statute, the elements of the two offenses nonetheless are identical as applied to *his* conduct because "[t]he identical elements test must always look at the actual weapon used" in a particular case. Pet. Br. 18. Indeed, this Court squarely rejected petitioner's argument in *Johanson*. 2024 IL 129425, ¶¶ 15-16 (rejecting defendant's contention that "[s]ince his acts satisfied the elements of both offenses, . . . the elements must be identical"). Therefore, petitioner's arguments that the pipe wrench that he used to rob his victim — if in fact that is what he used, *see* R233-34, 253, 263-64 — is both a "dangerous weapon other than a firearm" under the armed robbery statute and a "bludgeon . . . or other dangerous weapon of like character" under the armed violence statute's definition of Category III weapons, *see* Pet. Br. 16-33, are beside the point.

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In *Johanson*, the Court reaffirmed that such as-applied challenges are "not appropriate under the identical elements test." 2024 IL 129425, ¶ 16 (citing *Williams*, 2015 IL 117470, ¶ 19). As the Court explained, the identical elements test "does not consider the offenses as applied to an individual defendant." *Id.* Rather, "whether the elements of one offense are the same as those of another offense turns on the statutory language, not the facts alleged in a particular case." *Id.*

Moreover, *Johanson* is merely the most recent decision in this Court's long line of precedent recognizing that the identical elements test focuses on the statutory language that defines the elements of each offense, not the facts in a particular case. *See, e.g.*, *Sroga*, 2022 IL 126978, ¶ 12 ("As its name implies, the identical elements test examines whether the statutes under review contain the same elements."); *Williams*, 2015 IL 117470, ¶ 19 (identical elements test "simply compares the elements of the two offenses to determine if the offenses are the same" and "does not consider the offenses as applied to an individual defendant"); *People v. Espinosa*, 184 Ill. 2d 252, 259 (1998) (identical elements test "focuse[s] on the elements of the charged offenses as defined by statute, not on the conduct of the defendant as described in the charging instrument").

Because the identical elements test turns on statutory elements, and not the evidence in a particular case, this Court has repeatedly recognized that two sets of elements are not identical merely because, as here, some

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conduct may satisfy both sets. *See, e.g.*, *Williams*, 2015 IL 117470, ¶ 18 (two firearm possession offenses not identical where some acts of possession "violate[ ] both statutes" because "this is not always true"); *People v. Bailey*, 167 Ill. 2d 210, 235 (1995) ("Although under some circumstances, conduct constituting stalking might also constitute the offenses of assault and disorderly conduct, the three offenses do not contain identical elements."); *see also Cherry*, 2016 IL 118728, ¶ 20 (offenses not identical where one required infliction of "any injury" and the other required infliction of "great bodily harm"); *Espinosa*, 184 Ill. 2d at 259 (1998) (fact that same conduct was charged as two offenses does not mean those offenses are identical).

1. ***Hernandez* turned on the relevant statutory language, not the defendant's conduct.**

Contrary to petitioner's assertion, Pet. Br. 17-18, *Hernandez* is consistent with this long-held approach. *Hernandez* applied the identical elements test to hold that the elements of armed robbery under the pre-2000 armed robbery statute — robbery with a "dangerous weapon" — were not identical to those of armed violence predicated on robbery with a Category III weapon, not that the elements were not identical as applied to the particular pair of tin snips carried by the defendant in that case. In *Hernandez*, the Court construed the term "dangerous weapon" in the armed robbery statute and concluded that "the definition of dangerous weapon for purposes of the armed robbery statute includes not only objects that are *per se* dangerous, but objects that are used or may be used in a dangerous manner." 2016 IL

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118672, ¶ 12. In contrast, the term "Category III weapon" under the armed violence statute was "limited to the weapons identified by the statute," meaning "bludgeon-type weapons" and "other dangerous weapon[s] of like character." *Id.* ¶¶ 13-14. To be sure, the Court used the pair of tin snips wielded by the defendant in that case to illustrate this difference between the two weapon-category elements, explaining that the tin snips were a dangerous weapon under the armed robbery statute but not a Category III weapon under the armed violence statute. *Id.* ¶¶ 14-15. But the Court held that "the elements of armed robbery . . . *are not* identical to the elements of armed violence" because "it is clear that the common-law definition of 'dangerous weapon' found in the armed robbery statute is broader than the definition of 'dangerous weapon' in the armed violence statute." *Id.* ¶ 16 (citing *Ligon*, 2016 IL 118023, ¶ 27) (emphasis in original).

That the Court illustrated the difference between the two weapon-category elements using the defendant's tin snips rather than some other example of an object that satisfied one weapon-category element but not the other does not mean that the Court held that the weapon-category elements were different only as applied to those tin snips. Similarly, when the Court in *Ligon* explained that "many objects, including the BB gun defendant possessed in th[at] case," were dangerous weapons other than firearms but not Category III weapons, 2016 IL 118023, ¶ 20, it was not holding that the elements were different only as applied to that BB gun. In short, *Hernandez*

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and *Ligon* were not cases about tin snips and BB guns; they were cases about whether pairs of criminal statutes defined offenses with identical elements but imposed different penalties.

2. ***Lewis*, *Hauschild*, and *Clemons* applied the same statute-focused identical elements test.**

Lewis, *Hauschild*, and *Clemons* are also consistent with the long-standing rule that the identical elements test focuses on the statutorily defined elements, not the defendant's particular conduct. *See Hauschild*, 226 Ill. 2d at 85 (applying identical elements test by "compar[ing] section 18-2(a)(2) of the armed robbery statute with section 33A-2(a) of the armed violence statute . . . to determine whether these two offenses have identical elements"); *Clemons*, 2012 IL 107821, ¶ 26 (affirming *Hauschild*'s application of identical elements test); *Lewis*, 175 Ill. 2d at 415, 418 ("begin[ning] [the Court's] analysis with the pertinent statutes," then "consider[ing] the relationship" between those "statutory offenses"); *see also Espinosa*, 184 Ill. 2d at 259 ("The holdings of *Christy* and *Lewis* . . . are focused on the elements of the charged offenses as defined by statute, not on the conduct of the defendant as described in the charging instrument." (citing *People v. Christy*, 139 Ill. 2d 172, 177, 181 (1990), and *Lewis*, 175 Ill. 2d at 418).

To the extent that the holdings of *Lewis*, *Hauschild*, and *Clemons* appear in tension with the identical elements test's focus on statutory elements, that tension arises from errors in statutory interpretation, not from focusing on conduct rather than statutory language. For example, *Lewis*

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"beg[a]n [its] analysis with the pertinent statutes" to determine whether the "dangerous weapon" element of armed robbery under the pre-2000 armed robbery statute was identical to the Category I weapon element of armed violence predicated on robbery with a Category I weapon. 175 Ill. 2d at 412; *see id.* at 418 ("consider[ing] the relationship of three statutory offenses: robbery, armed robbery, and armed violence").

But *Lewis* then erred in construing those statutes. Specifically, *Lewis* erred by assuming that "the holding of *Christy*" — a case holding that the "dangerous weapon" element under the aggravated kidnapping statute was identical to the Category I weapon element of armed kidnapping predicated on kidnapping with a Category I weapon, *id.* at 416-17 — "govern[ed] [its] analysis in the case at bar," *id.* at 417-18. Relying on *Christy*'s interpretation of the "dangerous weapon" element under the aggravated kidnapping statute as identical to the Category I weapon element under the armed violence statute, *Lewis* held that the "dangerous weapon" element under the pre-2000 armed robbery statute was also identical to the Category I weapon element. *Id.* at 418.

But *Lewis* missed a critical difference between the aggravated kidnapping and armed robbery statutes: they did not use the same terms. The armed robbery statute used the term "dangerous weapon" as broadly defined under common law. *See People v. Skelton*, 83 Ill. 2d 58, 64-65 (1980) (construing "dangerous weapon" under the pre-2000 armed robbery statute as

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weapons that are "deadly per se" and objects that, though "not deadly per se," have "capacity to inflict serious harm even though not designed for that purpose"). But the aggravated kidnapping statute used the term "dangerous weapon, as defined in Section 33A-1," the provision of the armed violence statute that defined "dangerous weapon" in terms of specific categories. *See* Ill. Rev. Stat. 1987, ch. 38, par. 10-2(a)(5) (aggravated kidnapping is commission of kidnapping "while armed with a dangerous weapon, as defined in Section 33A-1"); Ill. Rev. Stat. 1987, ch. 38, par. 33A-1 (defining "dangerous weapon" as "a category I or category II weapon" and defining each category in terms of specific weapons). In other words, *Lewis* correctly focused its identical elements analysis on the statutory elements but misconstrued those elements.

Hauschild similarly focused its identical-elements analysis on statutory language, "compar[ing] section 18-2(a)(2) of the armed robbery statute with section 33A-2(a) of the armed violence statute . . . to determine whether these two offenses have identical elements." 226 Ill. 2d at 85. But in construing those statutes, *Hauschild* made two errors.[5] First, *Hauschild* misidentified the offenses being compared. It correctly identified the relevant armed robbery offense as armed robbery with a firearm, but incorrectly

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[5] These two errors in interpreting the armed robbery and armed violence statutes likely occurred because the parties joined issue only on the narrow question of whether offenses under the armed robbery and armed violence statutes could be compared at all after armed robbery had been excluded as a predicate offense for armed violence. *See Hauschild*, 226 Ill. 2d at 85.

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identified the relevant armed violence offense as "armed violence predicated on robbery with a category I or category II weapon," *id.* at 86, a combination of two separate armed violence offenses, *see* 720 ILCS 5/33A-3(a), (a-5) (2000) (armed violence with Category I weapon carries different penalty than armed violence with Category II weapon). The Court had previously warned against just this error in *People v. Koppa*, where it explained that the identical elements test does not permit comparison of a single offense to a combination of offenses, 184 Ill. 2d 159, 166-68 (1998), and it later warned against the same error in *People v. Cherry*, 2016 IL 118728, ¶¶ 16-17. As a result of this error, *Hauschild* compared the elements of armed robbery with a firearm to the combined elements of armed violence predicated on robbery with a Category I weapon and armed violence predicated on robbery with a Category II weapon. *See* 226 Ill. 2d at 85-86.

Hauschild's second interpretive error lay in not construing the statutory definitions of Category I and Category II weapons when comparing those weapon-category elements to the firearm element under the armed robbery statute. *See* 226 Ill. 2d at 86-87 (holding that elements of armed robbery with a firearm were identical to those of armed violence predicated on Category I and Category II weapons without identifying or construing statutory definitions of Category I and Category II weapons). Had *Hauschild* construed the relevant statutory language, it would have recognized that the term "firearm" under the armed robbery statute included all firearms, *see* 720

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ILCS 5/2-7.5 (2000); 430 ILCS 65/1.1 (2000), whereas Category I weapons under the armed violence statute were defined more narrowly, including only a subset of firearms, *see* 720 ILCS 5/33A-1(c)(2) (2000) ("A Category I weapon is a handgun, sawed-off shotgun, sawed-off rifle, any other firearm small enough to be concealed upon the person, semiautomatic firearm, or machine gun."). And Category II weapons were defined both more narrowly than "firearm" under the armed robbery statute, including only those firearms excluded from Category I, and more broadly, including non-firearm weapons such as stun weapons and bladed weapons. *See id.* ("A Category II weapon is any other rifle, shotgun, spring gun, other firearm, stun gun or taser . . . , knife with a blade of at least 3 inches in length, dagger, dirk, switchblade knife, stiletto, axe, hatchet, or other deadly or dangerous weapon or instrument of like character."). The addition of stun and bladed weapons in Category II meant that even when armed robbery with a firearm was mistakenly compared to the aggregated offenses of armed violence with Category I and Category II weapons, the elements were still not identical. Thus, *Hauschild* reflects errors in interpreting the statutory language, not in applying an identical elements test that is untethered from statutory language.

Nor does *Clemons* suggest that the identical elements test focuses on a defendant's conduct rather than statutory language. When *Clemons* affirmed *Hauschild*'s application of the identical elements test, it did so in response to

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a challenge that raised neither of *Hauschild*'s two interpretative errors, but instead argued that the elements of armed robbery with a firearm were different from those of armed violence because "only robbery may satisfy the robbery element of armed robbery with a firearm" but "[a]rmed violence . . . may be predicated on any number of felonies while armed with any number of weapons." 2012 IL 107821, ¶ 21. In other words, the argument raised in *Clemons* was that the predicate offense element under the armed violence statute — any felony other than specified exceptions — was broader than the predicate offense element under the armed robbery statute, which was limited to robbery.

Clemons rejected this argument, recognizing that the armed violence statute's predicate offense element was not broader than the armed robbery statute's predicate element of robbery. *See id.* ¶ 22. The armed violence statute defines different armed violence offenses with different elements depending on which predicate felony is committed with which category of weapon. There is no armed violence offense of armed violence predicated on "any felony" while armed with "any weapon." Rather, as *Clemons* recognized, the relevant armed violence offense to compare with armed robbery while armed with a firearm was armed violence predicated on robbery while armed with the relevant category of weapon, *see id.*, just as the relevant armed violence offense for comparison to aggravated kidnapping with a Category I

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weapon was armed violence predicated on kidnapping with a Category I weapon, *id.* ¶ 23 (citing *Christy*, 139 Ill. 2d at 181).

Due to the way in which the armed violence statute functions, *Clemons* held that the apparent breadth of the armed violence statute's predicate offense element was illusory. Under the statute, the offense of armed violence must be predicated on a specific felony, and so an armed violence offense predicated on a particular felony necessarily has the same predicate offense element as any other offense predicated on that same felony. In explaining this feature of the armed violence statute, *Clemons* observed that that "the identical elements test has never required that the two offenses be equally specific." *Id.* As this Court later put it in *Williams*, "the words used in the statutes were different but they meant the same thing." 2015 IL 117470, ¶ 19.

But in observing that the identical elements test looks at whether statutes define substantively different elements rather than use different words, *Clemons* did not, as petitioner suggests, *see* Pet. Br. 18, hold that offenses are identical if their elements overlap with respect to *some* defendants' conduct, regardless of whether one offense is defined more broadly than the other. After all, if two offenses were identical merely because some conduct that satisfies the broader elements of one also satisfies the more specific elements of the other, then all aggravated or enhanced offenses would be identical to their lesser-included offenses since they

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necessarily overlap. But *Clemons* did not purport to invalidate great swaths of the Criminal Code. *See* 2012 IL 107821, ¶ 24 (explaining that burglary and residential burglary do not have identical elements because the location element of burglary, which prohibits entering a building or vehicle to commit a felony, is not identical to location element of residential burglary, which more narrowly prohibits entering a dwelling to commit a felony).[6] *Clemons*'s observation that the identical elements test focuses on whether two offenses have elements that are identical in substance rather than in form was consistent with this Court's precedent that the identical elements test focuses on the elements as statutorily defined, not the conduct that establishes those elements in a particular case.

D. Even if an as-applied claims were cognizable under the identical elements test, petitioner's claim would fail.

Even if petitioner could raise an as-applied claim under the identical elements test — that is, a claim that the legislature cannot provide different

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[6] Had *Clemons* been presented with a challenge to *Hauschild*'s holding that the weapon-category elements were identical — that is, *Hauschild*'s holding that "firearm" under the armed robbery statute was defined identically with the combination of Category I and Category II weapons under the armed violence statute — it would have recognized that the elements are not identical but merely overlap in some instances, as the Court did a few years later when comparing other weapon-category elements of varying breadths in *Ligon* and *Hernandez*. *See Ligon*, 2016 IL 118023, ¶ 25 (element of being armed with dangerous weapon other than firearm broader than, and therefore not identical to, element of being armed with Category III weapon); *Herandez*, 2016 IL 118672, ¶ 16 (same with elements of being armed with dangerous weapon and being armed with a Category III weapon); *see also Cherry*, 2016 IL 118728, ¶ 20 (same with elements of causing "any injury" and causing "great bodily harm").

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penalties for offenses with different statutory elements if a defendant's conduct happens to satisfy both sets of elements — his claim would fail. As an initial matter, if petitioner raised an as-applied claim, then the circuit court correctly dismissed it as untimely, *see* C438, because as-applied claims are subject to the two-year statute of limitations governing petitions for relief from judgment and petitioner did not file his petition for relief from his 2007 judgment until 2016. *See People v. Thompson*, 2015 IL 118151, ¶¶ 30-39 (petition for relief from judgment raising as-applied challenge to sentencing statute subject to two-year limitations period); 735 ILCS 5/2-1401(c) (2016) (petitions for relief from judgment "must be filed not later than 2 years after the entry of the order or judgment").

Untimeliness aside, petitioner's as-applied claim would fail because petitioner's robbery with a pipe wrench (if in fact that is what petitioner used to rob his victim, *see* R233-34, 253, 263-64) does not satisfy the elements of both armed robbery with a dangerous weapon other than a firearm and armed violence predicated on robbery with a Category III weapon. A pipe wrench is a dangerous weapon other than a firearm under the armed robbery statute, but it is not a Category III weapon under the armed violence statute.

As noted above, a Category III weapon is defined under the armed violence statute as "a bludgeon, black-jack, slungshot, sandbag, sand-club, metal knuckles, billy, or other dangerous weapon of like character." 720 ILCS 5/33A-1(c)(3) (2005). This Court has twice construed this list of blunt-

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force weapons as excluding instruments that are not designed or commonly thought of as blunt-force weapons, regardless of whether they could be used to beat someone. *Hernandez*, 2016 IL 118672, ¶ 14 (instruments that "'might be capable of being used as a bludgeon'" are not bludgeons under Category III if "'not typically identified as such'" (quoting *Davis*, 199 Ill. 2d at 141); *Ligon*, 2016 IL 118023, ¶ 23 (same).[7]

A pipe wrench is not a Category III weapon because it is neither one of the specified blunt-force weapons nor a "dangerous weapon of like character." *See Hernandez*, 2016 IL 118023, ¶ 23 (Category III weapons are "limited to the weapons identified by the statute"). A pipe wrench is not among the blunt-force weapons specifically listed in the Category III weapon definition. *See* 720 ILCS 5/33A-1(c)(3) (2005). Although petitioner suggests that a pipe

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[7] All of the items named in section 33A-1(c) are specifically weapons, not just items that a person might use to beat someone. *See Webster's Third New International Dictionary* (1961) (defining "bludgeon" as "a short stick used as a weapon usu[ally] having one thick, heavy, or loaded end" or "any similar weapon"); *id.* at 226 (defining "blackjack" as "a small striking weapon typically consisting of a leather-enclosed piece of lead or other heavy metal and at the handle end of a strap or springy shaft that increases the force of impact"); *id.* at 2148 (defining "slung-shot" as "a weapon consisting of a small mass of metal or stone fixed on a flexible handle or strap"); *id.* at 2009 (defining "sandbag" as "a bag filled with sand . . . used as a weapon swinging at the end of a staff or beam of a quintain or only partially filled for use as a club"); *id.* at 269, 1253 (defining "knuckles" by referring to "brass knuckles," which are defined as "a set of four metal finger rings or guards attached to a transverse piece and worn over the front of the doubled fist for use as a weapon"); *id.* at 217 (defining "billy" as "a heavy usu[ally] wooden weapon for delivering blows"); *id.* at 2589 (defining "weapon" as "an instrument of offense or defensive combat," "something to fight with," and "something (as a club, sword, gun, or grenade) used in destroying, defeating, or physically injuring an enemy").

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wrench might be a "bludgeon" — a term that he asserts "has no obvious meaning," Pet. Br. 8 — a pipe wrench is not a bludgeon. Contrary to petitioner's assertion, the term "bludgeon" has a clear and common meaning: a bludgeon is "[a] short heavy club, usually of wood, that is thicker or loaded at one end." *American Heritage Dictionary of the English Language* 200 (5th ed. 2018) (defining "bludgeon"); *see Webster's Third New International Dictionary* 240 (1993) (defining "bludgeon" as "a short stick used as a weapon, usu[ally] having on thick, heavy, or loaded end"); *Random House Dictionary of the English Language* 240 (1966) (defining "bludgeon" as "a short, heavy club with one end weighted, or thicker and heavier than the other"). A pipe wrench — "a wrench for gripping and turning a pipe or other cylindrical surface," *Webster's Third New International Dictionary* 1722 (1993) (defining "pipe wrench") — is not a club with one thicker or weighted end, any more than were the tin snips that the defendant in *Hernandez* used to commit his robbery. *See* 2016 IL 118672, ¶¶ 14-15 (tin snips, which "are essentially a craftsman's tool," "*cannot* be considered a bludgeon . . . under the armed violence statute" (emphasis in original)). The fact that an object "might be capable of being used as a bludgeon" does not render it a bludgeon if "it is not typically identified as such." *Id.* (quoting *Davis*, 199 Ill. 2d at 141); *Ligon*, 2016 IL 118023, ¶ 23 (same).

Nor is a pipe wrench a "dangerous weapon of like character" to the blunt-force weapons listed in section 33A-1(c). The final catch-all term in the

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list of Category III weapons is limited to "weapons" of like character to the listed blunt-force weapons, *see* 720 ILCS 5/33A-1(c)(3) (2005); objects that are not weapons "cannot be interpreted to be 'of like character' to the bludgeon-type weapons included in the category [III] listing," regardless of whether they might be used to beat someone. *Hernandez*, 2016 IL 118672, ¶ 14 (quoting and altering *Davis*, 199 Ill. 2d at 141); *see Ligon*, 2016 IL 118023, ¶ 23 (same). Accordingly, a pipe wrench, which is not a weapon by nature, *see Webster's Third New International Dictionary* 1722 (1993) (defining "pipe wrench" as "a wrench for gripping and turning a pipe or other cylindrical surface"), is not a "weapon of like character" to the blunt-force weapons listed in section 33A-1(c)(3) just because petitioner used one to strike someone.

Although petitioner cites a handful of nonprecedential appellate court decisions holding that various objects were bludgeons (sometimes in cases where the point was not disputed), *see* Pet. Br. 21-23 (discussing holdings of *People v. Jones*, 2017 IL App (1st) 161344-U; *People v. Cummings*, 2016 IL App (1st) 143948-U; and *People v. Gonzalez*, 2014 IL App (1st) 120710-U), none of those opinions provide a basis to overrule the holdings in *Hernandez* and *Ligon* that objects cannot be Category III weapons unless they are weapons by nature.[8] The sole precedential decision cited by petitioner for the

[8] Petitioner acknowledges that these nonprecedential decisions may not be cited as persuasive authority but asserts that he relies on them "only to illustrate how courts . . . have addressed what meets the statutory definition of a 'dangerous weapon.'" Pet. Br. 20 n.5. But relying on non-binding cases to show how courts have addressed a particular situation in the past while

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proposition that a tool is a bludgeon under the armed violence statute — *People v. Span*, 2011 IL App (1st) 083037, ¶ 10 — pre-dated this Court's contrary holdings in *Hernandez* and *Ligon* and was wrongly decided because it failed to grapple with, or even address, the Court's holding in *Davis* that objects that "might be capable of being used as a bludgeon" are not blunt-force weapons included under the armed violence statute's definition of Category III weapons unless they are "typically identified as such." 199 Ill. 2d at 141.[9]

Construing the term "weapons of like character" as excluding objects that are not weapons is consistent with the purpose of the armed violence statute, and petitioner's argument to the contrary is incorrect. *See* Pet. Br. 30-31. As this Court explained in *Ligon*, the legislature, "concerned with the possession of *weapons* during the commission of felonies, adopted the armed violence statute to 'discourage those who contemplate a felonious act beforehand from carrying a *weapon* when they set forth to perform the act.'" *Ligon*, 2016 IL 118023, ¶ 26 (quoting and adding emphasis to *People v. Alejos*, 97 Ill. 2d 502, 509 (1983)) (internal citation omitted). Indeed, it is petitioner's

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arguing that this Court should address the situation the same way *is* relying on that case as persuasive authority and is precisely what this Court's rules do not allow. *See Johanson*, 2024 IL 129425, ¶ 18 n.3.

[9] The definition construed in *Davis* — that of Category II weapons under the 1992 version of the armed violence statute, *see Ligon*, 2016 IL 118023, ¶ 23 n.4 — is identical to the definition of Category III weapons under the 2006 version. *Compare* 720 ILCS 5/33A-1(c) (1992) (defining Category II weapons), *with* 720 ILCS 5/33A-1(c)(3) (2005) (defining Category III weapons).

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reading of the Category III weapon definition that is inconsistent with this legislative purpose, for "the specific intent of the legislature in creating the armed violence statute would be defeated if objects other than those actual weapons defined and listed therein were considered 'dangerous weapons' within the statute's three categories." *Id.*

The legislature made only one exception to its exclusion of non-weapon objects from the definition of "dangerous weapons" under the armed violence statute, and that exception was express: the catch-all term of the Category II weapon definition, which, unlike the catch-all term of the Category III definition, prohibits carriage of "any other dangerous weapon *or instrument* of like character" to the specific weapons listed in Category II. *See* 720 ILCS 5/33A-1(c)(2) (2005) (emphasis added); *see Webster's Third New International Dictionary* 1172 (1961) (defining "instrument" as "utensil" or "implement"). By specifying that Category II weapons include both weapons of like character to the listed weapons and instruments of like character to those weapons, the legislature made clear that non-weapon objects can be Category II weapons for the purposes of armed violence. That the legislature did not use the same language when defining Category III weapons indicates that it did not intend that category to similarly include non-weapon objects. *See People v. Goossens*, 2015 IL 118347, ¶ 12 ("It is well settled that when the legislature uses certain language in one instance of a statute and different

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language in another part, [the Court] assume[s] different meanings were intended.").

Nor does construing section 33A-1(c)(3) consistent with this plain and unambiguous language lead to absurd results. Petitioner argues that giving "bludgeon" its usual meaning — a club — would lead to absurd results elsewhere in the Criminal Code, *see* Pet. Br. 31-33, specifically, under the statutes defining the offense of unlawful use of a weapon, which prohibits a person from buying, selling, or possessing various weapons, including "any bludgeon," 720 ILCS 5/24-1(a)(1), and unlawful use of a weapon by a felon, which prohibits felons from possessing the same weapons, 720 ILCS 5/24-1.1(a) (prohibiting felons from possessing "any weapon prohibited under Section 24-1 of this Act"). Petitioner reasons, based on nonprecedential appellate decisions, that if "bludgeon" is read to exclude non-weapon objects, then it would lead to the absurd result that people — including people with felony convictions — would be free to buy, sell, and possess non-weapon objects such as golf clubs, rolling pins, and baseball bats without facing criminal sanction under sections 24-1(a)(1) and 24-1.1(a). *See* Pet. Br. 32 (quoting *People v. Gonzalez*, 2014 IL App (1st) 120710-U, ¶ 20, and citing *People v. Fields*, 2011 IL App (3d) 100121-U, ¶¶ 20-24).

But there is nothing absurd about the legislature's decision not to criminalize playing golf, making a pie from scratch, or working at a sporting goods store, even if one was once convicted of a felony. Indeed, if the

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prohibitions against possessing "any bludgeon" in sections 24-1(a)(1) and 24-1.1(a) were construed to prohibit anyone from possessing any heavy rigid object, they might well violate due process as criminalizing "a significant amount of wholly innocent conduct not rationally related to the statute[s'] purpose[s]." *People v. Hollins*, 2012 IL 112754, ¶¶ 15, 27.[10]

II. The Parties Agree That the Remedy for a Proportionate Penalties Violation Under the Identical Elements Test Is to Vacate the Disproportionate Greater of the Two Penalties and Impose the Proportionate Lesser of the Two Penalties.

If this Court finds that the Class X felony penalty for armed robbery with a dangerous weapon other than a firearm violates the proportionate penalties clause because it is greater than the Class 2 felony penalty for armed violence predicated on robbery with a Category III weapon, the parties agree that the proper remedy is to vacate the Class X felony sentence and

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[10] This is not to say that *no* item that has a use other than as a weapon can be a Category III weapon, for bludgeons (and other weapons of like character) are those items "typically identified as such." *Davis*, 199 Ill. 2d at 141. For that reason, petitioner's reliance on baseball bats as examples of non-weapon objects, *see* Pet. Br. 30, 32, is misplaced. After years of extensive use as weapons and frequent portrayal as weapons in popular culture, baseball bats well may be typically identified as weapons where they once were not. *See Webster's Third New International Dictionary* 184 (2021) (defining "bat" as both "a stout solid stick," synonymous with "club" and "cudgel," and "a wooden implement used for hitting the ball in various games (as baseball and cricket)"); *see also, e.g.*, Target, Listing Describing Baseball Bat as "for Baseball, Self Defense, Home Defense, & Training," https://tinyurl.com/mrx8h68x (last visited June 4, 2024) (marketing baseball bat as self-defense weapon). But whether a bat has become a "weapon of like character" to the blunt-force weapons listed in the Category III weapon definition — or has become typically identified as a "bludgeon" in specific — is a question for another day. In any event, the answer to that question will not change the plain language of section 33A-1(c)(3), which excludes objects that are not typically identified as blunt-force weapons from Category III weapons.

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remand for imposition of a Class 2 felony sentence. *See* Pet. Br. 33 (arguing that petitioner's "armed robbery sentence should be vacated and he should be resentenced under the armed violence statute").

The proper remedy for an identical elements proportionality violation is to vacate the sentence imposing the disproportionate greater of the two penalties provided for a single offense and remand for resentencing to the proportionate lesser of the two penalties. This is both the remedy that the Court provided when it first adopted the identical elements test in *Christy*, *see* 139 Ill. 2d at 174, 181, and the remedy "best 'tailored to the injury suffered from the constitutional violation [which does] not unnecessarily infringe on competing interests,'" *People v. Curry*, 178 Ill. 2d 509, 537 (1997) (quoting and altering *United States v. Morrison*, 449 U.S. 361, 364 (1981)); *see*, *e.g.*, *People v. J.H.*, 136 Ill. 2d 1, 12-13 (1990) (considering nature of injury from constitutional violation to determine proper remedy for that violation). The injury suffered from an identical elements proportionality violation is not that the defendant was held criminally liable for conduct that was beyond the legislature's authority to prohibit or received a penalty that was inherently beyond the legislature's authority to provide, but that the defendant received the greater of the two penalties that the legislature provided for his offense. *See Ligon*, 2016 IL 118023, ¶ 11 ("where identical offenses do not yield identical penalties, this court has held that the penalties

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were unconstitutionally disproportionate and the greater penalty could not stand”).

The remedy of vacating the greater of two penalties provided by the legislature and replacing it with the lesser of the two penalties is narrowly tailored to the “unique nature of an identical elements proportionality violation,” *Blair*, 2013 IL 114122, ¶ 31, and accomplishes “the fundamental goal of the identical elements test,” which is “to guarantee that identical criminal offenses have identical sentencing ranges,” *Clemons*, 2012 IL 107821, ¶ 70 (Kilbride, J., specially concurring). This remedy also avoids unnecessarily infringing on the legislature’s authority to set the penalties for crimes by giving effect to the legislature’s intent that a defendant who commits a particular offense at a particular time receive one of the two penalties that the legislature provided for the commission of that offense at that time.

Providing this remedy would require the Court to modify the remedy it provided in *Hauschild*, which departed from *Christy* to hold that when a defendant receives the greater of two penalties provided for a single offense, “the proper remedy is to remand for resentencing in accordance with the statute [under which the offense carries the greater penalty] as it existed prior to the amendment” that rendered its penalty the unconstitutionally greater of two available penalties, 226 Ill. 2d at 88-89, rather than resentencing to lesser of the two available penalties. In other words,

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Hauschild held that when the legislature provides two different penalties for the same offense, *neither* penalty may be imposed, even though only the greater of the two is unconstitutional. Rather, the only penalty that may be imposed is the penalty provided under the prior version of the invalidated sentencing statute, which is the only penalty of the three possible choices that the legislature found *not* to be appropriate for the offense at the time of commission.

The *Hauschild* remedy unnecessarily infringes on legislative authority to set penalties by prohibiting imposition of either of the two penalties provided by the legislature, even though only one of those penalties is unconstitutional. In contrast, the *Christy* remedy creates "no risk of the court acting as a 'superlegislature' or substituting its judgment for that of the legislature," because "[t]he court merely considers two different penalties given to two identical offenses by the same legislative body." *Sharpe*, 216 Ill. 2d at 505.

In sum, *Hauschild*'s remedy departed from prior precedent without considering the unique nature of an identical elements proportionality violation and unnecessarily infringes on the legislature's authority to set the penalties for the offenses it creates. Therefore, there is good cause to overrule *Hauschild*'s holding regarding the proper remedy for an identical elements proportionality violation and return to the remedy that the Court provided in *Christy*. *See Sharpe*, 216 Ill. 2d at 520-21.

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CONCLUSION

This Court should affirm the judgment of the appellate court.

June 4, 2024

Respectfully submitted,

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RULE 341(c) 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 containing 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 42 pages.

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CERTIFICATE OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On June 4, 2024, the foregoing **Brief of Respondent-Appellee People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the Court's electronic filing system, which provided service to the following:

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