No. 129357

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- ANTHONY HARVEY, Defendant-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-21-1242. There on appeal from the Circuit Court of Cook County, Illinois , No. 21119172101. Honorable Robert Kuzas, Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

JAMES E. CHADD
State Appellate Defender

DOUGLAS R. HOFF
Deputy Defender

PHILIP D. PAYNE
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLANT

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CYNTHIA A. GRANT
SUPREME COURT CLERK

ARGUMENT

In order to comport with the Second and Fourteenth Amendments, the State had to prove that Anthony Harvey had not been issued a currently valid concealed carry license to sustain his conviction for unlawful use of a weapon, and the State's evidence in this case fell short of that threshold.

This Court granted leave to appeal in this case to settle a simple and straightforward question: in prosecuting Anthony Harvey for unlawful use of a weapon ("UUW") under 720 ILCS 5/24-1(a)(10)(iv), did the State have to prove that Harvey had not "been issued a currently valid" concealed carry license ("CCL")? By answering in the affirmative, Harvey has proposed a reading of the UUW statute that gives meaning to all of its terms, harmonizes that statute with the Firearm Concealed Carry Act ("FCCA"), and avoids constitutional entanglements that might otherwise threaten the UUW statute's ongoing validity.

The State, on the other hand, submits—for the first time—the radical proposition that "evidence that [Harvey] had not been issued a valid CCL *is not required*" to secure a conviction for UUW under 720 ILCS 5/24-1(a)(10)(iv). (St. Br. 6) (emphasis added). According to the State, the prosecution needed only prove at trial that the defendant had violated the FCCA:

> [E]vidence that [Harvey] had not been issued a valid CCL is not required to prove unlawful use of a weapon. Instead, the People proved the offense by proving that defendant failed to produce a CCL at the traffic stop, as required by the Firearm Concealed Carry Act.

(St. Br. 6). This position, however, places the UUW statute in direct conflict with the FCCA, threatens to invalidate the UUW statute under the proportionate penalties clause of the Illinois Constitution, and sets the UUW statute on a collision course with the Second Amendment.

A. A weapon "carried or possessed in accordance with the Firearm Concealed Carry Act" refers to a handgun that is concealed from public view.

The State's new argument is based on the phrase in section 24-1(a)(10)(iv)'s exception making it applicable to a weapon that is "carried or possessed in accordance with the Firearm Concealed Carry Act." (St. Br. 11) (contending that Harvey "ignor[es] that possession must also be 'in accordance with the Firearm Concealed Carry Act'"). That statutory exception, in full, provides that the UUW statute does not apply to weapons that "are carried or possessed in accordance with the Firearm Concealed Carry Act by a person who has been issued a currently valid license under the Firearm Concealed Carry Act." 720 ILCS 5/24-1(a)(10)(iv) (2021). The State acknowledges that it bore the burden of disproving this exception beyond a reasonable doubt. (St. Br. 8-9).

The latter portion of the exception—"by a person who has been issued a currently valid license under" the FCCA—plainly means that the State must prove that the defendant had not been issued a currently valid CCL. The State does not dispute the plain meaning of that portion of the statutory exception; rather, the State now contends that it need not disprove a defendant's licensure if it can alternatively prove that the weapon was not "possessed or carried in accordance with" the FCCA. (St. Br. 9). According to the State, a person who violates a provision of the FCCA while possessing a handgun is guilty of UUW, "regardless of whether defendant had been issued a CCL." (St. Br. 9).

The State's contention is not supported by the language of the statute and is foreclosed by case law that the State ignores. The FCCA provides a ready answer to what it means for a weapon to be "possessed or carried in accordance with the

Firearm Concealed Carry Act": The only type of public gun possession countenanced by the FCCA is that of a "concealed firearm," which in turn is defined as "a loaded or unloaded handgun carried on or about a person completely or mostly concealed from view of the public or on or about a person within a vehicle." 430 ILCS 66/5 (2021). With this definition in mind, the phrase "possessed or carried in accordance with the Firearm Concealed Carry Act" simply delimits the **type** of weapon (*i.e.*, handgun), and the **manner** of its public carriage (*i.e.*, completely or mostly concealed), that is authorized under the FCCA. It does not, as the State contends, incorporate into the UUW statute every term and condition found within the FCCA. See Arg. B-1, *infra*. As shown below, the case law supports Harvey's reading.

In *People v. Webb*, 2019 IL 122951, this Court interpreted identical statutory language from subsection 24-1(a)(4) of the UUW statute. There, the defendants challenged the statute's categorical ban on publicly carrying stun guns and tasers as a violation of the Second Amendment. *Webb*, 2019 IL 122951, ¶¶ 3-6. In response, the State argued that the UUW statute did not categorically ban those weapons, but merely required that they be "carried or possessed in accordance with" the FCCA, even though the FCCA excludes stun guns and tasers from the types of weapons one can be licensed to carry in Illinois. *Id.*, ¶¶ 14-16.

This Court rejected the State's interpretation. This Court noted that the FCCA authorizes a CCL holder to carry a "concealed firearm," *i.e.,* "a loaded or unloaded handgun" that is "completely or mostly concealed from view of the public." *Id.*, ¶ 15 (quoting 430 ILCS 66/5). Based on the plain and natural meaning of the UUW statute and the FCCA, this Court held that "carried or possessed in accordance with the Firearm Concealed Carry Act" means that the type of weapon carried

must fall within the FCCA's definition of "concealed firearm":

> In our view, the most natural reading of the requirement that weapons be carried or possessed "in accordance" with the Carry Act is that the weapons, themselves, *are of the type for which a valid concealed carry license may be issued under the Carry Act.*"

Id., ¶¶ 18 (emphasis added). The interpretation proffered by the State in *Webb*, on the other hand, would allow anyone with a CCL to "carry any other weapon, including a rifle or shotgun, and still be 'in accordance' with the Carry Act, even though the Carry Act is specifically limited to handguns and does not allow for the concealed carry of rifles or shotguns." *Id.*

Webb thus holds that in order for a weapon to be "carried or possessed in accordance with" the FCCA, it must be the type of weapon that the FCCA allows a licensee to carry in public, *i.e.*, "a loaded or unloaded handgun" that is completely or mostly concealed from public view. *Id.*, ¶ 15. Despite its patent relevance to the State's central argument in this case, the State inexplicably makes no mention of *Webb*.

Like *Webb*, the appellate court has likewise interpreted the phrase, "in accordance with the Firearm Concealed Carry Act" to mean that the exception only applies to people carrying or possessing a concealed handgun. In *People v. Balark,* 2019 IL App (1st) 171626, ¶¶ 5-6, the defendant was arrested after an officer saw him place a handgun into the glove compartment of his car. The defendant argued on appeal that his trial attorney was ineffective for failing to seek suppression of the firearm, contending that his conduct did not provide probable cause that he had committed UUW. *Balark*, 2019 IL App (1st) 17626, ¶ 30. Addressing that question required the appellate court to construe "[t]he exception

before us, carried or possessed in accordance with" the FCCA, which permits a licensee "to 'keep or carry a loaded or unloaded concealed firearm on or about his or her person within a vehicle.'" *Id.*, ¶ 55.

Noting that "Illinois does not allow for open carry of firearms," the court rejected the defendant's claim that his open and notorious handling of the handgun within his vehicle was lawful under the FCCA: "The term 'concealed' cannot be read out of the Act where the term is, in essence, the entire purpose of the Act." *Id.*, ¶ 58. Consequently, the court found that the defendant "did not possess the firearm *in accordance with the Act* when he was observed with the firearm in his hand and moving it about the vehicle, and thus, his conduct was not within the exception to the unlawful use of a weapon statute." *Id.,* ¶ 72 (emphasis added).

Balark, then, like *Webb*, interprets subparagraph (iv) as limiting the type and manner of public carry in Illinois to concealed handguns by those who have been issued a valid CCL. This is precisely the interpretation adopted by the federal district court in *Moore v. Madigan* after the 2013 passage of the FCCA:

> The plain language [of the FCCA] also demonstrates the legislature's intent to *continue enforcement of the Unlawful Use of Weapons* and Aggravated Unlawful Use of a Weapon statutes *if an individual does not have a valid license under the Firearm Concealed Carry Act and if an individual carries weapons other than a handgun, revolver, or pistol outside of the home.*

Moore v. Madigan, No. 11-CV-3134, 2013 WL 5587289, at *7 (C.D. Ill. Oct. 10, 2013) (emphases added).

Thus, under the plain language of the statute and pursuant to the case law interpreting that language, when a defendant is charged with UUW based on possession of a concealed handgun, the State's only way of disproving the statutory exception is to prove that the defendant has not been issued a currently

valid CCL. That is precisely the case here: the testimony of Officers Baciu and Cruz established that the recovered firearm was a handgun (Supp.3R. 53, 62), and that it was found hidden beneath the center console of the van. (Sup.3R. 56-58, 62, 65-66). Accordingly the State had to prove that Harvey had not been issued a currently valid CCL. Not coincidentally, this was the State's position below where it conceded, "[t]he People had to further prove that at the time defendant possessed the firearm, he did not have a valid license under the Firearm Concealed Carry Act. (St. App. Br. 5) To make matters even clearer, the State wrote, "there was sufficient independent corroborating evidence that tended to establish that *defendant had not been issued a valid CCL*." (St. App. Br. 15) (emphasis added).

The State, however, now advances a radically different reading of the UUW statute, contending that it can disprove subparagraph (iv)'s exception merely by "prov[ing] that defendant failed to produce a CCL during the traffic stop." (St. Br. 9). This argument not only flies in the face of the position the State previously took in this case, but it opens a Pandora's Box of problems, which Harvey will itemize below.

B. The State's present interpretation of the UUW statute (1) does not harmonize with the FCCA, but renders much of the latter superfluous, (2) gives rise to an identical elements violation, and (3) sets subsection 24-1(a)(10) inexorably on a path of conflict with the Second Amendment.

The State asserts that its failure to prove that Harvey had not been issued a currently valid CCL is of no moment, because it can carry its burden under the UUW statute by proving any violation of the FCCA. (St. Br. 9) ("[T]he People disproved [subparagraph (iv)'s] exception—regardless of whether defendant had been issued a CCL—by showing that he had not complied with the Firearm

Concealed Carry Act."). This position effectively erases an entire section of the FCCA, while simultaneously giving rise to serious constitutional problems.

1. The State's reading of the UUW statute cannot be reconciled with the FCCA—critical portions of which the State ignores.

Under the guise of harmonizing the two statutes, the State essentially asks this Court to graft all of the FCCA onto subsection 24-1(a)(10). According to the State, "evidence that [Harvey] had not been issued a valid CCL is not required to prove unlawful use of a weapon. Instead, the People proved the offense by proving that defendant failed to produce a CCL at the traffic stop, as required by the Firearm Concealed Carry Act." (St. Br. 6). In support of this reading of the UUW statute, the State marshals no legal authority. (St. Br. 9-11).

The State reaches this conclusion by reading the first portion of subparagraph (iv)'s exception—"carried or possessed in accordance with the Firearm Concealed Carry Act"—as demanding full compliance with every term and condition of the FCCA in order to avoid conviction for UUW. As the State emphasizes, the FCCA's requirements include that a licensee must "possess a license at all times the licensee carries a concealed firearm" and must "present the license upon request of the officer" during a traffic stop. 430 ILCS 66/10(g), (h) (2021); (St. Br. 9). By failing to present a CCL to Officers Baciu and Cruz during the traffic stop, the State asserts that Harvey "had not complied with" the FCCA; this, in turn, means that his possession of the recovered handgun was not "in accordance with the Firearm Concealed Carry Act," such that he committed the offense of UUW. (St. Br. 9-10). In this manner, the State reads the UUW statute as allowing conviction whenever the FCCA is violated, *"regardless of whether defendant had been issued a CCL*." (St. Br. 9) (emphasis added).

This cannot be the case, for a number of reasons. **First**, by reading the UUW statute as encompassing any "fail[ure] to comply" with the FCCA's terms "regardless of whether defendant had been issued a CCL," the State overlooks that the FCCA *itself* explicitly provides for the prosecution and punishment of licensees who fail to comply with that statute's requirements. Specifically, the FCCA contains a section entitled "Violations," which states that "a licensee in violation of this Act shall be guilty of a Class B misdemeanor. A second or subsequent violation is a Class A misdemeanor." 430 ILCS 66/70(e) (2021). See *Levine v. UL LLC*, 2023 IL App (1st) 221845, ¶ 33 (the FCCA "does establish criminal culpability and punishment for a violation of its provisions. See 430 ILCS 66/70(e)."). So, for instance, if a licensee fails to present his CCL to police upon request during a traffic stop as required in 430 ILCS 66/10(h), that individual is subject to prosecution under 430 ILCS 66/70(e), rather than under the UUW statute. To make matters even clearer, the next subsection demonstrates the legislature's intent that any violation of the FCCA should be prosecuted and punished under 430 ILCS 66/70, and *not* under the UUW statute:

> A licensee convicted or found guilty of a violation of this Act who has a valid license and is otherwise eligible to carry a concealed firearm *shall only be subject to the penalties under this Section* and shall not be subject to the penalties under . . . paragraph (4), (8), or (10) of subsection (a) of Section 24-1[.]

430 ILCS 66/70(f) (2021) (emphasis added).

In short, the FCCA is a self-contained regulatory scheme that does not rely on prosecution through the UUW statute for its enforcement. The State's brief, which makes no mention whatsoever of the FCCA's "Violations" section, would render that statute's own enforcement mechanisms totally "inoperative." *Flynn*, 211 Ill.2d at 555; (St. Br. 7) (quoting *Flynn*).

Second, the FCCA's own language undercuts the State's position that UUW can be proven merely by showing that a concealed carrier failed to present a CCL during a traffic stop. Subsection 430 ILCS 66/40(e) plainly contemplates and allows that certain individuals—namely, nonresidents from states that require no permit to carry a firearm—may lawfully possess a concealed handgun inside a vehicle within Illinois without any CCL at all. That subsection provides:

> Nothing in this Act shall prohibit a non-resident from transporting a concealed firearm within his or her vehicle in Illinois, if the concealed firearm remains within his or her vehicle and the non-resident:
>
> (1) is not prohibited from owning or possessing a firearm under federal law;
>
> (2) is eligible to carry a firearm in public under the laws of his or her state or territory or residence, as evidenced by the possession of a concealed carry license or permit issued by his or her state of residence, if applicable; and
>
> (3) is not in possession of a license under this Act.

430 ILCS 66/40(e) (2021). In other words, the FCCA allows for non-residents who are traveling in Illinois to possess a concealed handgun inside their vehicle *without a CCL*, so long as their possession does not violate federal law and they are eligible to carry a firearm in public in their home state. See *Barnes v. Gibbons*, 2021 IL App (5th) 190415-U, ¶ 25 ("Nonresidents of Illinois that have an out-of-state permit may still be allowed to transport a concealed firearm within their vehicle in Illinois, if the concealed firearm remains within the vehicle of the nonresident. 430 ILCS 66/40(e) (West 2018).").[1]

As the Supreme Court has recently noted, a full half of the states in the

[1] Harvey cites to *Barnes* pursuant to Illinois Supreme Court Rule 23(e)(1). A copy of that order is attached hereto as an appendix.

Union are now "permitless carry" jurisdictions, where an adult need not obtain any permit from the state in order to carry a firearm in public. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen* , 597 U.S. 1, 13, n. 1 (2022). Consequently, residents of 25 states may come to Illinois and engage in the same conduct as Harvey (*i.e.* possessing a concealed handgun in a car while presenting no CCL at all) without violating the FCCA's own terms.

Incidentally, the State presented no evidence at trial to establish that Harvey was an Illinois resident. The reason is obvious: no party at trial believed the State could convicted Harvey of UUW by showing mere lack of compliance with the FCCA.

Obviously, Harvey stands convicted of UUW, not for a violation of the FCCA. Yet the State's reasoning collapses those two offenses into one. As Harvey will explain below, the Illinois Constitution does not tolerate such an outcome.

2. The State's reading of the UUW statute would lead to its invalidation under the proportionate penalties clause of the Illinois Constitution.

The State urges this Court to sustain Harvey's conviction for UUW, a Class A misdemeanor, based on proof that Harvey (1) publicly possessed a concealed firearm and (2) failed to produce a CCL during the traffic stop. 720 ILCS 5/24-1(b) (2021). Yet these are the same elements necessary to prove a violation of the FCCA under 430 ILCS 66/10(h) and 66/70(e), which is a Class B misdemeanor—leading inexorably to a proportionate penalties problem.

The proportionate penalties clause provides that "all penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, §11. It mandates that penalties be proportionate to the seriousness of the offense. *People v. Ligon*, 2016 IL 118023, ¶ 10. A penalty violates this clause if it is greater than

the sentence for an offense with identical elements. *Id.* "If the legislature determines that 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," and the greater penalty cannot stand. *People v. Hernandez*, 2016 IL 118672, ¶ 9; *People v. Clemons*, 2012 IL 107821, ¶ 30; *People v. Sharpe*, 216 Ill.2d 481, 522 (2005).

The FCCA imposes numerous requirements on a licensee, including (but not limited to): (1) "possess[ing] a license at all times the licensee carries a concealed firearm"; (2) disclosing, upon an officer's request during an investigative stop, that he is in possession of a concealed firearm, as well as the location of the concealed firearm; (3) presenting his CCL upon an officer's request during an investigative stop; and (4) permitting an investigating officer to "safely secure the firearm for the duration of the investigative stop." 430 ILCS 66/10(g), (h). Accordingly, a violation of the FCCA can be shown through proof that a licensee has failed to comply with any one of these requirements while carrying a concealed handgun.

If the State's position were accepted, then an accused who—like Harvey—possesses a concealed handgun while failing to comply with any one of the FCCA's requirements would be guilty of both UUW under section 24-1(a)(10) *and* a violation of the FCCA under 430 ILCS 66/70(e). In fact, the State declares the same openly: "When defendant possessed an accessible, loaded, uncased gun in a vehicle in public, without producing a CCL at a traffic stop, he did not comply with the Firearm Concealed Carry Act *and* violated the UUW statute." (St. Br. 10) (emphasis added); see also (St. Br. 14) ("[T]he failure to *produce* the CCL is itself a violation of the UUW statute."). These two offenses possess different classifications with different sentencing ranges. 730 ILCS 5/5-4.5-55 (2021) (Class A misdemeanor punishable by imprisonment less than one year); 730 ILCS 5/5-4.5-60

(2021) (Class B misdemeanor punishable by imprisonment not more than 6 months). Accordingly, the State's reading would lead to subsection 24-1(a)(10)'s invalidation under the proportionate penalties clause. *Hernandez*, 2016 IL 118672, ¶ 9; *Clemons*, 2012 IL 107821, ¶ 30.

3. The statutory exemption at 720 ILCS 5/24-2(a-5), which would require a CCL holder to prove they are licensed to carry a concealed weapon, has no practical application and is incompatible with the Second Amendment.

In this case, the fact-proposition that was necessary to make Harvey's possession of the concealed handgun illegal under the UUW statute was his not having been issued a currently valid CCL. 720 ILCS 24-1(a)(10)(iv). In his opening brief, Harvey outlined how, in light of *Bruen*, due process required the State to prove that fact-proposition, notwithstanding the exemption found at 720 ILCS 5/24-2(a-5). (Deft. Br. 10-15); see *Commonwealth v. Guardado*, 491 Mass. 666, 668 (2023) ("[I]n order to convict a defendant of unlawful possession of a firearm, due process requires the Commonwealth prove beyond a reasonable doubt that a defendant did not have a valid firearms license.").

To the State's mind, however, the (a-5) exemption is an essential component of the UUW statute, as it allows CCL holders to escape criminal liability for violations of the FCCA. The State proposes that, since subsection 24-1(a)(10) embraces all violations of the FCCA, someone who is prosecuted under that subsection may use the exemption to affirmatively prove his licensure, and thereby avoid conviction. (St. Br. 10-11). But the legislature did not enact the exemption to excuse violations of the FCCA, because it never envisioned mere FCCA violations would be prosecuted under the UUW statute. Rather, as explained above, the legislature included within the FCCA the precise manner for prosecuting and

punishing violations of its own terms by licensees. See p. 8, *supra*. The (a-5) exemption has no application to a prosecution under section 70 of the FCCA.

Whereas section 70 provides teeth for enforcing the FCCA's specific requirements against licensees, subsection 24-1(a)(10) of the UUW statute serves the distinct purpose of ensuring that public carry in Illinois is limited to the possession of concealed handguns by those with a valid CCL. It does so by specifically providing the exception in subparagraph (iv), which, the parties agree, the State must disprove beyond a reasonable doubt. (St. Br. 8-9).

The exemption at subsection 24-2(a-5), on the other hand, anomalously reverses that burden of proof, demanding that the defendant prove that he was "carrying a concealed pistol, revolver, or handgun" and that he "has been issued a currently valid license" under the FCCA. See 720 ILCS 5/24-2(h) (2021); *People v. Fields*, 2014 IL App (1st) 130209, ¶ 37 (defendant must prove exemption under 720 ILCS 5/24-2 by preponderance of the evidence). Yet upon examination, each element of the (a-5) exemption is duplicative of the (iv) exception that the State has to disprove beyond a reasonable doubt. In other words, in a proper prosecution for UUW under subsection 24-1(a)(10), by the time the defendant avails himself of the (a-5) exemption, the State will necessarily have already disproved the (iv) exception with proof that the defendant either (1) openly carried a firearm in public, (2) carried a non-handgun firearm in public, or (3) had not been issued a currently valid CCL. See pp. 3-6, *supra*. It would be impossible, then, for any defendant to affirmatively prove the exemption, where doing so would require the defendant to negate what the State has already proven beyond a reasonable doubt. This is why the (a-5) exemption has no practical application, to this or any other case.

The State points out that Harvey's reading renders the (a-5) exemption

superfluous. (St. Br. 10-11). To be blunt, superfluousness is the least of the exemption's problems, for it is facially unconstitutional under *Bruen*. As the State acknowledges, the defendant bears the burden of proving any exemption to the UUW statute. 720 ILCS 5/24-2(h); (St. Br. 10). Since "the Second Amendment's plain text covers" the conduct described in the (a-5) exemption, "the Constitution presumptively protects that conduct." *Bruen*, 597 U.S. at 24.[2] More to the point, the (a-5) exemption describes the *only* type of public carriage of firearms permitted for a private citizen in Illinois: the concealed carry of a handgun by a person who has been issued a valid CCL.

Since Illinois has limited the exercise of the Second Amendment right in this manner, it cannot then foist upon a defendant the burden to prove that he is entitled to engage in conduct that "the Constitution presumptively protects." *Id.*; *Guardado*, 491 Mass. at 669; (Deft. Br. 13). Yet that is precisely how this exemption operates. Subsection 24-2(a-5) cannot be distinguished from the affirmative defense that was invalidated under *Bruen* by the Massachusetts Supreme Judicial Court. See *Guardado*, 491 Mass. at 690 ("We therefore conclude that the absence of a license is an essential element of the offense of unlawful possession of a firearm . . . . [The statute], which provides that licensure is an affirmative

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[2] Though the State characterizes Harvey's reading of *Bruen* as establishing an "evidentiary 'presumption'" (St. Br. 15, 17), Harvey's opening brief makes no mention of any evidentiary presumption. *Bruen*'s explicit holding, however, is as follows: "[W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution *presumptively protects* that conduct." 597 U.S. at 17, 24 (emphasis added). Since the Court further stated, "[t]he Second Amendment's plain text *presumptively guarantees* petitioners . . . a right to 'bear' arms in public for self-defense," Harvey relies on that language to submit that the State bears the burden of proving his lack of licensure under the FCCA. *Id.* at 33 (emphasis added).

defense, is no longer applicable[.]"). Where, as here, the only fact that could transform Harvey's conduct into a violation of the UUW statute was his lack of a currently valid CCL, the State had to prove that fact beyond a reasonable doubt. Until its brief before this Court, the State had wisely chosen to forgo reliance on the (a-5) exemption, for good reason. (St. App. Br. 5, 15).

Harvey reiterates that the State's present position seeks to import into the UUW statute all of the discrete requirements of the FCCA, including the requirements that a licensee "possess a license at all times the licensee carries a concealed firearm" and "present the license upon request of the officer" during a traffic stop. 430 ILCS 66/10(g), (h); (St. Br. 9). To the extent that, in so doing, the State attempts—for the first time before this Court—to substitute a conviction under Section 430 ILCS 66/70 for the UUW conviction actually under review, such a tack is plainly foreclosed by Harvey's right to due process. See *Jackson v. Virginia*, 443 U.S. 307, 314 (1979) ("It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process."); *Cole v. State of Ark.*, 333 U.S. 196, 201 (1948) ("It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.").

4. Conclusion.

As the preceding pages demonstrate, the State's tortured reading of the UUW statute gives rise to far more problems than it solves. Harvey, on the other hand, simply submits that the State was required to prove that he had not been issued a currently valid CCL—a position that honors the respective legislative intents behind the UUW statute and the FCCA, and reads those laws in a harmonious and complementary fashion. Under Harvey's interpretation, Section

70 of the FCCA is given proper force to deal with violations of that statute's requirements, while the UUW statute maintains Illinois' limitations on the public carry of firearms to concealed handguns by properly licensed individuals. Most importantly, Harvey's position does so in a manner that accords with the Proportionate Penalties clause of the Illinois Constitution, as well as the Due Process Clause and the Second Amendment of the Federal Constitution. And although the (a-5) exemption cannot stand in light of *Bruen*—a fatality that necessarily lies at the feet of the Second Amendment—its invalidation has no practical impact because the State already bore the burden of disproving the (iv) exception beyond a reasonable doubt. (St. Br. 9).

C. The State must not merely show that Harvey did not possess a CCL at his arrest, but rather that he had not been issued a currently valid CCL—a burden that the State failed to meet in this case.

Next, the State argues that, if it bore the burden to prove that Harvey had not been issued a valid CCL, "the People's evidence sufficed" because "a rational factfinder could conclude, based on defendant's admission that he lacked a concealed carry license, that he had not been issued a CCL." (St. Br. 23).

In taking this position, the State contradicts the entirety of its preceding argument, wherein it had insisted that it did not need to disprove Harvey's licensure because his one-word admission"proved that defendant *failed to produce a concealed carry license at the traffic stop*." (St. Br. 6) (emphasis added). Now, the State asks this Court to construe that one-word admission, not merely as the "failure to produce" a CCL, but as proof beyond a reasonable doubt that Harvey had not been issued a valid CCL altogether. (St. Br. 23-24). The State cannot have it both ways.

By way of reminder, the police asked Harvey at the traffic stop if he "had a FOID or a CCL," and Harvey replied, "No." (Supp.3R. 53-54, 63). Officer Baciu

immediately clarified that Harvey's answer meant that he did not "[p]ossess either one." (Supp.3R. 54). This was the **entirety** of the State's evidence on the lack of licensure element. (Deft. Br. 20-21).

Since this evidence merely establishes that Harvey did not possess a CCL at the time of the traffic stop, the State's argument runs headlong into this Court's decision in *People v. Holmes*, 241 Ill.2d 509 (2011); (Deft. Br. 19-20). *Holmes* held that, in order to prove that "the person possessing the firearm has not been issued a currently valid Firearm Owner's Identification Card"—a necessary element of aggravated UUW ("AUUW") under 720 ILCS 5/24-1.6(a)(1), (3)(C) (2004)—the State could not carry its burden by merely showing that the defendant "did not have his Indiana permit in his possession at the time of his arrest." *Holmes*, 241 Ill.2d at 521-22. Rather, the statute under which the defendant was prosecuted "only contemplates that a FOID card has been issued to that individual. There is no requirement in the unlawful use of weapons statute that an individual have his or her FOID card or other similar permit in his or her possession." *Id.*, at 522. Courts have correctly applied *Holmes* to reverse AUUW convictions based on evidence that the accused "did not present a FOID card following his arrest, but the State presented no evidence that the respondent had not been issued a FOID card." *In re Manuel M.*, 2017 IL App (1st) 162381, ¶ 15; *In re Gabriel W.*, 2017 IL App (1st) 172120, ¶ 3 (same). When assessing the sufficiency of the evidence against Harvey, the State does not address *Holmes*, *Manuel M.*, or *Gabriel W.*[3]

Instead, the State asserts that "it was reasonable to infer from defendant's

[3] The State discusses *Holmes, Manuel M.,* and *Gabriel W.* earlier in its brief when insisting that all it had to prove was that Harvey "failed to produce a CCL" during the traffic stop. (St. Br. 12-14)

failure to produce a CCL or tell people that he had one, that he did not have a CCL." (St. Br. 26) However, an essential element of proof—here, Harvey's lack of licensure under the FCCA—"cannot be inferred but must be established." *People v. Murray*, 2019 IL 123289, ¶ 36 (citing *People v. Mosby*, 25 Ill.2d 400, 403 (1962)). Nothing at Harvey's trial **established** that he had not been issued a valid CCL.

As Harvey explained in his opening brief, the State has demonstrated in many other cases that it can readily prove an individual has not been issued a currently valid CCL. (Deft. Br. 16-17). In response, the State complains that using the Illinois State Police database to prove lack of licensure would "impose an untenable, and unnecessary, burden on the People." (St. Br. 24-25). First, Harvey disagrees that requiring the State to satisfy this burden is difficult. As explained previously, the FCCA requires the ISP to maintain a searchable database of all CCL holders, and to make that database available to all law enforcement agencies, including prosecutor's offices. (Deft. Br. 16-17). Notably, the State does not suggest that engaging in a simple database search would prove unworkable or burdensome.

Instead, the State complains that Confrontation Clause concerns would "seemingly require the People to produce a live witness in every case to prove a lack of licensure[.]" (St. Br. 25). First, that contention ignores the realities of real-world litigation. In any case where a search of the ISP database affirmatively shows that the defendant has not been issued a valid CCL, those results will be turned over in discovery to the defendant, who will in all likelihood stipulate to that fact, or at least to the proper foundation for the admission of the ISP records. See, *e.g.*, *People v. Sutton*, 2020 IL App (1st) 181616, ¶ 13 ("The parties further stipulated that defendant had not been issued a valid FOID card or a concealed carry license as of April 22, 2017."); *People v. Sapp*, 2022 IL App (1st) 200436,

¶ 24 (same); *People v. Wallace,* 2023 IL App (1st) 200917, ¶ 12 (parties "stipulated to . . . records revealing that defendant did not possess a FOID card or a concealed carry license"); *People v. Spain*, 2019 IL App (1st) 163184, ¶ 15 (same); *People v. Edwards*, 2020 IL App (1st) 182245, ¶ 16 (parties stipulated that, at relevant time, defendant had valid FOID card, but did not have a valid CCL).

But even if a stubborn defendant were to insist that the State present a live witness to prove that he had not been issued a currently valid CCL, that is hardly a radical proposition. The Constitution does not exist solely to promote ease in the State's prosecution of crime; to the contrary, the rights guaranteed by the Constitution typically make prosecuting more difficult. So it goes. As the *Guardado* court stated when faced with the same argument:

> The Commonwealth's burden of proving the essential element of a crime cannot be altered because of any difficulty the Commonwealth may have in proving the element as compared to the relative ease with which the defendant could prove its negative.

Guardado, 491 Mass. at 692 (citation omitted). The State cannot shirk its obligation to prove every element of the offense just because doing so is inconvenient. Its failure to prove that Harvey had not been issued a valid CCL requires reversal.

D. Alternatively, the State failed to prove the *corpus delicti* of the offense, where the only evidence that Harvey lacked a valid concealed carry license was his own statement.

Nor was Harvey's one-word admission sufficiently corroborated to satisfy the *corpus delicti* rule. (Deft. Br. 23-26). The State only makes passing reference to the "furtive movements" attributed to Harvey—tacit recognition that those movements corroborated nothing. (St. Br. 25-26). Instead, the State focuses primarily, not on what evidence was adduced at trial to corroborate the admission, but on what the State believes Harvey *would have done* had he been licensed:

> *Had* defendant been issued a [CCL], *he would have* complied with the Firearm Concealed Carry Act by carrying and producing his CCL at the traffic stop. At the very least, *he would have* told Officer Baciu that he had been issued a CCL that he was not carrying when he was stopped.

(St. Br. 26) (emphases added). By suggesting that the corroboration requirement can be satisfied by a counterfactual (*i.e.*, what a CCL holder would have done) rather than what the trial evidence actually showed, the State asks this Court to apply a radically new negligence standard to the *corpus delicti* inquiry. See *People v. Cloutier*, 156 Ill.2d 483, 503 (1993) ("[T]he prosecution must also adduce corroborating evidence independent of a defendant's own statement."); *People v. Sargent*, 239 Ill.2d 166,187 (2010) (reversing convictions where "there was no actual corroboration" for defendant's statements); *People v. Richmond*, 341 Ill.App.3d 39, 46 (1st Dist. 2003) (*corpus delicti* rule requires corrboration, not speculation). This Court should reject the State's overture.

Here, even if Harvey's one-word admission somehow proved that he had not been issued a currently valid CCL, the trial evidence does not corroborate that admission. Accordingly, Harvey's conviction for UUW must be reversed.

CONCLUSION

For the foregoing reasons, Anthony Harvey, Defendant-Appellant, respectfully requests that this Court reverse his conviction for unlawful use of a weapon.

Respectfully submitted,

DOUGLAS R. HOFF
Deputy Defender

PHILIP D. PAYNE
Assistant Appellate Defender

COUNSEL FOR DEFENDANT-APPELLANT

CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 20 pages.

/s/Philip D. Payne
PHILIP D. PAYNE
Assistant Appellate Defender

APPENDIX TO THE REPLY BRIEF

Anthony Harvey, No. 129357

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CYNTHIA A. GRANT
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2021 IL App (5th) 190415-U

NO. 5-19-0415

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

DIAMOND BARNES, Plaintiff-Appellant, v. THOMAS GIBBONS, Madison County State's Attorney, Defendant-Appellee.	)	Appeal from the Circuit Court of Madison County. No. 19-L-605 Honorable David W. Dugan, Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justices Moore and Wharton concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted the defendant's motion to dismiss where the plaintiff could not establish a contractual relationship with the defendant, the claim was barred by the collateral attack doctrine, and the defendant had absolute immunity from claims brought by the plaintiff. The trial court properly dismissed the plaintiff's motion for default judgment and did not abuse its discretion when it denied the plaintiff's request to appear in person.

¶ 2 The plaintiff, Diamond Barnes, appeals from an order of the circuit court dismissing his breach of contract complaint against the defendant, Thomas Gibbons (Gibbons), in his capacity as State's Attorney of Madison County, Illinois. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On April 23, 2019, the plaintiff filed a 30-count complaint alleging a breach of contract action against Gibbons, in his capacity as the Madison County State's Attorney. The contract action arose following the plaintiff's conviction for first degree murder in 2009 in the circuit court of Madison County. In that case, the plaintiff was in attendance at a family gathering in Alton, Illinois, when he shot and killed the husband of his grandmother's caretaker with a 9-millimeter handgun. The plaintiff owned the handgun, and he had a permit to carry the weapon, which had been issued by the State of Virginia. The trial judge, sitting as the factfinder in the murder case, rejected plaintiff's claim of self-defense. The plaintiff was convicted of first degree murder and sentenced to 45 years in prison. His conviction was later affirmed on appeal. *People v. Barnes*, 2012 IL App (5th) 110246-U.

¶ 5 In his complaint, the plaintiff repeatedly asserted that Gibbons, in his investigative capacity as a prosecutor in the murder case, breached the existence of a valid and enforceable written contract. The alleged written contract was the permit issued by the State of Virginia that allowed the plaintiff to carry and lawfully conceal his 9-millimeter handgun, the handgun that plaintiff used to commit first degree murder. Attached to the complaint was a letter from the Virginia Beach Circuit Clerk's Office certifying that on August 29, 2007, the plaintiff was issued a five-year permit to carry a concealed handgun, with an expiration date of August 29, 2012. The plaintiff further alleged in his complaint that he incurred a loss of liberty and claimed damages for loss of income. Each count of the complaint alleged, essentially, the same claim, but relied upon differing dates that the

Madison County State's Attorney's office had worked on the plaintiff's murder case. In each of the 30 counts, the plaintiff sought $820,000 in damages due to "loss of income," for a total of $24.6 million.

¶ 6 On June 13, 2019, Gibbons entered his appearance and filed a motion for extension of time to file a responsive pleading. Gibbons asserted that additional time was necessary due to the 45-page complaint being "largely unintelligible," and additional time was necessary to decipher the allegations and claims. On June 17, 2019, the court granted the motion, and Gibbons was given until July 15, 2019, to file a response to the plaintiff's complaint.

¶ 7 On June 18, 2019, the circuit clerk's office filed the plaintiff's motion for default judgment against Gibbons.[1] The plaintiff claimed that more than 30 days had expired from the time Gibbons was served and Gibbons had failed to appear, answer, or otherwise defend against the plaintiff's pleading. The plaintiff filed a second motion for default judgment on July 10, 2019. A return of summons was attached as an exhibit. In the return of summons, there were two dates appearing following the signature of the process server. The first was May 10, 2019. Directly beneath that date was a second date, May 29, 2019, along with a handwritten notation that appeared to be the name of the defendant's secretary. Gibbons filed a response in opposition to the plaintiff's motion for default judgment. Therein, Gibbons argued that the trial court granted an extension of time, and his responsive pleading was filed in accordance with the court order.

[1]The plaintiff signed his pleading on June 13, 2019, but it was received in the circuit clerk's office on June 18, 2019.

¶ 8 In the meantime, on July 15, 2019, Gibbons also filed a motion to dismiss the plaintiff's complaint under section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2018)), along with a supporting memorandum. In his motion, Gibbons asserted that a breach of contract action could not be maintained because the plaintiff could not establish the existence of a valid and binding contract between the plaintiff and Gibbons; the plaintiff's claims were barred by the collateral attack doctrine; and Gibbon's actions were immune from suit because the defendant was acting within the scope of his prosecutorial duties. Gibbons also alleged, in the alternative, that the complaint should be dismissed under section 2-606 of the Code (735 ILCS 5/2-606 (West 2018)), because the plaintiff failed to attach a written contract to the complaint. Additionally, Gibbons claimed that the plaintiff's complaint was insufficient because it only alleged legal conclusions, and the plaintiff did not allege specific facts to support his claims.

¶ 9 The plaintiff argued in his response to the motion to dismiss that the breach of contract claim was sufficiently pled, and it was not necessary for Gibbons to be a party to the contract to breach the contract. Additionally, he argued that prosecutorial immunity did not apply to the plaintiff's breach of contract claim. The plaintiff claimed that the defendant's actions were "investigative" and "administrative" and that the conceal and carry permit issued in Virginia was not disclosed during the plaintiff's criminal proceeding. The plaintiff further asserted that his complaint should have been construed as a common law breach of contract action and that it was not a civil rights action under 42 U.S.C.A. § 1983; therefore, the collateral attack doctrine should not be applicable. The plaintiff also included a draft of a writ of *habeas corpus ad prosequendum* with his response to the

motion to dismiss but did not file an additional pleading to request an appearance at the motion hearing.

¶ 10 On August 12, 2019, after reviewing the motions and responses, the trial court entered an order denying the plaintiff's motion for default judgment. The August 12, 2019, order also gave the parties 21 days to file a proposed order with the trial court in regard to the defendant's motion to dismiss. Additionally, the court denied the writ to transport the plaintiff to the courthouse for a motion hearing.

¶ 11 The plaintiff offered a proposed order in support of his position to deny the defendant's motion to dismiss. The plaintiff also filed an additional pleading, arguing that Gibbons was a third-party beneficiary to a contract formed between the plaintiff and the State of Virginia. Gibbons, on the other hand, did not file a proposed order and relied on his pleadings on file.

¶ 12 On September 3, 2019, the trial court entered a written order, granting Gibbons' motion to dismiss the plaintiff's complaint, with prejudice, pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2018)). The order included the court's findings and analysis. Initially, the trial court found that the plaintiff had failed to allege the existence of a valid and enforceable contract between the plaintiff and Gibbons because Gibbons was not a party to the contract. In its findings, the trial court also considered the argument that the plaintiff's concealed handgun permit created contractual rights. In that regard, the trial court determined that if there was a valid contract, the contract would be between the plaintiff and the State of Virginia. The trial court found that "Gibbons [was] simply not a

party to any agreement between Barnes and the State of Virginia and cannot, therefore, be held liable under the theory of breach of contract."

¶ 13 The trial court next considered the plaintiff's claims that Gibbons had violated the plaintiff's constitutional rights, causing injury to the plaintiff in the form of loss of liberty and lost economic damages. The plaintiff alleged that Gibbons violated the contracts clause of the United States Constitution and Illinois Constitution; the plaintiff also claimed that his second amendment right to bear arms was violated. The trial court construed these claims as asserting civil rights violations under 42 U.S.C. § 1983. For instance, the plaintiff asserted that the investigation into his criminal conduct "lacked probable cause" and he was indicted, arraigned, and unlawfully convicted resulting in his loss of liberty. Additionally, the trial court considered the claims that Gibbons' investigation breached the contract between the plaintiff and the State of Virginia resulting in "injury incurred via 'loss of liberty' " as a civil rights violation. The trial court found that the case of *Heck v. Humphrey*, 512 U.S. 477 (1994), and the collateral attack doctrine was dispositive of the plaintiff's claims. Specifically, since the plaintiff's murder conviction had not been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal, or called into question by a federal court's issuance of a writ of *habeas corpus*, the plaintiff had no cause of action under 42 U.S.C. § 1983.

¶ 14 The trial court additionally found that the actions by Gibbons were protected by prosecutorial immunity. Specifically, the alleged actions occurred while his office was protected by absolute immunity.

¶ 15 The plaintiff then filed a petition for relief from judgment pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2018)) and a postjudgment motion. The court treated the plaintiff's pleadings as motions to reconsider and, after reviewing the pleadings, denied them. This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 The plaintiff, acting *pro se*, raises 13 points on appeal. In considering his claims, he essentially asserted that the trial court erred in its decision to grant the motion to dismiss his complaint, deny his motion for default judgment, and deny his request to appear in person for the motion hearings

¶ 18 Initially, we note that the arguments by Gibbons, in his motion to dismiss and on appeal, focused on the dismissal of the plaintiff's complaint under section 2-619. 735 ILCS 5/2-619 (West 2018). Gibbons also, however, raised issue with the contents of the *pro se* plaintiff's pleading under section 2-615 and argued that the plaintiff must allege facts, not conclusions, sufficient to bring a claim within a legally recognized cause of action. 735 ILCS 5/2-615 (West 2018). The standard of review for a dismissal under section 2-615 or 2-619 is *de novo*. *Neppl v. Murphy*, 316 Ill. App. 3d 581, 583-84 (2000).

¶ 19 The trial court granted the defendant's motion to dismiss pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2018)). The purpose of section 2-619 is to provide litigants with a method to dispose of issues of law and easily proven issues of fact early in the case, even before discovery has commenced. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003); 735 ILCS 5/2-619 (West 2018). A motion for involuntary dismissal under section 2-619 admits the legal sufficiency of the plaintiff's claim but asserts that

there is an affirmative matter that defeats the claim outside of the complaint. *Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008); 735 ILCS 5/2-619(a)(9) (West 2018). "The term 'affirmative matter' *** has been defined as a type of defense that either negates an alleged cause of action completely or refutes crucial conclusions of law or conclusions of material fact unsupported by allegations of specific fact contained in or inferred from the complaint." *Neppl*, 316 Ill. App. 3d at 585.

¶ 20 A. Motion to Dismiss

¶ 21 In each count of the plaintiff's complaint, he alleged that Gibbons, by prosecuting the plaintiff for first degree murder, breached a contract that the plaintiff had entered into with the State of Virginia, which allowed him to carry a concealed weapon. In general, contract law is based on a voluntary agreement between parties and any damages awarded are based on the mutual expectations of the parties. *Collins v. Reynard*, 154 Ill. 2d 48, 51 (1992). Without mutual assent, there is no contract. *Catholic Charities of the Archdiocese of Chicago v. Thorpe*, 318 Ill. App. 3d 304, 307 (2000).

¶ 22 To maintain a breach of contract claim, a plaintiff must allege and prove the existence of a valid and enforceable contract, a plaintiff's performance, a defendant's breach, and a plaintiff's injury. *Henderson-Smith & Associates, Inc. v. Nahamani Family Service Center, Inc*., 323 Ill. App. 3d 15, 27 (2001). Neither the permit itself nor any written contract was attached to the plaintiff's complaint, as required by section 2-606 of the Code (735 ILCS 5/2-606 (West 2018)). The plaintiff only provided, and relied upon, a letter from the circuit court of Virginia Beach, Virginia, that certified the existence of the plaintiff's handgun permit issued by the State of Virginia.

¶ 23 The plaintiff admitted that Gibbons was a nonparty to the contract between the plaintiff and the State of Virginia. A nonparty to a contract cannot be held liable for breach of contract. *Meeker v. Gray*, 142 Ill. App. 3d 717, 727-28 (1986). Nevertheless, the plaintiff argued that it did not matter if Gibbons was a party to the contract because Gibbons "breached the existence" of his permit issued in Virginia. The plaintiff relied on and misinterpreted the case of *Green v. Biddle*, 21 U.S. 1 (1823), to argue that nonparties to a contract may be subject to liability. Contrary to the plaintiff's argument, *Green* considered a contract as "the agreement of two or more parties, to do, or not to do, certain acts." *Green*, 21 U.S. at 92.

¶ 24 The plaintiff additionally made a claim that Gibbons was a third-party beneficiary to the permit issued by the State of Virginia. The parties to a contract must expressly intend for a beneficiary to receive a benefit under the contract for there to be liability to a third party. *Hacker v. Shelter Insurance Co.*, 388 Ill. App. 3d 386, 394 (2009). Here, the plaintiff alluded to Gibbons as having a "stake in the outcome," but did not provide a contract or assert a benefit that Gibbons purportedly received.

¶ 25 And contrary to the assertions by the plaintiff regarding the rights under the Virginia permit, pursuant to section 40 of the Illinois Firearm Concealed Carry Act (Concealed Carry Act) (430 ILCS 66/40 (West 2018)), Illinois law requires nonresidents to apply for an Illinois license to carry a concealed handgun, regardless of if they are licensed out of state. Nonresidents of Illinois that have an out-of-state permit may still be allowed to transport a concealed firearm within their vehicle in Illinois, if the concealed firearm remains within the vehicle of the nonresident. 430 ILCS 66/40(e) (West 2018). In the

underlying facts of the murder case, the firearm did not remain in the plaintiff's car. The plaintiff's reliance on a permit with the State of Virginia had no impact on, or benefit for, Gibbons when the Illinois Concealed Carry Act had its own permitting requirements for a license to carry a concealed handgun. Accordingly, the plaintiff has not shown that the defendant is a third-party beneficiary under the plaintiff's alleged contract with the State of Virginia.

¶ 26 While considering the breach of contract claim, the trial court also considered the plaintiff's claims under 42 U.S.C. § 1983 as an assertion of civil rights violations. Section 1983 provides a cause of action against any person who deprives an individual of federally guaranteed rights under color of state law. 42 U.S.C. § 1983 (2018). The plaintiff denied raising a cause of action for a civil rights violation under 42 U.S.C. § 1983. However, in the plaintiff's complaint, he alleged that Gibbons violated the contracts clauses of the United States and Illinois Constitutions by interfering with the plaintiff's contract with the State of Virginia that allowed him to carry a concealed weapon. Additionally, the plaintiff's complaint asserted a violation of his second amendment right to bear arms. And, each count pled by the plaintiff sought damages for his loss of liberty.

¶ 27 The trial court also considered whether the claims filed by the plaintiff were a collateral attack on his murder conviction or his sentencing. In *Heck v. Humphrey*, the United States Supreme Court considered the effect of filing a case to recover damages in a section 1983 claim and stated:

> "We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a

> § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983." (Emphasis in original.) *Heck*, 512 U.S. at 486-87.

¶ 28 For damages to be awarded against Gibbons based on loss of liberty, the court would had to have found that the plaintiff's conviction was invalid based on the actions by the prosecutor. A prisoner has no cause of action under section 1983 unless and until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of *habeas corpus*. *Heck*, 512 U.S. at 489. The plaintiff filed his complaint while incarcerated and his complaint did not allege that his sentence was reversed, expunged, invalidated, or impugned by the grant of a writ of *habeas corpus*. Since the plaintiff argued that Gibbons violated the plaintiff's constitutional rights that caused injury in the form of loss of liberty and lost economic damages, we agree that the plaintiff alleged civil rights violations in his complaint. The trial court did not err in granting the motion to dismiss when it construed the plaintiff's claims in the context of a section 1983 action and found that the plaintiff's complaint was a collateral attack on the plaintiff's murder conviction.

¶ 29 Furthermore, government officials, such as Gibbons, sued in their individual capacities for civil rights violations can be entitled to either qualified or absolute immunity from damages. *Filarsky v. Delia*, 566 U.S. 377, 390 (2012). The purpose behind either form of immunity is to ensure that the government officials are able to perform their public duties without being in fear of being sued for damages. *Filarsky*, 566 U.S. at 390. The defendant in this action was sued after his office prosecuted the plaintiff for first degree

murder. The burden to prove that immunity exists is on the party seeking the immunity. *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993).

¶ 30 The defendant's office prosecuted the plaintiff in his murder trial. Prosecutors acting within the scope of their prosecutorial duties performing traditional functions of an advocate are afforded absolute immunity. *White v. City of Chicago*, 369 Ill. App. 3d 765, 769 (2006). The immunity is broad and covers most aspects of the prosecutor's duties, including decisions about whether to prosecute an individual and actions carried out during the judicial process. *Van de Kamp v. Goldstein*, 555 U.S. 336, 343 (2009). If prosecutors are not acting in their role as an advocate, qualified immunity can apply to activities such as acting as a complaining witness or providing a supporting affidavit to establish probable cause for an arrest. *Malley v. Briggs*, 475 U.S. 335, 340-41 (1986). In an attempt to claim that absolute immunity did not apply to Gibbons or the prosecutors in his office, the plaintiff argued that the actions by the prosecutor were "investigative" or "administrative." The plaintiff's use of the terms "investigative" and "administrative" is misplaced. For example, the first "investigative" action alleged by the plaintiff occurred on May 4, 2009, when the information containing the charges was filed by the defendant's office against the plaintiff. A prosecutor's preparation and filing of an information against the defendant and the issuance of a motion for an arrest warrant are protected by absolute immunity as those actions are functions of an advocate. *Kalina v. Fletcher*, 522 U.S. 118, 128 (1997). The plaintiff additionally mischaracterized the providing of, and responding to, discovery requests in the criminal case as "administrative" actions. This argument is also unavailing. The allegations in the complaint by the defendant all occurred while the defendant was

acting as an advocate to prosecute the plaintiff in the murder trial; therefore, the defendant had absolute immunity against the plaintiff's claims.

¶ 31 B. Default Judgment

¶ 32 We turn next to the plaintiff's contention that the trial court abused its discretion in denying the plaintiff's motion for default judgment. The plaintiff asserted that Gibbons was four days past the deadline to appear and that, as a result of the delay, a $24.6 million judgment should have issued in the plaintiff's favor, by default. The trial court's order denying the motion for default judgment stated that it gave due consideration to the motion and response.

¶ 33 In deciding whether to grant or deny a default judgment, the overriding consideration is "whether substantial justice is being done" between the parties and whether it is reasonable under the facts to compel the parties to trial. *Walker v. Monreal*, 2017 IL App (3d) 150055, ¶ 28. Additionally, a default judgment is one of the most drastic sanctions, and it should be used as a last resort. *Wollschlager v. Sundstrand Corp.*, 143 Ill. App. 3d 347, 349 (1986). Decisions by the trial court to grant or deny a motion for default judgment will be reversed only for if there is an abuse of discretion. *Walker*, 2017 IL App (3d) 150055, ¶ 28. In *Walker*, even though the plaintiff filed two motions for default and the defendant failed to file an answer within the extension of time provided, the trial court's decision to deny a motion for default judgment was affirmed because substantial justice would not have been accomplished by granting a default motion where the complaint failed to state claim. *Walker*, 2017 IL App (3d) 150055, ¶¶ 7, 28.

¶ 34 The trial court may enter a default judgment for want of an appearance or a failure to plead. 735 ILCS 5/2-1301(d) (West 2018). When the summons requires an appearance within 30 days, an answer or appropriate motion shall be filed on or before the last day on which he or she was required to appear. Ill. S. Ct. R. 181 (eff. Jan. 1, 2018). The service date in the record is not clear because the return of service had two dates, May 10, 2019, and May 29, 2019. If service was effectuated on May 29, 2019, then the defendant would have entered his appearance within 30 days of service.

¶ 35 Even if the plaintiff had clearly demonstrated that the defendant was served on May 10, 2019, a motion for default judgment is not automatically entered after the 30-day period to appear expires since the trial court has discretion to deny a motion for default judgment. *Wollschlager*, 143 Ill. App. 3d at 349. The trial court may also extend the time for filing any pleading required to be done within a limited period before or after the expiration of the time. Ill. S. Ct. R. 183 (eff. Feb. 16, 2011). In this case, the trial court entered an order allowing the defendant additional time to plead and the defendant filed a responsive pleading within the additional time period allowed by the court.

¶ 36 The trial court did not abuse its discretion in denying the plaintiff's motion for default judgment for a $24.6 million judgment. Gibbons timely filed his responsive pleading in response to the plaintiff’s complaint.

¶ 37 C. Denial of Request for Prisoner to Appear in Person

¶ 38 The plaintiff appealed the denial of a writ of *habeas corpus ad prosequendum*. A writ of *habeas corpus ad prosequendum*’s function is to secure the presence of a defendant in federal criminal cases for trial. *United States v. Mauro*, 436 U.S. 340, 341 (1978). The

trial court considered the blank writ filed without a supporting motion as a request to appear on a specific hearing date. The hearing date was vacated, and the court allowed for both parties to submit proposed orders before it eventually entered the final order based on the pleadings.

¶ 39 Prisoners are not free to attend trials in civil cases, even though they may be party to the proceedings. *In re Marriage of Allison*, 126 Ill. App. 3d 453 (1984). The trial court has discretion to grant prisoner relief that allows him to personally appear in a civil proceeding. *Beahringer v. Roberts*, 334 Ill. App. 3d 622, 629 (2002) (prison inmate was not denied effective access to the court, even though trial court denied inmate allowance to personally appear at hearing on defendants' motion to dismiss civil action brought by inmate, where trial court had discretion to deny this request, and trial court considered inmate's thorough written response). Some relevant considerations for the trial court to consider are whether the prisoner has showed a probability of success and whether testimony is needed. *In re Marriage of Allison*, 126 Ill. App. 3d at 459. In this case, the trial court reviewed the pleadings and allowed both parties to submit proposed orders in support of their pleadings. The plaintiff filed extensive pleadings and did not provide argument on what testimony he would have provided that would have potentially changed the outcome of the motion hearings had he been allowed to appear in person. The trial court did not abuse its discretion when it did not issue a writ for the plaintiff to appear in court.

¶ 40 III. CONCLUSION

¶ 41 For the reasons stated, we affirm the order of the trial court.

¶ 42 Affirmed.

No. 129357

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- ANTHONY HARVEY, Defendant-Appellant.	))))))))))	Appeal from the Appellate Court of Illinois, No. 1-21-1242. There on appeal from the Circuit Court of Cook County, Illinois , No. 21119172101. Honorable Robert Kuzas, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 115 S. LaSalle St., Chicago, IL 60603, eserve.criminalappeals@ilag.gov;

Ms. Kimberly M. Foxx, State's Attorney, Cook County State's Attorney Office, 300 Daley Center, Chicago, IL 60602, eserve.criminalappeals@cookcountysao.org;

Mr. Anthony Harvey, 201 Mason Ave., Chicago, IL 60644

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 April 3, 2024, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the Defendant-Appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

/s/Monica Rios
LEGAL SECRETARY
Office of the State Appellate Defender
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
Service via email is accepted at
1stdistrict.eserve@osad.state.il.us