No. 127443

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court Illinois, First Judicial District, No. 1-20-0912
Respondent-Appellee,	)	
v.	)	There on Appeal from Circuit Court of Cook County, Illinois, No. 06 CR 18368(1)
DEMETRIUS JOHNSON,	)	The Honorable LeRoy K. Martin, Jr., Judge Presiding
Petitioner-Appellant.	)	

BRIEF AND ARGUMENT FOR RESPONDENT-APPELLEE PEOPLE OF THE STATE OF ILLINOIS

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

KATHERINE M. DOERSCH
Criminal Appeals Division Chief

GARSON S. FISCHER
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(773) 590-6911
eserve.criminalappeals@ilag.gov

Attorneys for Respondent-Appellee People of the State of Illinois

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NATURE OF THE CASE

In 1992, petitioner, Demetrius Johnson, was convicted of murder and attempted murder. After he was released in 2004, petitioner was arrested with a firearm and charged with unlawful use of a weapon by a felon (UUWF). In 2019, he successfully petitioned to vacate his 1992 murder conviction[1] based on police misconduct. Petitioner then filed a petition for relief from judgment, *see* 735 ILCS 5/2-1401, arguing that because the murder conviction had been vacated, he was no longer a felon, and thus his UUWF conviction should be vacated as well.

Petitioner appeals from the Illinois Appellate Court's judgment affirming the dismissal of his petition for relief from judgment.

ISSUES PRESENTED

In *People v. McFadden*, 2016 IL 117424, this Court held that a defendant's conviction for UUWF remains valid unless the predicate felony conviction had been vacated prior to the defendant's possession of a weapon. *Id.* ¶ 31. In *In re N.G.*, 2018 IL 121939, the Court created a limited exception, applicable when the predicate offense derives from a statute subsequently declared *void ab initio*. *Id.* ¶ 73.

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[1] Petitioner's § 2-1401 petition sought relief from his murder conviction only, but the circuit court vacated both the murder and attempt murder convictions.

The issues presented here are:

(1) Whether this Court should respect *stare decisis* and reaffirm its holding in *McFadden* where no persuasive argument has been advanced for overturning *McFadden*'s "felon status" rule;

(2) Whether this Court should disregard, as dicta, *N.G.*'s discussion of *McFadden*, or at least decline to extend *N.G.* to UUWF convictions where the predicate offense derives from a valid statute;

(3) Whether prohibiting petitioner from possessing a firearm while a convicted felon did not violate his Second Amendment or due process rights; and

(4) Whether § 2-1401 does not permit a purely equitable remedy in the absence of a valid claim or defense.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 301, 303, and 315. This Court allowed petitioner leave to appeal on September 29, 2021. *People v. Johnson*, 447 Ill. Dec. 746 (2021) (Table).

STATUTORY PROVISION INVOLVED

§ 5/24-1.1. Unlawful use or possession of weapons by felons or persons in the custody of the Department of Corrections facilities.

> (a) It is unlawful for a person to knowingly possess on or about his person or on his land or in his own abode or fixed place of business any weapon prohibited under Section 24-1 of this Act or any firearm or any firearm ammunition if the person has been convicted of a felony under the laws of this State or any other jurisdiction.

720 ILCS 5/24-1.1.

STATEMENT OF FACTS

In 1992, petitioner was convicted of the murder of Edwin Fred and the attempted murder of Raul Ortiz and sentenced to 25 years in prison. C98.[2] Petitioner was released from prison in 2004, A2, and, two years later, he was arrested and charged with UUWF and six counts of aggravated unlawful use of a weapon (AUUW). C15-21. Officers who stopped petitioner for a traffic violation saw him put a chrome, .380 semi-automatic handgun in the vehicle's center console and arrested him. C23. After being advised of his right to remain silent, petitioner informed police that he "had the gun because [he] was messing around with a girl who has a boyfriend and [he]

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[2] Citations to petitioner's appendix, the common law record, the report of proceedings, and petitioner's opening brief appear as "A_," "C_," "R_," and "Pet. Br. __," respectively.

need[ed] some protection from him." *Id.* A subsequent review of petitioner's criminal history revealed his 1992 murder conviction. *Id.* The charges further alleged that petitioner did not have a Firearm Owners Identification (FOID) Card at the time. C17, 19, 21. On September 12, 2006, petitioner pleaded guilty to UUWF, the AUUW charges were nolle prossed, C395, 399, and he was sentenced to 3 years and 6 months in prison, C165.

On September 11, 2019, petitioner filed a § 2-1401 petition seeking to vacate the 1992 murder conviction, alleging police misconduct during the investigation. C167-93. Two months later, and with the agreement of the Cook County State's Attorney's Office, the circuit court granted petitioner's § 2-1401 petition and vacated his 1992 convictions. C374. The People then dismissed the charges against petitioner in the 1992 case. C396.

On January 30, 2020, petitioner filed a § 2-1401 petition seeking to vacate his 2006 UUWF conviction. Petitioner argued that because his murder conviction had been vacated, he was no longer a felon, and his UUWF conviction must be vacated, as well. C395-97. The People moved to dismiss the petition for failure to state a claim, C444-49, and on July 27, 2020, the circuit court granted the People's motion, R27-36. The court held that the predicate murder conviction, though vacated, "was not void, in as much as at

the time [petitioner] pled, his conviction was in effect and he was not eligible to have a firearm or possess a firearm at that time." R35-36.

On appeal, petitioner argued that when the predicate felony of a UUWF conviction is vacated in a manner that negates guilt, the UUWF conviction "should be vacated as a matter of law." A3. The People argued that a UUWF conviction should be vacated only when the predicate felony conviction is void because it was obtained under a statute later declared facially unconstitutional. *Id.* Relying on *McFadden* and *N.G.*, the appellate court agreed with the People and affirmed the judgment dismissing petitioner's § 2-1401 petition. A6-8.

ARGUMENT

I. Section 2-1401 and the Standard of Review

Section 2-1401 authorizes a trial court to vacate or modify a final judgment in both civil and criminal proceedings. *People v. Thompson,* 2015 IL 118151, ¶ 28. A § 2-1401 petition can present "either a factual or legal challenge to a final judgment or order." *Warren Cty. Soil & Water Conservation Dist. v. Walters*, 2015 IL 117783, ¶ 31. A motion to dismiss a § 2-1401 petition under 735 ILCS 5/2-615 tests the legal sufficiency of the petition. *Patrick Eng'g, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. "Under section 2-615, the critical question is whether the allegations in the

complaint, construed in the light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted." *Doe-3 v. McLean Cty. Unit Dist. No. 5 Bd. of Dir.*, 2012 IL 112479, ¶ 16.

Here, the circuit court found petitioner's § 2-1401 petition failed to state a cause of action as a matter of law. This Court reviews the dismissal of petitioner's § 2-1401 petition *de novo*. *People v. Carter*, 2015 IL 117709, ¶ 13. Similarly, matters of statutory interpretation, such as whether the relevant question under UUWF is the defendant's status as a convicted felon at the time he possessed a weapon, are also reviewed *de novo*. *See People v. Trzeciak*, 2013 IL 114491, ¶ 58. So, too, are petitioner's constitutional questions: whether UUWF, as applied to him, violates his Second Amendment or due process rights. *People v. Aguilar*, 2013 IL 112116, ¶ 15 (applying *de novo* review to Second Amendment challenge to statute); *People v. Hollins*, 2012 IL 112754, ¶ 13 (applying *de novo* review to substantive due process challenge to statute).

II. *McFadden*, Which Held That UUWF Is A Status Offense, Remains Good Law Following *N.G.*

Under this Court's holding in *McFadden*, in determining a defendant's guilt under the UUWF statute, the relevant question is whether he was a convicted felon at the time he possessed the weapon. *McFadden*, 2016 IL

117424, ¶ 29. To be sure, this Court in *N.G.* was critical of *McFadden*. *See N.G.*, 2018 IL 121939, ¶¶ 67-77. But this criticism was unwarranted. First, it was unnecessary to address *McFadden* in *N.G.*, which was not a criminal case and instead concerned the termination of parental rights. Second, *N.G.*'s criticism of *McFadden*'s reasoning was limited to its application of the felon status rule to a conviction arising from a portion of the AUUW statute that was void *ab initio*. Thus, at most, *N.G.* carved out a limited exception to *McFadden*'s rule. And that exception has no applicability here, because the statute under which defendant was convicted of first degree murder has not been held to be void *ab initio*.

A. *McFadden* Recognized a Felon Status Rule That Applies to Convictions Under the UUWF Statute.

In *McFadden*, this Court held that, under 720 ILCS 5/24-1.1(a), the statute on which defendant's 2006 UUWF conviction was premised, a defendant's status as a felon is properly determined as of the time of his firearm possession, and that felon status ceases only when and if the prior conviction is vacated. *McFadden*, 2016 IL 117424, ¶ 29. Thus, as long as the defendant was a felon at the time he possessed the weapon, the later vacatur of that predicate felony will not invalidate the UUWF conviction. *Id.* ¶ 31. The Court based this conclusion both on the plain language of the UUWF statute and the policy and purpose of that statute, which "are served by

requiring an individual to clear his felony record before possessing a firearm." *Id.* ¶ 30. The Court observed that "[t]here is nothing absurd or unjust or unreasonable about requiring a person who believes he has been wrongly convicted of a felony to clear his status through the judicial process before being allowed to possess a firearm," and held that the General Assembly, through the UUWF statue, had made a considered and deliberate decision to require just that. *Id.* ¶ 30.

In reaching this decision, the *McFadden* Court drew guidance from the United States Supreme Court's opinion in *Lewis v. United States*, 445 U.S. 55 (1980), which interpreted a similar federal statute. *McFadden*, 2016 IL 117424, ¶ 28. In *Lewis*, the Supreme Court held that the government could use a constitutionally infirm prior felony conviction as the predicate offense for a subsequent violation of the federal felon-in-possession statute. *Lewis*, 445 U.S. at 65. The Court interpreted the federal statute as prohibiting a felon from possessing a firearm even when that prior felony conviction was vulnerable to collateral attack on constitutional grounds. *Id.* In doing so, the Court concluded that the federal statute prohibited anyone with a felony conviction from possessing a firearm "until the conviction is vacated or the felon is relieved of his disability by some affirmative action." *Id.* at 60-61. The Court reasoned that Congress intended that "the defendant clear his

status *before* obtaining a firearm," as demonstrated by the fact that the statute did not contain an exception for a felony conviction that might be invalid for any reason. *Id.* at 62, 64-65 (emphasis in original).

In *McFadden*, this Court noted that, like the federal statute, the language of Illinois's UUWF statute is "'consistent with the common-sense notion that a disability based upon one's status as a convicted felon should cease only when the conviction upon which that status depends has been vacated.'" *McFadden*, 2016 IL 117424, ¶ 29 (quoting *Lewis*, 445 U.S. at 61 n.5). The Court also noted that the state and federal statutes shared the same purpose: to protect the public from persons who are potentially irresponsible and dangerous. *Id.* ¶ 29. Therefore, just as with the federal felon-in-possession statute, under Illinois's UUWF statute, it is irrelevant whether the predicate felony "'ultimately might turn out to be invalid for any reason.'" *Id.* (quoting *Lewis*, 445 U.S. at 62). Thus, under *McFadden*, unless a defendant has already obtained vacatur of his felony conviction, the fact of that prior felony conviction subjects him to criminal liability for possessing a firearm under Illinois's UUWF, even if the predicate felony conviction is subject to challenge as constitutionally infirm. All that matters is the defendant's status as a felon at the time he possessed a firearm.

Petitioner's argument that the Court should abandon *McFadden* and adopt "a strict rule that whenever a predicate offense is vacated—for whatever reason—a petitioner can get relief from an UUWF conviction" because other jurisdictions have interpreted their state statutes that way, Pet. Br. 14-17, is without merit. Indeed, petitioner offers no argument for why this Court should depart from its own well-settled precedent in *McFadden*. As the Court has observed:

> "The doctrine of *stare decisis* is the means by which courts ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion. *Stare decisis* permits society to presume that fundamental principles are established in the law rather than in the proclivities of individuals. The doctrine thereby contributes to the integrity of our constitutional system of government both in appearance and in fact. *Stare decisis* is not an inexorable command. However, a court will detour from the straight path of *stare decisis* only for articulable reasons, and only when the court must bring its decisions into agreement with experience and newly ascertained facts."

In re Derrico G., 2014 IL 114463, ¶ 55 (quoting *Iseberg v. Gross*, 227 Ill. 2d 78, 94-95 (2007)) (cleaned up). Thus, the Court explained, it will depart from *stare decisis* only with special justification. *Id.* Petitioner has offered no such special justification.

Indeed, federal courts have consistently applied the felon status rule regardless of why the predicate felony conviction might be invalid. *See, e.g.*, *United States v. Leuschen*, 395 F.3d 155, 157-59 (3d Cir. 2005) (upholding

conviction where felon status was pursuant to statute amended prior to trial); *United States v. Padilla*, 387 F. 3d 1087, 1092 (9th Cir. 2004) (upholding conviction where felony was vacated *nunc pro tunc*, but was not yet invalidated when defendant possessed firearm); *United States v. Wallace*, 280 F.3d 781, 784 n.1 (7th Cir. 2002) (upholding conviction where felon status was pursuant to a statute declared void *ab initio* by Illinois court); *United States v. Chambers*, 922 F.2d 228, 238-40 (5th Cir. 1991) (upholding conviction where predicate felony was subject to nullification on collateral attack); *United States v. Mayfield*, 820 F.2d 943, 945-46 (10th Cir. 1987) (affirming conviction where predicate felony conviction may have been void for lack of jurisdiction under state law).

Similarly, most state courts that have considered the issue have also followed the reasoning of *Lewis* and applied the same felon status rule that this Court adopted in *McFadden*. *See, e.g., Clark v. State*, 739 P.2d 777, 781 (Alaska Ct. App. 1987) (following *Lewis*, and concluding that "later reversal of [defendant's] former conviction was not a defense to the felon in possession charge," and noting legislature may "require that a person who has been convicted of a felony wait until that conviction has been reversed on appeal before being allowed to possess a concealable firearm"); *Reynolds v. State*, 712 S.W.2d 329, 331 (Ark. Ct. App. 1986) (concluding statute "prohibits a person

convicted of a felony from possessing a firearm, regardless of the fact that the prior felony conviction is subject to collateral attack, and that this prohibition continues until the conviction is either successfully attacked and set aside, or a specific pardon is granted"); *People v. Harty*, 219 Cal. Rptr. 85, 87, 88 (Ct. App. 1985) ("the possible invalidity of an underlying prior felony conviction provides no defense to possession of a concealable weapon by a felon"; although convicted felon may challenge validity of prior conviction in court that entered that judgment, "he may not resort to self help by first obtaining and possessing [a] firearm, and thereafter try to assert the invalidity of the prior conviction as a defense to a [prohibited possessor] prosecution"); *State v. Lobendahn*, 784 P.2d 872, 873 (Haw. 1989) ("[Defendant's] status was that of a convicted felon at the time he possessed the firearm and ammunition. Such possession was unlawful and the subsequent reversal of the conviction does not then render such possession lawful."); *Small v. State*, 623 P.2d 1200, 1205 (Wyo. 1981) ("Whatever else may be said about the validity of a prior uncounseled felony conviction, constitutionally infirm, it is clear under *Lewis* that it is at least a valid conviction for purposes of a statute prohibiting the possession of firearms by a previously convicted and unpardoned felon."). These outcomes are not surprising because, as noted, they are consistent with legislatures' intent to require convicted felons to obtain reversal of their

convictions before making the decision to possess firearms and thereby to keep guns out of the hands of potentially irresponsible and dangerous people. *See Lewis*, 445 U.S. at 64-65; *McFadden*, 2016 IL 117424, ¶ 29 ("The purpose of the [UUWF] statute, like the federal prohibition, is to protect the public from persons who are potentially irresponsible and dangerous.").

Contrary to petitioner's argument, *see, e.g.*, Pet. Br. 23, it is irrelevant to the General Assembly's intent to keep guns out of the hands of potentially irresponsible and dangerous people that he is "factually innocent" of the predicate offense. That he was subsequently determined to be innocent of the 1992 murder does not demonstrate that he was not potentially irresponsible and dangerous at the time that he chose to carry a gun in public, notwithstanding the fact that he was prohibited by law from doing so. Notably, petitioner did not lack the ability to seek to obtain relief from this status. First, the UUWF statute does "not apply if the person has been granted relief by the Director of the Illinois State Police under Section 10 of the Firearm Owners Identification Card Act." 720 ILCS 5/24-1.1(a). Thus, before obtaining his firearm, petitioner could have sought permission to do so under section 10 of the FOID Card Act, but he did not even try. Second, petitioner could have challenged his 1992 conviction in an appropriate proceeding, such as via a § 2-1401 petition, as he ultimately was successful

in doing. Instead of pursuing either of these avenues before possessing a firearm in public, however, petitioner "resort[ed] to self help," and he thus engaged in the same potentially irresponsible and dangerous conduct that Illinois's UUWF, as well as its federal and state counterparts, was designed to prevent. *Harty*, 219 Cal. Rptr. at 88.

The state court opinions on which petitioner relies similarly do not support his position because they were either superseded by legislative amendment or interpreted significantly different state statutes.

For example, petitioner argues that in *State v. Gore*, 101 Wash. 2d 481 (1984), the Washington Supreme Court adopted his preferred rule that a defendant can obtain relief from a felon-in-possession conviction whenever his predicate offense is vacated. Pet. Br. 14-15. In *Gore*, the Washington Supreme Court held:

> The statute provides that no person who has been 'convicted' of a crime of violence shall possess a firearm. As all parties admit, this statute may be interpreted in two alternative ways. The first is the State's, *i.e.,* that any outstanding felony conviction may be used as the predicate conviction. The second alternative is that only a *constitutionally valid* outstanding conviction may serve as the predicate conviction.

101 Wash. 2d at 485 (emphasis in original). Citing the rule of lenity, the *Gore* court adopted the latter interpretation. *Id.* at 486. But the Washington state legislature subsequently amended the Washington statute to make

clear that the State's interpretation was correct. *See State v. Hickok*, 39 Wash. App. 664, 672-73 (Wash. App. 1985) (explaining that "[t]he amended statute supersedes the judicial interpretations of the preamendment statute that . . . the underlying conviction's constitutional validity must be proven by the State when challenged by the defendant"). In other words, although the Washington Supreme Court adopted petitioner's preferred rule, the state legislature promptly amended the statute to clarify that the court's interpretation was not consistent with what the legislature had intended. The Florida cases that petitioner cites are inapt for the same reason, because they relied on *Gore*'s interpretation of Washington's "similar felon in possession statute" as requiring a "constitutionally valid predicate conviction," *see* Pet. Br. 14 (citing *State v. Snyder*, 673 So.2d 9, 11 (Fla. 1996); *Johnson v. State*, 664 So.2d 986, 988 (Fla. DCA 4th 1995)). Again, after *Gore*, the Washington legislature amended the statute to reject that interpretation.

People v. Howie, 137 Cal. App. 3d 258 (Cal. Dist. Ct. App. 1982), the unpublished decision of the California Court of Appeals on which petitioner also relies, Pet. Br. 16, is similarly not good law. Under California law, an unpublished opinion "must not be cited or relied on by a court or a party in any other action," Cal. Rules of Court 8.1115(a). Moreover, in a later published opinion, the California Court of Appeals reversed course and held,

just as this Court held in *McFadden*, that the potential invalidity of a defendant's prior conviction was not material to his felon-in-possession conviction. *Harty*, 173 Cal. App. 3d at 499-500. Petitioner asserts that *Harty* is not persuasive here because, in that case, the validity of the predicate felony had not yet been resolved. Pet. Br. 16 n4. But this is a distinction without a difference. In *Harty*, the defendant pleaded guilty to a felon-in-possession charge, "conditioned on the court's finding the alleged prior conviction to be true." *Harty*, 173 Cal App. 3d at 498. The defendant then unsuccessfully moved to vacate the prior conviction. *Id.* On appeal from the denial of the motion to vacate, the appellate court held that even if the defendant's predicate felony were infirm, he would not be prejudiced by any error in denying the motion. *Id.* at 497. Relying on *Lewis*, the court reasoned, "the possible invalidity of an underlying prior felony conviction provides no defense to possession of a concealable weapon by a felon." *Id.* at 499. Put differently, the court explained that: "if a previously convicted felon desires to obtain a firearm, he should first challenge the validity of the prior conviction by a motion to vacate the conviction in the court that entered the judgment. But he may not resort to self help by first obtaining and possessing the firearm, and thereafter try to assert the invalidity of the prior conviction as a defense to a prosecution." *Id.* at 500. Thus, in *Harty*, only

relevant question was the defendant's status as a felon at the time he possessed the weapon.

Petitioner's reliance on *People v. Quintana*, 707 P. 2d 355 (Colo. 1985), is similarly unavailing. *See* Pet. Br. 15-16. In *Quintana*, the Colorado Supreme Court held that *Lewis*'s interpretation of the federal felon-in-possession statute was reasonable, but adopted a contrary construction of its own Colorado statute upon identifying important differences between it and the federal statute. *Id.* at 358. In particular, the Colorado court explained, the federal statute applied to all felons, whereas the Colorado statute was limited to certain predicate offenses and applied only to felons within ten years of release from incarceration. *Id.* at 356, 358. Also, the federal statute provided specific avenues whereby a felon could pursue relief from a prior conviction, whereas the Colorado statute did not. *Id.* at 358. The *Quintana* court reasoned that "[t]he existence of such statutory exceptions and specific and limited remedies in the federal scheme support the Supreme Court's conclusion in *Lewis* that if Congress had intended prior convictions to be subject to collateral attack, it would have so provided." *Id.* But nothing in the Colorado statute permitted it to make a similar inference of legislative intent, and the *Quintana* court therefore concluded that the Supreme Court's construction of the federal statute in *Lewis* was not dispositive. *Id.*

Illinois's UUWF statute is more similar to the federal statute interpreted in *Lewis* than to Colorado's, so even if *Quintana* were correctly decided, it should not guide this Court's interpretation of Illinois's statute. First, like the federal statute (and unlike Colorado's), Illinois's UUWF statute prohibits possession of a firearm by anyone convicted of any felony and places no time restriction on when the predicate felony must have occurred. *See* 720 ILCS 5/24-1.1(a); *see also McFadden*, 2016 IL 117424, ¶ 14 (to satisfy the prior felony conviction element of UUWF, "the prosecutor need only establish 'the defendant's felon status.' . . . Our statute 'does not require proof of a specific felony conviction[.]'" (quoting *People v. Walker*, 211 Ill. 2d 317, 337 (Ill. 2004))). In other words, like the federal statute, Illinois's statute has a broad reach, rather than a narrow one like Colorado's.

Second, like the federal statute (and unlike Colorado's), Illinois's UUWF statute provides a means for a felon to obtain an exemption from the statute's prohibition, stating: "This Section shall not apply if the person has been granted relief by the Director of the Illinois State Police under Section 10 of the Firearm Owners Identification Card Act." 720 ILCS 5/24-1.1(a). Thus, the United States Supreme Court's determination in *Lewis* that the specific remedy available under the federal felon-in-possession statute supported its conclusion that the legislature intended that the statute

prohibited anyone with a felony conviction from possessing a firearm "until the conviction is vacated or the felon is relieved of his disability by some affirmative action," 445 U.S. at 60-61, is equally applicable to Illinois's UUWF statute. Under principles of statutory construction, "the expression of one thing is the exclusion of another." Black's Law Dictionary 581 (6th ed. 1990) (discussing *expressio unius est exclusio alterius*). Thus, because Illinois's statute makes specific reference to obtaining relief from a firearms disability under § 10 of the FOID Card Act, it is to be inferred that the General Assembly intended to exclude other means of obtaining relief. *See Burke v. 12 Rothschild's Liquor Mart, Inc.*, 148 Ill. 2d 429, 442 (1992) (where statute lists things to which it refers, there is inference that all omissions should be understood as exclusions, despite lack of negative words of limitation).

In sum, Illinois's UUWF statute is more similar to the federal statute than Colorado's, and therefore the Colorado Supreme Court's interpretation of its substantively different state statute is not persuasive here.

Finally, petitioner's effort to identify distinctions between the federal felon-in-possession statute and Illinois's UUWF statute, *see* Pet. Br. 20, is misplaced, given that in *McFadden* this Court performed that comparison and concluded that the statutes are similar enough that there was "no reason

to treat the interpretation of section 24-1.1(a) differently than the Supreme Court's interpretation of the similar federal statute in *Lewis*." *McFadden*, 2016 IL 117424, ¶ 28. Indeed, while *McFadden* took guidance from *Lewis*, this Court recognized that "the Supreme Court's construction of a federal statute is not binding on Illinois courts in construing an Illinois statute," and thus performed its own independent analysis of legislative intent to reach the conclusion that what matters under Illinois law is a defendant's status as a felon at the time he possesses a weapon. *Id.* ¶¶ 29-31. As explained, *McFadden*'s interpretation of Illinois's UUWF statute to extend to individuals who possess firearms notwithstanding an extant felony conviction, even where that conviction is later overturned, is consistent with both the plain language of the statute and other decisions interpreting similar statutes. Consistent with principles of *stare decisis*, this Court should decline petitioner's request that it overturn *McFadden*.

B. *N.G.* Created at Most a Limited Exception to *McFadden*'s Rule, Which Exception Does Not Apply Here.

Contrary to petitioner's argument, this Court did not abandon *McFadden*'s felon status rule in *N.G.* Pet. Br. 21. *N.G.* held that the People could not rely on a conviction obtained under a provision of the AUUW statute that this Court had declared *void ab initio* to find that a father was unfit in a parental termination case. *N.G.*, 2018 IL 121939, ¶ 84. Thus, at

most, *N.G.* identified a limited exception to *McFadden*'s felon status rule, but that exception is inapplicable here.

At issue in *N.G.* was whether the circuit court "erred when it terminated Floyd F.'s parental rights to his minor child, N.G., on the grounds that he was an unfit person, . . . because, prior to N.G.'s birth, he had been convicted of at least three felonies under the laws of this state and was therefore 'depraved'" within the meaning of section 1(D) of the Adoption Act, 750 ILCS 50/1(D). *N.G.*, 2018 IL 121939, ¶ 1. The Court determined that one of Floyd F.'s convictions had been obtained under a provision in Illinois's AUUW statute that this Court declared facially unconstitutional in *Aguilar*. *See N.G.*, 2018 IL 121939, ¶ 32 In light of *Aguilar*, this Court explained, the circuit court had "an affirmative duty to invalidate Floyd F.'s AUUW conviction and to treat the statute on which it was based as having never existed." *N.G.*, 2018 IL 121939, ¶ 42. The Court reasoned that "[w]hen a statute is found to be facially unconstitutional in Illinois, it is said to be void *ab initio*; that is, it is as if the law had never been passed." *Id.* ¶ 50 (collecting cases). Thus, the Court held, "[b]ecause the finding of depravity depended on a void conviction based on a constitutionally nonexistent statute," the circuit court's termination of Floyd F.'s parental rights had to be reversed, "for without that conviction the State would have failed to meet its

burden of showing by clear and convincing evidence that Floyd F. was depraved and therefore unfit." *Id.* ¶ 42.

To be sure, *N.G.* stated that, "to the extent that this result. . . conflict[s] with *McFadden, McFadden* is hereby overruled." *N.G.*, 2018 IL 121939, ¶ 84. But the result in *N.G.* does not conflict with *McFadden*. On the contrary, this Court recognized that it was unnecessary to overrule *McFadden* to resolve the issue in *N.G.* *See id.* ¶ 64 ("[A] careful reading of *McFadden* reveals evidentiary and procedural differences that separate that case from this one."); *id.* ¶ 84 ("we find this case distinguishable from *McFadden*"). And the Court noted that *McFadden* and *Lewis* were "inapposite," in that, unlike the civil parental termination proceeding at issue in *N.G.*, they both "involved criminal prosecutions" involving "the interpretation and application of specific felon-in-possession statutes, and both were premised on concerns over effectuating the purposes of those statutes, namely, protecting the public from dangerous persons who are seeking to obtain firearms." *Id.* ¶ 78 (citing *McFadden*, 2016 IL 117424, ¶¶ 29-30, and *Lewis*, 445 U.S. at 67). Therefore, as the dissent explained, the Court's discussion of *McFadden* was, and most, dicta. *N.G.*, 2018 IL 121939, ¶ 181 (Theis, J., dissent upon denial of rehearing) ("the majority's *sua sponte* treatment of this issue was pure *dicta*, which should be excised from its

opinion given the court's conclusion that this case could be distinguished from *McFadden* on 'evidentiary and procedural' grounds").

Moreover, even if *N.G.* created an exception to *McFadden*'s felon status rule, that exception would be inapplicable here. Petitioner states that "nothing in *N.G.* holds that *only* when the predicate felony is void. . . should a court intervene," Pet. Br. 22 (emphasis in original), but this is incorrect. In fact, *N.G.* holds exactly that. As explained, *N.G.* reversed the circuit court's decision terminating Floyd F.'s parental rights "[b]ecause the finding of depravity depended on a void conviction based on a constitutionally nonexistent statute." *N.G.*, 2018 IL 121939, ¶ 42. In reaching this holding, this Court reasoned that "[i]n upholding the use of defendant's prior firearms conviction to establish an element of the subsequent firearms offense for which he had been convicted," "*McFadden* neither considered nor addressed . . . United States Supreme Court cases which have consistently held that convictions based on facially unconstitutional statutes are void, can be given no effect, and must be treated by the courts as if they do not exist." *Id.* ¶ 67. "In contrast to *McFadden*," the Court explained, "*Lewis* did not present a situation where the prior offense was based on a facially unconstitutional statute that penalized conduct the state had no power to punish." *Id.* ¶ 71. As a result, the Court concluded, "Had our analysis in

McFadden taken into account the distinction between a prior conviction resulting from a constitutionally deficient procedure and one based on a facially unconstitutional statute, the approach we took in that case would have been different." *Id.* ¶ 76. In other words, *N.G.* did not call into question *McFadden*'s interpretation of the UUWF statute as focusing solely on the defendant's status as a felon at the time he possessed a weapon, but rather reasoned that this felon-status rule might not apply when the predicate felony is based on a facially unconstitutional statute because such a statute is *void ab initio*.

Contrary to petitioner's argument, then, *N.G.* did not suggest that whether a UUWF conviction should be vacated following the reversal of the underlying felony conviction depends on "the gravity of the interests at stake" or "any other relevant, case-specific factor." *See* Pet. Br. 23. Nor is there anything in the language of the UUWF statute that would support such an interpretation. In *McFadden*, this Court recognized that the statute's plain language must guide its interpretation. *See* 2106 IL 117424, ¶ 26. The plain language of § 5/24-1.1 reads: "It is unlawful for a person to knowingly possess . . . any firearm or any firearm ammunition if the person has been convicted of a felony." 720 ILCS 5/24-1.1(a). Thus, as *McFadden* explained, the focus of the UUWF statute's language is on whether a predicate felony

conviction exists, and not on its reliability. *See McFadden*, 2106 IL 117424, ¶ 29 ("based on the plain wording of this particular statutory scheme, the UUW by a felon offense is a status offense"). *N.G.* identified, at most, a single exception to the felon status rule based on the Court's historic application of the *void ab initio* doctrine, which provides that when a statute is *void ab initio*, it is as if the statute never existed. Thus, the exception identified in *N.G.* can be reconciled with the language of the UUWF statute's focusing on the mere existence of a predicate felony. In contrast, petitioner's suggestion that the UUWF statute should be interpreted to allow for "case-specific" exceptions cannot be reconciled with the statute's language.

Lastly, the *N.G.* Court's reasoning attacking *McFadden* is unpersuasive and should not be followed. Indeed, subsequent to *N.G.*, the Seventh Circuit held in *United States v. Thompson*, 901 F.3d 785 (7th Cir. 2018), that a conviction under the same AUUW provision at issue in *McFadden* and *N.G.* could serve as a predicate offense for the federal felon-in-possession statute. In *Thompson*, the defendant pleaded guilty in federal court to being a felon in possession of a firearm. *Id*. at 786. His predicate felony conviction arose under the AUUW statute this Court held to be facially unconstitutional in *Aguilar*. *Id.* The defendant subsequently argued that this prior AUUW conviction could not serve as the predicate felony because it

was based on a statute declared *void ab initio*, *id.*, but the Seventh Circuit rejected that argument, *id.* at 787. The court noted its prior holding in *United States v. Lee*, 72 F.3d 55 (7th Cir. 1995), that, consistent with *Lewis*, a defendant could not avoid a felon-in-possession conviction under federal law by showing that his prior felony conviction was expunged as *void ab initio*. *Id.* Reaffirming *Lee*, the court held that the plain language of the federal felon-in-possession statute made "clear that 'Congress . . . intended that defendant clear his status *before* obtaining a firearm.'" *Id.* (quoting *Lewis*, 445 U.S. at 64) (elipses and emphasis in original). There is no reason to interpret Illinois's felon-in-possession statute differently from its federal counterpart.

In sum, this Court should uphold the judgment dismissing petitioner's § 2-1401 petition by reaffirming that *McFadden* remains good law. *N.G.*'s discussion of *McFadden* was dicta, issued in the absence of full briefing, *see N.G.*, 2018 IL 121939, ¶ 187 ("I strongly agree with the State that, at a minimum, it should be given an opportunity for supplemental briefing to address the continued validity of *McFadden* where it was clearly blindsided by the majority's redefining of the issues in this case.") (Theis, J. dissent upon denial of rehearing), and reached a conclusion that conflicts with the Seventh Circuit's subsequent decision in *Thompson*. But even if the Court limits

McFadden as contemplated by the dicta in *N.G.*, the circuit court properly dismissed petitioner's § 2-1401 petition, because petitioner's predicate murder conviction was not based on a statute that was subsequently held to be *void ab initio*. The limited exception to *McFadden*'s rule contemplated by *N.G.* thus does not apply to petitioner's case. Accordingly, either because *McFadden* remains good law, or because the limited exception to *McFadden*'s rule contemplated by *N.G.* has no application to this case, the circuit court properly denied petitioner's § 2-1401 petition.

III. Application of the Felon Status Rule Does Not Violate Petitioner's Second Amendment or Due Process Rights.

Petitioner's arguments that applying the UUWF statute to him would violate the Second Amendment and the Due Process Clause, Pet. Br. 29-31, are meritless. Statutes are presumed to be constitutional, and should be upheld whenever reasonably possible. *McFadden*, 2016 IL 117424, ¶ 35. Petitioner, as the party challenging the UUWF statute's constitutionality, bears the burden of establishing its invalidity. *Id.*

A two-step framework governs this Court's analysis of petitioner's Second Amendment challenge. *In re Jordan G.*, 2015 IL 116834, ¶ 22. First, the Court must determine whether the regulated activity is protected by the Second Amendment. *Id.* To do so, the Court conducts a textual and historical analysis to determine whether the conduct was protected by the

Second Amendment at the time of its ratification. *Id.* If the regulated activity falls outside the scope of the Second Amendment, no further review is necessary. *Id.* If the regulated activity is not categorically unprotected, then, under the second step, the Court applies the appropriate level of scrutiny to the State's justification for the regulation. *Id.*

Here, this Court's analysis begins and ends at the first step. Illinois's UUWF statute "is a presumptively lawful 'longstanding prohibition[ ] on the possession of firearms.'" *McFadden*, 2016 IL 117424, ¶ 35 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008)); *see also McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (*Heller* "did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons'") (quoting *Heller*, 554 U.S. at 626)); *People v. Burns*, 2015 IL 117387, ¶ 29 (confirming that the legislature may constitutionally prohibit felons from carrying readily accessible firearms outside the home).

For his part, petitioner argues that it violates the Second Amendment to apply the UUWF statute to him because his predicate felony conviction was subsequently vacated. Pet. Br. 29-31. Petitioner is incorrect. As the Court explained in *McFadden*, Second Amendment protections "are held by law-abiding, responsible citizens' for self-

defense," and do not extend to individuals who choose to possess a firearm knowing that they have an extant felony conviction, as petitioner did here. *See McFadden*, 2016 IL 117424, ¶ 36; *see also, e.g.*, *United States v. Ligon*, No. 3:04-cr-00185-HDM, 2010 U.S. Dist. LEXIS 116272, at *18 (D. Nev. Oct. 20, 2010) (reversal of defendant's underlying felony did not invalidate his felon-in-possession conviction or call into question constitutionality of that conviction) *aff'd*, 461 F. App'x 582 (9th Cir. 2011).

Petitioner's due process claim also fails. This Court held in *McFadden* that "with respect to due process, the legislature 'could rationally conclude that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit the possession of a firearm.'" 2016 IL 117424, ¶ 34 (quoting *Lewis*, 445 U.S. at 66). Indeed, petitioner acknowledges that this Court has already rejected a due process claim that is identical to the one he now raises. Pet. Br. 29-31. But he claims that *McFadden* and *Lewis* erred by applying a rational basis standard, because a fundamental right is at stake. *Id.* at 30 (arguing that "strict scrutiny, not rational basis, should apply, as gun possession is a fundamental right"). As explained, however, a convicted felon does not have a fundamental right to possess a firearm, even if his conviction might subsequently be declared invalid. *See supra* p. 26. Petitioner's due process challenge thus fails for the same reason as his

Second Amendment challenge. *See Albright v. Oliver*, 510 U.S. 266, 273 (1994) ("[w]here a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing those claims'" (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)).

As explained, *see supra* p. 12, a convicted felon is not without recourse. He can apply for relief under § 10 of the FOID Card Act, 430 ILCS 65/10; *see also* 720 ILCS 5/24-1.1(a), and, as this case demonstrates, he can seek to have his prior convictions vacated, even years later. But neither the Second Amendment nor the Due Process Clause guarantee a convicted felon the right to carry a gun in public, in contravention of Illinois's UUWF statute, because there is a possibility that his predicate felony conviction might be overturned in the future.

IV. There Is No Independent Equitable Basis For Granting § 2-1401 Relief Here.

As a backstop, petitioner argues that even "if there is no legal statutory or constitutional basis" to afford him relief, he is still entitled to relief, either pursuant to § 2-1401 or under equitable considerations. Pet. Br. 33-43. These arguments are baseless.

Section 2-1401 represents a comprehensive statutory procedure authorizing a trial court to vacate or modify a final order or judgment in civil and criminal proceedings. *Warren County Soil & Water Conservation Dist.*, 2015 IL 117783, ¶ 31. "Although a section 2-1401 petition is ordinarily used to bring facts to the attention of the trial court which, if known at the time of judgment, would have precluded its entry . . . , a section 2-1401 petition may also be used to challenge a purportedly defective judgment for legal reasons." *Paul v. Gerald Adelman & Associates*, 223 Ill. 2d 85, 94 (2006) (citations omitted).

The nature of the challenge presented in a § 2-1401 petition (that is, whether the challenge is based on newly available facts or the law) is critical because it dictates the proper standard of review on appeal. *See Warren County Soil & Water Conservation Dist.*, 2015 IL 117783, ¶ 31. When a petitioner raises a fact-based challenge under § 2-1401, the petition must allege specific facts supporting each of the following elements: (1) the existence of a meritorious defense; (2) due diligence in presenting this defense to the circuit court in the original action; and (3) due diligence in filing the § 2-1401 petition. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986). However, with respect to the second and third element of a fact-based challenge, "[b]ecause a section 2-1401 petition is addressed to equitable

powers, courts have not considered themselves strictly bound by precedent, and where justice and good conscience may require it a default judgment may be vacated even though the requirement of due diligence has not been satisfied." *Id.* at 225. By contrast, when a petitioner presses a legal challenge under § 2-1401 "[e]quitable considerations are inapplicable." *Warren County Soil & Water Conservation Dist.*, 2015 IL 117783, ¶ 47 (discussing *People v. Vincent*, 226 Ill. 2d 1 (2007)).

Here, petitioner invokes equitable principles and "the interests of justice" to argue for vacating his UUWF conviction. Pet. Br. 35. But contrary to petitioner's assertion, Pet. Br. 41-42, his § 2-1401 petition raises a legal challenge, not a fact-based challenge: the petition argues that his UUWF conviction should be vacated pursuant to *N.G.* because "the predicate offense for Petitioner's UUW conviction in the instant matter no longer exists," which raises a question of law. C396. Nor are there any disputed facts, as the appellate court noted. A2 (stating that "[t]he facts of this case are not in dispute"). There is no dispute that petitioner was a convicted felon when he committed UUWF, that his 1992 murder conviction was subsequently vacated, and that the conviction was vacated due to police misconduct during the

investigation. The question is whether, as a matter of law, this renders petitioner's UUWF conviction invalid. Again, however, "[e]quitable considerations are inapplicable when a section 2-1401 petition raises a purely legal issue." *Warren Cnty. Soil & Water Conservation Dist.*, 2015 IL 117783, ¶ 47.

Moreover, even if petitioner's § 2-1401 petition were viewed as a fact-dependent challenge, petitioner cannot show that he is entitled to relief. The purpose of a § 2-1401 petition is to bring before the trial court factual matters, unknown to the court and party seeking relief at the time judgment was rendered, that would have prevented the entry of the contested judgment. *People v. Pinkonsly*, 207 Ill. 2d 555, 566 (2003). Again, when a § 2-1401 petition presents a fact-dependent challenge, the "petitioner must set forth specific *factual* allegations supporting each of the following elements: (1) the existence of a meritorious defense; (2) due diligence in presenting this defense; and (3) due diligence in filing the section 2-1401 petition for relief." *Warren Cnty. Soil & Water Conservation Dist.*, 2015 IL 117783, ¶ 51 (emphasis in original). If the petitioner does so, the petition will "be resolved by considering the particular facts, circumstances, and equities of the underlying case." *Id.* ¶ 50. Thus, while consideration of the equities is relevant to this analysis, it does not absolve a petitioner of his burden of

demonstrating that the specific facts of his case establish a meritorious defense to the contested judgment against him. And as demonstrated, *see* Sec. II, *supra*, the specific facts presented here – the subsequent vacatur of petitioner's predicate conviction due to police misconduct – would not have prevented the entry of petitioner's conviction for UUWF.

Finally, even if this Court could consider the equities under the circumstances presented, it is far from clear that they favor petitioner. Petitioner was afforded justice on the murder conviction that arose from police misconduct, which misconduct played no role in petitioner's subsequent UUWF conviction. In 2006, when petitioner chose to possess a firearm, he knew he was a convicted felon. But he chose to ignore the prohibition on possession of a firearm by a felon and carry a gun in public. He therefore knowingly engaged in precisely the kind of behavior that the UUWF statute aims to prevent. *See supra* pp. 12-13.

For his part, petitioner argues that "[w]ithout the predicate conviction, his conduct in August 2006 of possessing a firearm would not have been criminal; accordingly, he would not have been arrested, let alone convicted of the offense." Pet. Br. 33. Not so. Petitioner's argument overlooks that he possessed a firearm in public without a FOID card, so his conduct was illegal even if he did not have an extant

felony conviction. *See* 720 ILCS 5/24-1.6(a)(3)(C). The People nolle prossed multiple AUUW charges that were premised on petitioner's public possession of the handgun without a FOID card when he pleaded guilty to UUWF. C17, 19, 21.

Petitioner also suggests that police misconduct in his murder case entitles him to relief in his UUWF case, citing *Airoom* for the proposition that the police misconduct in the murder case is "a clear and meritorious defense to the UUWF conviction." Pet. Br. 33. But *Airoom* has minimal relevance here. It was a breach of contract case and merely restated the proposition that to succeed on a § 2-1401 petition, one must set forth a "meritorious defense or claim." *Airoom*, 114 Ill. 2d at 22. Thus, Airoom provides no support for the proposition that the fact that petitioner's murder conviction was later overturned constitutes a meritorious defense to his UUWF conviction.

In fact, petitioner has not identified a single case in which a court granted a § 2-1401 petition vacating a conviction on equitable grounds where there is "no legal constitutional or statutory basis" for doing so, *see* Pet. Br. 35. Petitioner cites *People v. Lawton*, 212 Ill. 2d 285 (2004), for the proposition that relief can be granted under § 2-1401 "when necessary to achieve justice," Pet. Br. 40, and apparently would extend this principle to

circumstances where there is no legal or factual basis for providing relief, *see* Pet. Br. 35 ("If this Court determines there is no legal statutory or constitutional basis to afford [petitioner] relief, it should consider the question of whether section 2-1401 allows courts to grant equitable relief in the interests of justice."). To be sure, *Lawton* stated that the purpose of § 2-1401 is to grant relief when necessary to achieve justice. *Lawton*, 212 Ill. 2d at 297-98. But all this Court held in *Lawton* is that § 2-1401 can serve as a vehicle to challenge to a judgment when no other procedural vehicle was available and justice so demanded. *Id.* *Lawton*, like *Airoom*, provides no support for the proposition that relief may be granted under § 2-1401 when there is no legal or factual basis for such relief.

Never has this Court held that a court has discretion to grant relief under § 2-1401 based on purely equitable considerations where there is no legal or factual basis for overturning the contested judgment, nor is there language in § 2-1401 to support such a rule. Petitioner is effectively asking this Court to rewrite § 2-1401, which it neither can nor should do. *People v. One 1998 GMC*, 2011 IL 110236, ¶ 13 ("The rule is well settled in Illinois that our state courts may not rewrite legislation").

In conclusion, dismissal of the § 2-1401 petition was proper. Petitioner is unable to show that he is entitled to relief as a matter of law where the predicate felony for his UUWF conviction was not *void ab initio*, such that even applying *N.G.*'s limited exception to the felon status rule articulated in *Lewis* and *McFadden*, petitioner's murder conviction, which was not vacated until 2019, could properly serve as the predicate felony for the 2006 UUWF conviction. Accordingly, the judgment of dismissal should be affirmed.

CONCLUSION

This Court should affirm the appellate court's judgment.

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Respectfully submitted,

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

KATHERINE M. DOERSCH
Criminal Appeals Division Chief

GARSON S. FISCHER
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 814-2566
eserve.criminalappeals@atg.state.il.us

Attorneys for Respondent-Appellee
People of the State of Illinois

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 thirty-eight pages.

/s/ Garson S. Fischer
GARSON S. FISCHER
Assistant Attorney General

PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct. On April 27, 2022, the foregoing **Appellee's Brief** was electronically filed with the Clerk, Illinois Supreme Court, and served upon the following:

Joshua Tepfer
The Exoneration Project
311 N. Aberdeen Street, 3rd Floor
Chicago, IL 60607
(312) 789-4955
josh@exonerationproject.org

Counsel for Petitioner-Appellant
Demetrius Johnson

/s/ Garson S. Fischer
Counsel for Respondent-Appellee
People of the State of Illinois