ORIGINAL

No. 121417

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- JULIO CHAIREZ Defendant-Appellee	)	On appeal from the Circuit Court of the Sixteenth Judicial Circuit, Kane County, Illinois, No. 13 CF 317. Honorable John A. Barsanti, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE

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***** Electronically Filed *****

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05/24/2017

Supreme Court Clerk

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POINTS AND AUTHORITIES

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ISSUES PRESENTED FOR REVIEW

1. Whether the circuit court correctly vacated the defendant's conviction because it was based on statutory provisions that are facially unconstitutional under the Second Amendment? (Arguments I and II)

2. Whether the circuit court had jurisdiction to consider the facial unconstitutionality of 720 ILCS 5/24-1(c)(1.5) in its entirety, at least insofar as it involves violations of 720 ILCS 5/24-1(a)(4)? (Argument III)

3. Whether section (c)(1.5) of 720 ILCS 5/24-1 is severable from section (a)(4) of that statute so that violations which occur within 1,000 feet of other protected zones specified in (c)(1.5) are constitutional, even if violations that occur within 1,000 feet of a park violate the Second Amendment? (Argument IV)

4. Whether vacating the defendant's conviction allows the State to reinstate charges it voluntarily dismissed where the statute of limitations has now expired for those charges? (Argument V)

STATUTE INVOLVED

720 ILCS 5/24-1(a)(4) and (c)(1.5) (2013):

§ 24-1. Unlawful Use of Weapons.

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

(4) Carries or possesses in any vehicle or concealed on or about his person except when on his land or in his own abode, legal dwelling, or fixed place of business, or on the land or in the legal dwelling of another person as an invitee with that person's permission, any pistol, revolver, stun gun or taser or other firearm, except that this subsection (a) (4) does not apply to or affect transportation of weapons that meet one of the following conditions:

(i) are broken down in a non-functioning state; or
(ii) are not immediately accessible; or
(iii) are unloaded and enclosed in a case, firearm carrying box, shipping box, or other container by a person who has been issued a currently valid Firearm Owner's Identification Card

c) Violations in specific places

(1.5) A person who violates subsection 24-1(a)(4), 24-1(a)(9), or 24-1(a)(10) in any school, regardless of the time of day or the time of year, in residential property owned, operated, or managed by a public housing agency or leased by a public housing agency as part of a scattered site or mixed-income development, in a public park, in a courthouse, on the real property comprising any school, regardless of the time of day or the time of year, on residential property owned, operated, or managed by a public housing agency or leased by a public housing agency as part of a scattered site or mixed-income development, on the real property comprising any public park, on the real property comprising any courthouse, in any conveyance owned, leased, or contracted by a school to transport students to or from school or a school related activity, in any conveyance owned, leased, or contracted by a public transportation agency, or on any public way within 1,000 feet of the real property comprising any school, public park, courthouse, public transportation facility, or residential property owned, operated, or managed by a public housing agency or leased by a public housing agency as part of a scattered site or mixed-income development commits a Class 3 felony.

ARGUMENT

I. The statute under which the defendant was convicted is facially unconstitutional based on this Court's prior decisions. Therefore, the circuit court correctly vacated the defendant's conviction.

On April 24, 2013, the defendant, Julio Chairez, was convicted of unlawful use of weapons under 720 ILCS 5/24-1(a)(4) and (c)(1.5) (2013).With certain exceptions not applicable here, those statutes made it illegal for any person in Illinois to carry a firearm in his vehicle or concealed on his person and provided that the offense would be a Class 3 felony if committed within 1,000 feet of a park or other restricted area. (C. 22- 23) On November 5, 2015, the defendant filed a petition for relief for judgment under 735 ILCS 5/2-1401 (2013), alleging that the statute under which he was convicted was unconstitutional on its face. (C. 78-82) To support his claim, the defendant cited *Moore v. Madigan,* 702 F.3d 933 (7th Cir. 2012), and *People v. Aguilar,* 2013 IL 112116. (C. 78-82). The circuit court granted the defendant's petition, finding that the statute was facially unconstitutional. (R. 81-85)

The constitutionality of a statute is a question of law which this Court reviews *de novo*. *Aguilar*, 2013 IL 112116 at ¶ 15. A facially unconstitutional statute is void *ab initio*, which means it was unconstitutional from the moment of its enactment and is therefore unenforceable. *People v. McFadden*, 2016 IL 117424,¶ 17. When a defendant has been convicted under a statute which a court later declares facially unconstitutional, he "must be allowed to apply the court's declaration as a basis to vacate his judgment of conviction premised on the facially unconstitutional statute." *McFadden*, 2016 IL 117424 at ¶¶ 19-20.

Both this Court and the Seventh Circuit Court of Appeals have previously ruled that the Illinois statutes which prohibited citizens from carrying a firearm outside of the home were facially unconstitutional. *See Aguilar,* 2013 IL 112116 at ¶¶ 21-22; *Moore,* 702 F.3d at 942. In *Moore*, the Seventh Circuit reviewed the constitutionality of the Illinois unlawful use of a weapon statute (UUW)– specifically 720 ILCS 5/24-1(a)(4) & (a)(10)– and the aggravated unlawful use of a weapon statute (AUUW), 720 ILCS 5/24-1.6(a). *Moore,* 702 F. 3d at 934. After reviewing, *District of Columbia v. Heller,* 554 U.S. 570 (2008), as well as the historical context of the Second Amendment, *Moore* concluded that the Second Amendment gives an individual the right to bear arms outside of the home for self-defense. 702 F. 3d at 934-42. The Seventh Circuit held that sections(a)(4) and (a)(10) of the UUW statute, as well as section (a) of the AUUW statute set forth "uniquely sweeping" bans on the carriage of firearms in public, and thus violated the Second Amendment. *Moore,* 702 F. 3d at 942.

Subsequently, this Court expressly adopted the reasoning used in *Moore* to find sections 24-1.6(a)(1);(a)(3)(A); and (d) of the AUUW statute facially unconstitutional under the Second Amendment. *Aguilar*, 2013 IL 112116 at ¶¶ 20-22. According to this Court, *Moore* correctly noted that neither *Heller*, nor *McDonald v. City of Chicago*, 561 U.S. 742 (2010) expressly limited the Second Amendment's protections to the home. On the contrary, both *Heller* and *McDonald* at least strongly suggest, if not confirm, that the Second Amendment right to keep and bear arms extends beyond the home. *Aguilar,* 2013 IL 112116 at ¶20.

Because the specific section of the AUUW statute at issue in *Aguilar*

"categorically prohibit[ed] the possession and use of an operable firearm for self-defense outside the home," this Court held that those sections were facially unconstitutional. *Aguilar*, 2013 IL 112116 at ¶¶ 21-22. After *Aguilar*, this Court extended its finding of facial unconstitutionality to other sections of the AUUW statute that also proscribed the carrying of a weapon outside the home. *People v. Mosley*, 2015 IL 115872, ¶25.

The defendant here was convicted under 720 ILCS 5/24-1(a)(4), which *Moore* declared to be facially unconstitutional. 702 F. 3d at 942. Although *Moore* did not specifically address section 24-1(c)(1.5)–the provision under which the defendant was sentenced–the outcome here should be the same as in *Moore*. The sentencing provision contained in section (c)(1.5), which enhanced UUW from a Class A misdemeanor to a Class 3 felony if the offense was committed within 1,000 feet of certain locations, did not create a separate offense from that defined by section (a)(4), which was found unconstitutional in *Moore*. As this Court has held, a sentencing provision of a statute cannot create separate offense which survives when the statute to which it is attached has been found unconstitutional. *People v. Burns*, 2015 IL 117387 at ¶ 24.

In *Burns*, the defendant was convicted under 24–1.6(a)(1) and (a)(3)(A) of the AUUW statute, both of which *Aguilar* held to be facially unconstitutional. *Burns*, 2015 IL 117387 at ¶ 17. Section (d) of the AUUW statute provided that the offense is a Class 4 felony, but is elevated to a Class 2 felony when committed by anyone who has been previously convicted of a felony in this State or another jurisdiction. 720 ILCS 5/24- 1.6(d)(1) and (3)(2013). The defendant in *Burns* argued

that the he could not be convicted under 24–1.6(a)(1) and (a)(3)(A) of the AUUW statute because *Aguilar* found those statutes to be facially unconstitutional. *Burns,* 2015 IL 117387 at ¶ 17.

While recognizing that where a statute initially sets forth the elements of the offense, and then separately provides sentencing classifications based on other factors, these factors ordinarily only enhance the punishment and do not create a new offense, the appellate court concluded that felons lack Second Amendment rights and upheld the defendant's conviction under section (d) because he had committed a prior felony, making the offense a Class 2 felony. *Burns,* 2015 IL 117387 at ¶ 17. This Court, however, reversed the appellate court's decision and clarified its holding in *Aguilar,* stating that the AUUW statute did not create separate Class 2 or a Class 4 felony offenses. *Burns,* 2015 IL 117387 at ¶ 22.

Burns shows that sentencing provisions cannot create separate and distinct substantive offenses. *Burns,* 2015 IL 117387 at ¶ 24. This Court reaffirmed that sections (a)(1) and (a)(3)(A) of the AUUW statute set forth complete ban on carrying ready-to-use guns outside the home and therefore were unconstitutional. *Burns,* 2015 IL 117387 at ¶ 24. Because the prohibition was not limited to a particular subset of persons, such as felons, the statute was unconstitutional on its face. *Burns,* 2015 IL 117387 at ¶ 25. This Court recognized that the legislature can prohibit felons from possessing guns and has done so. *Burns,* 2015 IL 117387 at ¶ 29. However, the AUUW statute considered in *Burns* did not include as an element of the offense that the offender must have a prior felony conviction. *Burns,* 2015 IL 117387 at ¶ 29. As *Burns* explained an unconstitutional statute "does not 'become

constitutional' simply because it is applied to a particular category of persons who could have been regulated, had the legislature seen fit to do so." 2015 IL 117387 at ¶ 29.

Burns controls the outcome of this case. The defendant here was convicted of UUW based on a violation of 720 ILCS 5/24-1(a)(4) (2013), which made it illegal for any person in Illinois to carry a firearm concealed on his person or in his vehicle. *Moore* found (a)(4) facially unconstitutional as a ban on the carriage of weapons in Illinois, and this Court followed *Moore* when considering a nearly identical provision of the AUUW statute in *Aguilar*. The fact that the defendant was sentenced on a Class 3 felony offense based on section (c)(1.5)–a sentencing provision which increased the class of offense when committed within 1,000 feet of various areas including parks–does not make section (a)(4) constitutional. Because the defendant was convicted under an unconstitutional statute, his conviction is void *ab initio*. Therefore, this Court should uphold the circuit court's order vacating that conviction.

II. Even if 720 ILCS 5/24-1 (c)(1.5) creates a separate offense from the offense defined in (a)(4) of the statute, the circuit court properly vacated the defendant's conviction because (c)(1.5) violates an individual's Second Amendment right to carry firearms in public for self-defense.

Argument I shows that the circuit court properly vacated the defendant's conviction because it was based on a violation of 720 ILCS 5/24-1(a)(4) and the facial unconstitutionality of the statute at issue here is already settled, given the decision in *Moore v. Madigan,* 702 F.3d 933 (7th Cir. 2012), and this Court's decisions following *Moore. People v. Aguilar,* 2013 IL 112116; *People v. Mosley*, 2015 IL 115872; and *People v. Burns*, 2015 IL 117387.This section refutes the State's argument that the sentencing provision of the statute– 720 ILCS 5/24-1(c)(1.5)– makes the defendant's conviction constitutional.

A. The Second Amendment includes a right to carry firearms in public for self-defense.

As the State recognizes, the right to bear arms is the right to carry them in public for self-defense. (St. Br. at 5); *District of Columbia v. Heller,* 554 U.S. 570, 582-83 (2008). The State nonetheless argues that the conduct at issue here, carrying a weapon within 1,000 feet of a park, is not protected by the Second Amendment. (St. Br. at 5) To support that proposition, the State cites *Heller* (St. Br. at 5), but *Heller* did not hold that exclusion zones around parks are exempted from the Second Amendment. *Heller* simply stated that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms *in* sensitive places such as schools and government buildings." 554 U.S. at 626 (emphasis added). The State's argument that carrying weapons within 1,000 feet

of a park is not protected by the Second Amendment does not follow from *Heller*.

Heller considered the historical context of the Second Amendment and determined that the Second Amendment codifies an existing right for individuals to possess and carry weapons in case of a confrontation with others. *Heller*, 554 U.S. at 592. Two years later, the Court held that the Second Amendment applies to the states and encompasses the right to keep and bear arms for the purpose of self-defense. *McDonald v. City of Chicago*, Ill., 561 U.S. 742, 750 (2010)

To support its argument that the Second Amendment from the time of its inception was not meant to include a right to carry a firearm within 1,000 feet of a park, the State cites the 1328 Statute of Northampton. (St. Br. at 7) The State's reliance on this ancient statute is misplaced. In *Moore v. Madigan,* 702 F.3d 933, 936-7 (7th Cir. 2012), the Seventh Circuit dismissed the Statute of Northampton as irrelevant, finding that the right to keep and bear arms for personal self-defense in eighteenth century America could not rationally have been limited to the home. *Moore* 702 F.3d at 936.

Contrary to the State's assertion, a historical analysis actually reveals that the carriage of weapons in public for self-defense is at the heart of the Second Amendment. Citing the historical analysis in *Heller, Moore* found that eighteenth-century English law recognized a right to possess guns for self-defense and protection against both public and private violence. 702 F.3d at 937. *Moore* observed that "in contrast to the situation in England, in less peaceable America a distinction between keeping arms for self-defense in the home and carrying them outside the home would, as we said, have been irrational." 702 F.3d at 937. *Moore*

therefore concluded that the Second Amendment "confers a right to bear arms for self-defense, which is as important outside the home as inside." 702 F.3d at 942.

A state may ban carrying weapons in certain public places because "when a state bans guns merely *in* particular places, such as public schools, a person can preserve an undiminished right of self-defense by not entering those places." *Moore*, 702 F.3d at 940. (emphasis added) However, the statute at issue here did not ban firearms merely in particular places that a person may avoid. Instead the statute created large zones extending onto public ways in which firearms may not be carried. 720 ILCS 5/24-1(a)(4) and (c)(1.5) (2013). The 1,000-foot zones surrounding parks, which include public ways, are not exempted from the Second Amendment protections. Under *Moore,* public spaces are protected by the Second Amendment. 702 F.3d at 936. Indeed, the right to carry firearms in public for self-defense is at the core of the Second Amendment. *Moore,* 702 F.3d at 936. In *Aguilar,* this Court adopted *Moore's* interpretation of *Heller* and the Second Amendment. *Aguilar,* 2013 IL 112116 at ¶20.

B. Because 720 ILCS 5/24-1(c)(1.5) regulated activity that is at the core of the Second Amendment, it must survive strict scrutiny.

The State argues that intermediate scrutiny applies to 720 ILCS 5/24-1(c)(1.5) and that it would survive such scrutiny if it is substantially related to an important government objective. (St. Br. p 12-14) The State's argument ignores case law showing that strict scrutiny is the standard that applies to statutes which regulate conduct at the core of the Second Amendment. Moreover, the State does not demonstrate that this statute survives even intermediate scrutiny.

As this Court has recognized, if a challenged statute implicates a fundamental right, it is subject to strict scrutiny, which means the statute may only be upheld if it is narrowly tailored to serve a compelling State interest. *People v. Alcozer*, 241 Ill. 2d 248, 262 (2011). To determine the appropriate level of scrutiny to apply to a statute that regulates conduct protected by the Second Amendment, courts must consider both "how close the law comes to the core of the Second Amendment right" and "the severity of the law's burden on the right." *Ezell v. City of Chicago*, 651 F.3d 684, 705 (7th Cir. 2011). A regulation that threatens a core Second Amendment right is subject to strict scrutiny, while a less severe regulation is only subject to intermediate scrutiny. *Ezell,* 651 F.3d at 705.

In *Ezell,* the Seventh Circuit recognized that the Second Amendment codified a pre-existing right to keep and bear arms, that the right is personal, and that the "central component of the right" is the right of armed self-defense. *Ezell,* 651 F.3d at 700. Simply put, the right to carry a loaded weapon in public for self-defense is at the core of the Second Amendment. See *Moore v. Madigan*, 702 F.3d 933, 937 (7th Cir. 2012); *People v. Aguilar*, 2013 IL 112116 at ¶ 19.

Here, when triggered by a violation of section (a)(4), section (c)(1.5) restricted activity at the core of the Second Amendment because it prohibited all persons from carrying operational firearms in their vehicles or concealed on their persons in public places. 720 ILCS 5/24-1(a)(4) and (c)(1.5)(2013). Section (c)(1.5) is therefore subject to strict scrutiny. The State has not shown and cannot show that the statute was narrowly tailored to serve a compelling State interest. That is precisely why *Moore* found section (a)(4) to be unconstitutional. 702 F.3d at 942.

The defendant here was sentenced under a provision that increases the sentence for having a firearm in public for persons who are within 1,000 feet of a park. 720 ILCS 5/24-1(a)(4) and (c)(1.5)(2013). As discussed in Argument I, the sentencing provision in section (c)(1.5) does not create a separate offense than what is defined by section (a)(4). But even if section (c)(1.5) created a separate offense, it also restricts conduct that is at the core of the Second Amendment and is thus subject to strict scrutiny.

Section (c)(1.5) created large zones surrounding public spaces and extending onto public ways in which individuals were prohibited from carrying firearms in their vehicles or on their persons. 720 ILCS 5/24-1(a)(4)and (c)(1.5)(2013). Those zones– 2,000 feet in diameter– restrict the ability of persons to carry weapons for protection. As *Moore* recognized, the right to carry firearms for self-defense may be especially important when traveling outside of the home, perhaps even more important than while at home. *Moore,* 702 F.3d at 937. Further, persons have a right to travel freely. *City of Chicago v. Morales*, 177 Ill. 2d 440, 460 (1997).

Section (c)(1.5) curtailed the ability of persons to exercise their Second Amendment right to self-defense without being narrowly tailored to serve a compelling state interest. The exclusion zones are large and arbitrary. The State gives no reason why such a large area around public parks must remain free of firearms to serve a compelling governmental interest. It is of particular concern that the statutory provisions in this case involve transporting a firearm in a vehicle. When triggered by a violation of section (a)(4), section (c)(1.5) prohibited citizens with firearms in their vehicles from driving near parks and effectively prevented

anyone who lives near a park from driving with a firearm in his vehicle on the street where he lives.

The State has not shown that it has any compelling interest which this restriction was narrowly tailored to serve. The State claims that it has an interest in protecting children and then focuses on the need to ban weapons in school zones. (St. Br. at 10-13) The State asserts that *Heller* finds school-zone prohibition to be presumptively lawful. (St. Br. at 13) However, *Heller* stated only that the Court's opinion should be considered to reverse laws which prohibited "carrying of firearms *in* sensitive places such as schools and government buildings." *District of Columbia v. Heller,* 554 U.S. 570, 626 (2008)(emphasis added).

The conduct at issue in this case is carrying a firearm *within* 1,000 feet of a park, not *in* a park. (C. 4, 85) Even if protecting children is a compelling government interest, the State has not demonstrated that the statute here is narrowly tailored to serve that interest. The use of parks in the statute is broad and covers areas which are not necessarily frequented by children. For example the defendant here was merely near a trail maintained by the park district. (C. 4, 85) The State has not shown that section (c)(1.5), when brought into play by a violation of section (a)(4), survives strict scrutiny.

Citing *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010), the State argues that the statutory scheme resulting from sections (a)(4) and (c)(1.5) is subject only to intermediate scrutiny. (St. Br. at 10-14) The State asserts that it must only show the law is "substantially related to an important governmental objective." (St. Br. at 10) However in *Ezell,* the Seventh Circuit stated that intermediate

scrutiny was appropriate in *Skoien* because the statute there affected persons who had been convicted of domestic battery, and thus did not involve the central self-defense component of the Second Amendment right. *Ezell* 651 F.3d at 708. In this case, the statutory scheme involves self-defense, which is a core component of the Second Amendment right, and it restricts the rights of all persons to carry firearms.

Ezell considered the legality of Chicago's ban on firing ranges within city limits given the city's law requiring individuals to complete a safety course at a firing range to obtain a permit to possess a firearm. 651 F.3d at 69. *Ezell* determined that ban on firing ranges was a "serious encroachment on the right to maintain proficiency in firearm use, an important corollary to the meaningful exercise of the core right to possess firearms for self-defense." 651 F.3d at 708. The court concluded that the case required a "more rigorous" level of scrutiny than the one used in *Skoien,* 651 F.3d at 69. Ultimately, *Ezell* found that the government "must establish a close fit between the range ban and the actual public interests it serves, and also that the public's interests are strong enough to justify so substantial an encumbrance on individual Second Amendment rights." 651 F.3d at 708-709.

The restriction here is more severe than the one in *Ezell.* Rather than affecting a right which is merely a "corollary" to the right to possess firearms for self-defense, the statutory scheme here prohibits the carriage of weapons in public for self-defense, thereby reaching the "core" of the Second Amendment and triggering strict scrutiny. However, even if this Court were to apply the level of scrutiny used in *Ezell,* the

statute does not survive. The State has not shown that there is a "close fit" between the ban on carrying firearms in a vehicle or on one's person within 1,000 feet of a park and whatever public interest the ban purported to serve. The State has also not demonstrated that the public interest in this case is strong enough to justify the restriction on the right to carry weapons in public for self-defense.

C. Prohibiting the carriage of firearms within 1,000 feet of any park improperly restricts an individual's Second Amendment right to carry a firearm for self-defense everywhere in Illinois.

The State argues that the facial challenge to the statute in this case fails because the statutory scheme does not amount to a comprehensive ban in areas of Illinois where there are many miles between "sensitive locations." (St. Br. pp. 14-16) The State offers no evidence for its assertion that there are many miles between "sensitive locations" in much of Illinois. (St. Br. p. 14) While the State asserts that courts may take judicial notice of geographical facts from Google Maps or MapQuest, the State cites no maps or geographical facts about Illinois which demonstrate where "sensitive locations" are located. (St. Br. p 14) Moreover, the State's argument conflates a facial challenge with an as-applied challenge and misapprehends the holding of *United States v. Salerno,* 481 U.S. 739 (1987). (St. Br. p 14-16)

As the State says, a law is facially unconstitutional only if it "is unconstitutional in all of its applications." (St. Br. p. 15); *Salerno*, 481 U.S. at 745. Although the circuit court, in ruling that the statutory scheme supporting the defendant's conviction in this case was facially unconstitutional, made statements that a hypothetical person might be unable to leave his or her house

because the 1,000 foot zones could overlap, that is not why the statute is unconstitutional. (R. 89) Taken together, 720 ILCS 5/24-1(a)(4) and (c)(1.5) (2013) violated the Second Amendment because they completely restricted the ability of an individual in Illinois to carry firearms for self-defense in public spaces. *See Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012). The restriction on the carriage of weapons within 1,000 feet of a park contained in 24-1 (c)(1.5) improperly restricts the ability of every person in Illinois to carry a firearm in a vehicle or on his person for self-defense. Regardless of where he lives in Illinois, every person is prohibited from coming within 1,000 feet of a park while traveling with a weapon on his person or in his vehicle for self-defense.

In a facial constitutional challenge, the specific facts of the case do not matter. *Ezell v. City of Chicago*, 651 F.3d 684, 697 (7th Cir. 2011). In *Ezell,* the district court, while considering Chicago's ban on firing ranges, improperly considered that the plaintiffs could travel elsewhere to obtain the firing range training required for firearm permits. 651 F.3d at 697. The Seventh Circuit asserted that the district court was considering the principle from *Salerno* by focusing on the individual travel harm. 651 F.3d at 698. According to the Seventh Circuit, by reasoning that the "harm to a constitutional right is measured by the extent to which it can be exercised in another jurisdiction", the district court had made "profoundly mistaken assumption." 651 F.3d at 697. *Ezell* held that, because there was a facial challenge, an individual's ability to travel outside of Chicago to obtain training was irrelevant. 651 F.3d at 697.

Ezell made it clear that the ban on firing ranges in Chicago was facially

unconstitutional. 651 F.3d at 698. The ban being limited to Chicago was irrelevant because the ban "was unconstitutional when enacted and violates Second Amendment rights every day it remains on the books." *Ezell,* 651 F.3d at 698.

Ezell is instructive because, despite the trial court's statements about overlapping zones, in this case, the court ruled that the statutory scheme created by sections (a)(4) and (c)(1.5) was facially unconstitutional. (R. 85) This is not an as-applied challenge that relies on the defendant living in an area near a park or some other restricted zone. The statutory scheme here is facially unconstitutional because it prohibits any person in Illinois from exercising his Second Amendment right to carry a firearm for self-defense in public by prohibiting him from traveling within 1,000 feet of a park.

Because it concerns an individual's right to self-defense in public (*People v. Aguilar*, 2013 IL 112116 at ¶ 20), the Second Amendment may be said to create a personal right. *Cf. Katz v. United States,* 389 U.S. 347, 351 (1967) (because the ~~first~~ fourth amendment "protects people not places," defendant had a right to keep his phone conversations private, even though they occurred in a public phone booth). In short, an individual's Second Amendment right to self- defense goes wherever he or she may go. Therefore, the mere fact that someone may be able to possess a weapon on his or her person or in his or her vehicle in some areas of Illinois without violating sections (a)(4) and (c)(1.5) of the UUW statute hardly means that the scheme passes constitutional muster.

Here, the statutory scheme still improperly burdens an individual's ability to exercise his or her Second Amendment right everywhere in Illinois because

under the scheme, an individual would enjoy that right only in certain places in Illinois and would have that right pop in and out of existence as he or she travels around the state. An individual might even have to drastically modify his or her travel routes to and from home, school, work, places of worship or health care facilities. Absent a compelling interest, the State may not burden Second Amendment rights by requiring an individual to remain stationary or to travel miles out of his or her way. In this respect, the statutory scheme here resembles the firing range ban struck down in *Ezell* with the difference being only that the firing range ban merely burdened a "corollary" of an individual's Second Amendment right– the right to maintain proficiency in firearm use for self-defense– whereas the scheme here burdens the core of that right.

In sum, the statutory scheme created by sections (a)(4) and (c)(1.5) of the UUW statue does not meet any heightened level of scrutiny, and it therefore violates the Second Amendment. The circuit court's order vacating the defendant's conviction should stand.

III. The circuit court had jurisdiction to consider the constitutionality of 720 ILCS 5/24-1(a)(4) and (c)(1.5), in its entirety, as that is the statutory scheme under which defendant was convicted.

The State argues that the circuit court had jurisdiction only to rule on the constitutionality of 720 ILCS 5/24-1(a)(4) and (c)(1.5) insofar as they made it a Class 3 felony to possess a firearm within 1,000 feet of a park, because that is the conduct in which the defendant engaged. (St. Br. pp. 16- 17) The State misconstrues the rules of jurisdiction. The circuit court had jurisdiction to rule on the constitutionality of the entire statutory scheme under which the defendant was convicted not just one particular statutory clause.

The Illinois Constitution grants circuit courts original jurisdiction over all justiciable matters. Ill. Const. 1970, Art. VI, § 9; *People v. Mosley*, 2015 IL 115872, ¶ 11. Because the defendant was convicted under 720 ILCS 5/24-1(a)(4) and (c)(1.5), the constitutionality of both sections, taken together, was a justiciable matters properly before the court.

In *Mosley*, the circuit court did not clearly indicate which sections of the AUUW statute it had found unconstitutional. 2015 IL 115872 at ¶ 10. This Court held that the circuit court's ruling was limited to the sections under which the defendant was charged. *Mosley*, 2015 IL 115872 at ¶ 12. Nothing in *Mosley* indicates that the circuit court lacked jurisdiction to consider the constitutionality of the entire statutory language under which the defendant here was charged.

However, if this Court believes that the circuit court exceeded its jurisdiction, the remedy would be to vacate only the improper portion of the circuit court's order, just as this Court did in *Mosley*. The circuit court's order vacating the defendant's

conviction in this case because he was convicted under facially unconstitutional statutory scheme should stand.

IV. Section (c)(1.5)of the UUW statute is not severable from section (a)(4). Therefore, based on the unconstitutionality of (a)(4), none of the provisions of section (c)(1.5) may remain.

The State argues that, even if this Court finds that the ban on the carriage of a firearm within 1,000 feet of a park is unconstitutional, the other prohibited zones described in section (c)(1.5) should remain intact because the provisions describing these other zones are severable. (St. Br. at 17) The State's argument ignores the fact that section (c)(1.5) statute is a sentencing provision that cannot be severed from section (a)(4) of that statute, which has already been declared unconstitutional. *Moore v. Madigan,* 702 F.3d 933, 942

An unconstitutional portion of a statute may be severed from the remaining portions, but only if what remains is both complete in itself and wholly capable of being independently enforced. *In re Jordan G.*, 2015 IL 116834 at ¶ 18. In *Jordan G.*, this Court held that the sections of the AUUW statute which were previously held unconstitutional could be severed from the provision criminalizing the possession of a firearm by a minor. *Jordan G.*, 2015 IL 116834 at ¶ 19. The section of the UUW statute at issue here is fundamentally different than the AUUW statute because the sections of the AUUW statute set out different elements which, standing alone, constituted the offense of AUUW. 720 ILCS 5/24–1.6 (2012). Section (c)(1.5) of the UUW statute at issue here cannot be severed from section (a)(4) of that statute because section (c)(1.5) is a sentencing provision. Therefore, this case is controlled not by *In re Jordan G.*, but rather by this Court's decision in *People v. Burns*, 2015 IL 117387 at ¶ ¶ 22, 24 (sentencing provision of AUUW statute did not create a substantive offense distinct from offenses defined in other sections).

The text of section (c)(1.5) shows that it is not complete in itself and cannot be enforced without reference to section (a)(4). 720 ILCS 5/24-1(c)(1.5) provided:

> A person who violates subsection 24-1(a)(4), 24-1(a)(9), or 24-1(a)(10) in any school, regardless of the time of day or the time of year, in residential property owned, operated, or managed by a public housing agency or leased by a public housing agency as part of a scattered site or mixed-income development, in a public park, in a courthouse, on the real property comprising any school, regardless of the time of day or the time of year, on residential property owned, operated, or managed by a public housing agency or leased by a public housing agency as part of a scattered site or mixed-income development, on the real property comprising any public park, on the real property comprising any courthouse, in any conveyance owned, leased, or contracted by a school to transport students to or from school or a school related activity, in any conveyance owned, leased, or contracted by a public transportation agency, or on any public way within 1,000 feet of the real property comprising any school, public park, courthouse, public transportation facility, or residential property owned, operated, or managed by a public housing agency or leased by a public housing agency as part of a scattered site or mixed-income development commits a Class 3 felony. 720 ILCS 5/24-1(c)(1.5)(2013).

Section (c)(1.5) is triggered by a violation of sections (a)(4), (a)(9) or (a)(10). As discussed in Argument I, section (c)(1.5) cannot be severed from section (a)(4) because it is a sentencing enhancement. As this Court found in *Burns,* a sentencing provision cannot create separate substantive offense or transform the offense into a different form. *Burns*, 2015 IL 117387 at ¶ 24.

Because section (c)(1.5) cannot be executed independently from section (a)(4), which was declared unconstitutional in *Moore,* none of the clauses in (c)(1.5) that describe other prohibited zones may stand where section (c)(1.5) depends on a violation of section (a)(4).

V. The State may not reinstate the previously dismissed charges.

The State notes that the circuit court granted it leave to reinstate the three charges it agreed to *nolle prosequi* as part of the defendant's negotiated plea agreement. (St. Br. at 18) However, the State cites no portion of the record where the circuit court made such an order, and counsel for the appellee cannot locate any such order in the record.

Even if such an order exists, this Court recently held that where the statute of limitations has run on charges which were voluntarily dismissed by the State as part of a plea agreement, the State may not reinstate such charges following a defendant's successful motion to vacate a guilty plea. *People v. Shinaul*, 2017 IL 120162 at ¶¶ 17-18. The State concedes that under *Shinaul* the *nolled* charges here may not be reinstated, but argues that *Shinaul* was wrongly decided. (St. Br. at 18-20) Apart from citing Justice Theis' dissent in *Shinaul,* the State offers no reason for overturning the majority opinion in that case. This Court should reject the State's attempt to relitigate *Shinaul* and bar the State from resurrecting the *nolled* charges here.

CONCLUSION

For the foregoing reasons, Julio Chairez, defendant-appellee, respectfully requests that this Court: (1) affirm the decision of the circuit court vacating his conviction for unlawful use of a weapon; and, (2) vacate any portion of the circuit court's order which permits State to reinstate the previously dismissed charges.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Erin S. Johnson, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) 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 24 pages.

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No. 121417

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- JULIO CHAIREZ Defendant-Appellee	)	On appeal from the Circuit Court of the Sixteenth Judicial Circuit, Kane County, Illinois, No. 13 CF 317. Honorable John A. Barsanti, Judge Presiding.

NOTICE AND PROOF OF SERVICE

TO: Lisa Madigan, Attorney General, 100 W. Randolph St., Chicago, IL 60601, mglick@atg.state.il.us cc: twhatley-conner@atg.state.il.us, jescobar@atg.state.il.us, lbendik@atg.state.il.us, chulfachor@atg.state.il.us

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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. An electronic copy of the Brief and Argument in the above-entitled cause was submitted to the Clerk of the above Court for filing on May 24, 2017. On that same date, we electronically served the Attorney General of Illinois, mailed one copy to the State's Attorney, and one copy to the defendant-appellee in envelopes deposited in a U.S. mail box in Elgin, Illinois, with proper postage prepaid. The original and twelve copies of the Brief and Argument will be sent to the Clerk of the above Court upon receipt of the electronically submitted filed stamped motion.

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