No. 121417

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. JULIO CHAIREZ, Defendant-Appellee.	))))))))))	On Appeal From the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois. No. 13 CF 317 The Honorable John A. Barsanti, Judge Presiding.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN
Attorney General of Illinois

DAVID L. FRANKLIN
Solicitor General

MICHAEL M. GLICK
GARSON S. FISCHER
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-2566
gfischer@atg.state.il.us

Attorneys for Plaintiff-Appellant
People of the State of Illinois

ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

Page(s)

NATURE OF THE CASE

Defendant Julio Chairez was charged with possession of a firearm by a street gang member (720 ILCS 5/24-1.8(a)(1)), unlawful use of a weapon (UUW) within 1000 feet of a park (720 ILCS 5/24-1(a)(4), (c)(1.5)), aggravated unlawful use of a weapon (AUUW) without a Firearm Owners Identification (FOID) card (720 ILCS 5/24-1.6(a)(1), (3)(C)), and AUUW under the age of twenty-one (720 ILCS 5/24-1.6(a)(2), (3)(I)). C3-C6.[1] He pleaded guilty to UUW within 1000 feet of a park in exchange for a sentence of probation and the *nolle prosequi* of the remaining counts. C22-C23. More than two years later, with several petitions to revoke his probation pending, and following this Court's opinions in *People v. Aguilar*, 2013 IL 112116 (invalidating 720 ILCS 5/24-1.6(a)(1), (a)(3)(A)) and *People v. Mosely*, 2015 IL 115872 (invalidating 720 ILCS 5/24-1.6(a)(2), (a)(3)(A)), defendant filed a petition for relief from judgment, 735 ILCS 5/2-1401, seeking to vacate his conviction on the ground that the statute criminalizing the carriage of a firearm within 1000 feet of a park is an unconstitutional ban on the right to bear arms under the Second Amendment to the United States Constitution. C78-C82. The circuit court held that 720 ILCS 5/24-1(a)(4), (c)(1.5) was facially unconstitutional, granted defendant's § 2-1401 petition, vacated his guilty plea, and granted the People leave to reinstate the remaining charges. C112, C142, R85. The People appealed directly to this Court. C116-C117.

[1] "C_" denotes the common law record; "R_" denotes the report of proceedings.

ISSUE PRESENTED

Whether a statute restricting the right to carry a firearm in and around sensitive places — namely schools, public parks, courthouses, public transportation facilities, and public housing — violates the Second Amendment to the United States Constitution.

JURISDICTION

The People filed a timely notice of appeal after the Circuit Court declared an Illinois statute unconstitutional. Accordingly, this Court has jurisdiction pursuant to Supreme Court Rules 302, 603, and 612(b).

STATUTORY PROVISIONS INVOLVED

In relevant part, the Criminal Code at the time of defendant's crime provided as follows:

Section 24-1. Unlawful use of a weapon.

(a) A person commits the offense of unlawful use of a weapon 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;

* * *

(c) Sentence.

(1.5) A person who violates subsection 24-1(a)(4) . . . on any public way within 1000 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 (2013).

STATEMENT OF FACTS

The People charged defendant with four gun offenses after he was arrested with a .25 caliber semi-automatic handgun near the Virgil Gilman Trail, a park in Aurora, Illinois, on February 19, 2013. Those charges were possession of a firearm by a street gang member (720 ILCS 5/24-1.8(a)(1)), UUW within 1000 feet of a park (720 ILCS 5/24-1(a)(4), (c)(1.5)), AUUW without a FOID card (720 ILCS 5/24-1.6(a)(1), (3)(C)), and AUUW under the age of twenty-one (720 ILCS 5/24-1.6(a)(2), (3)(I)). C3-C6. On April 24, 2013, defendant entered a fully negotiated plea of guilty to the charge of UUW within 1000 feet of a park. C22. In exchange, the People agreed to *nolle prosequi* all of the remaining charges, and the parties agreed to a sentence of two years of probation. C22-C23.

Thereafter, defendant repeatedly violated the terms of his probation by possessing drugs, using drugs, failing to report, obstructing justice, and having unlawful contact with a street gang member. C27, C33, C38, C42, C53, C68, C71. On November 5, 2015, with multiple probation revocation petitions pending against him, and more than two years after pleading guilty, defendant filed a § 2-1401 petition alleging that the statute prohibiting carriage within 1000 feet of a park is unconstitutional under the Second Amendment of the United States Constitution. C78. He argued:

> The effect of subsection (c)(1.5) on gun rights is a near comprehensive ban. The practical effect is that a person cannot leave his house with his licensed firearm because he would constantly be in jeopardy of accidently and unknowingly entering within 1000 feet of a school, public park, public transportation facility, or residential property owned, operated, managed, or leased by a public housing agency.

C81. Defendant acknowledged that in finding portions of the UUW statute unconstitutional the Seventh Circuit had distinguished a blanket prohibition on carrying a gun in public, from laws that ban carrying guns in particular places, "such as public schools." C81-C82 (quoting *Moore v. Madigan*, 702 F. 3d 933, 940 (7th Cir. 2012)). Nevertheless, defendant argued that subsection (c)(1.5) was more closely akin to a blanket prohibition than a restriction on carrying a gun in certain sensitive places:

> Here, we are not dealing with a ban only in particular places, which, as indicated in *Moore*, would be a reasonable regulation that puts gun owners on notice of where not to go. Rather, we are dealing with amorphous 1000 feet bubbles around many common locations. This regulation would render it unfeasible and impractical for law abiding citizens to assert their Second Amendment rights, and therefore cannot stand.

C82. In response, the People argued that subsection (c)(1.5) is not a blanket prohibition because it prevents people from carrying guns only "in the proscribed areas." C89.

The trial court agreed with defendant. In an extensive oral ruling on July 29, 2016, the trial court held:

> The Defendant argues and I agree, the only real difference between the Defendant's conviction in 24-1.6 which is the *Aguilar* and *Mosley* convictions is the addition of these languages in this particular charge within 1000 feet of a park language. This does not remove the statute from the infirmities found in *Aguilar* and *Mosley* as Defendant argues. It is not a reasonable regulation on the Second Amendment which both *Aguilar* and *Mosley* recognize as being constitutional.
>
> * * *
>
> The effect of the thousand foot language on gun rights is a near comprehensive ban. The practical effect is that a person cannot leave his house with his licensed firearm because he would constantly be in jeopardy of accidentally and unknowingly entering within a thousand feet of a school, public park, public transportation facility, or residential property owned, operated or managed by public housing agency[ ].

R81-R82. The trial court held defendant's conviction "to be void," granted his motion, and vacated his conviction for UUW within 1000 feet of a park. R85. The People filed a timely notice of appeal on August 29, 2017. C116.

ARGUMENT

I. Standard of Review

Issues involving the constitutionality of a statute are reviewed *de novo*. *People v. Sharp*e, 216 Ill. 2d 481, 486-87 (2005). "A court must construe a statute so as to affirm its constitutionality, if reasonably possible." *In re Lakisha M.*, 227 Ill. 2d 259, 263 (2008); *see also People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 290-91 (2003); *People v. Greco*, 204 Ill. 2d 400, 406 (2003); *People v. Malchow*, 193 Ill. 2d 413, 418 (2000). If a statute's "construction is doubtful, the doubt will be resolved in favor of the validity of the law attacked." *People v. Fisher*, 184 Ill. 2d 441, 448 (1998) (internal quotations omitted).

II. Banning the Carriage of Weapons Within 1000 Feet of a Park Does Not Violate the Second Amendment.

The Second Amendment confers two related individual rights: the right to keep arms and the right to bear arms. *See Dist. of Columbia v. Heller*, 554 U.S 570, 582-85 (2008); *McDonald v. Chicago*, 561 U.S. 742, 791 (2010) (applying Second Amendment to states). The right to keep arms is merely the right to possess them, while the right to bear arms is the right to carry them in public for self-defense. *Heller*, 554 U.S. at 582-83; *Aguilar*, 2013 IL 112116, ¶¶ 19-20 (quoting *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012)).

The conduct prohibited here — carrying weapons in sensitive locations — is not protected by the Second Amendment. *See Heller*, 554 U.S. at 626. That is the end of the inquiry in this case. But even if the statute is viewed as a regulation limiting the general right

to bear arms in public, the right to carry arms outside the home lies beyond the core protections of the Second Amendment. *See People v. Fields*, 2014 IL App (1st) 130209, ¶ 57 (quoting *Heller*, 554 U.S. at 635). Therefore, the statute is constitutional so long as it bears a substantial relationship to an important government interest. *See United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010). Because the prohibition on carrying a weapon within 1000 feet of parks, schools, and other sensitive locations is substantially related to the important government interest in protecting children and other vulnerable populations from harm, the statute survives scrutiny.

A. Carrying weapons in sensitive places such as parks and schools is not protected by the Second Amendment.

A two-step framework governs this Court's analysis of a Second Amendment challenge. *In re Jordan G.*, 2015 IL 116834, ¶ 22. First, this Court must make a threshold determination of whether the regulated activity is protected by the Second Amendment. *Id.* To do so, the Court must conduct 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 as it was understood at the time of ratification, then it is categorically unprotected, and no further review is necessary. *Id.* If the regulated activity is not categorically unprotected, then the Court applies the appropriate level of scrutiny to the State's justification for the regulation. *Id.*

In this case, the inquiry stops at the first stage because carrying weapons in sensitive locations is unprotected by the Second Amendment.[2] In *Heller*, the Court held that "nothing

[2] The Court's analysis in this case is limited to UUW prior to its amendment by Public Act 99-29, which amended subsections (a)(4) and (a)(10) to exclude weapons carried in accordance with the Firearm Concealed Carry Act by someone with a valid license under

in our opinion should be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." 554 U.S. at 626. Therefore, *Heller* unambiguously foreclosed Second Amendment challenges to statutes, such as the one at issue in this case, that bar the carriage of weapons into sensitive locations.

The trial court here distinguished the quoted language from *Heller*. It acknowledged that "where 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." R82-R83. But the trial court felt that the statute's application to an area of 1000 feet around a park or school placed it beyond the scope of regulations expressly authorized by *Heller*:

> The effect of the thousand foot language on gun rights is a near comprehensive ban. The practical effect is that a person cannot leave his house with his licensed firearm because he would constantly be in jeopardy of accidentally and unknowingly entering within a thousand feet of a school, public park, public transportation facility, or residential property owned, operated or managed by public housing agency[ ].

R82. But federal law also bars carriage of weapons in a "school zone," 18 U.S.C. § 922(q)(2)(A), which is defined to include a 1000 foot area around the "grounds of a . . . school." 18 U.S.C. §§ 921(a)(25). Therefore, when the Supreme Court expressly excluded laws barring carriage in sensitive places from protection under the Second Amendment, the relevant federal law included an identical 1000 foot zone around the school, and thus *Heller*'s language cannot be distinguished on this basis.

Although *Heller* did "not undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment," 554 U.S. at 626, a historical analysis confirms the Supreme Court's determination that the Second Amendment does not apply to laws barring

---

that Act. Public Act 99-29 (eff. Jul. 10, 2015).

carriage in sensitive locations. Indeed, such regulations limiting public carriage are long standing and rooted in the common-law right codified by the Second Amendment. *See Heller*, 554 U.S. at 599 (concluding that Second Amendment "codified a right inherited from our English ancestors") (internal quotation marks omitted); Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 Clev. St. L. Rev. 1, 7-8 (2012) ("[P]ublic regulation of arms is as old as the Norman Conquest or what eighteenth century commentators referred to as the beginning of the English Constitution."). Chief among such regulations was the 1328 Statute of Northampton, stating that "no person shall 'go nor ride armed by Night nor by Day in Fairs, Markets, nor in the Presence of the Justices or other Ministers nor in no Part elsewhere.'" Charles, 60 Clev. St. L. Rev. at 7-8 (quoting Statute of Northampton, 2 Edw. 3, c. 3 (Eng. 1328)). The statute was not only a prohibition on arms in sensitive locations, but "[i]ts tenets also provided the basis of English legal reform for centuries to come," *id*. at 13, with three states — Massachusetts, North Carolina, and Virginia — "expressly incorporat[ing]" the Statue of Northampton "immediately after the adoption of the Constitution," *id.* at 31-32 (citing 2 The Perpetual Laws, of the Commonwealth of Massachusetts, from the Establishment of its Constitution to the Second Session of the General Court, in 1798 259 (Worcester, Isaiah Thomas 1799); Francois-Xavier Martin, A Collection of Statutes of the Parliament of England in Force in the State of North-Carolina 60-61 (Newbern 1792); A Collection of All Such Acts of the General Assembly of Virginia, of a Public and Permanent Nature, as are Now in Force 33 (Augustine Davis 1794)). The "legal tenets" underlying the Statute of Northampton persisted beyond the colonial period, and "[t]hroughout the

nineteenth century numerous States enacted different versions." Charles, 60 Clev. St. L. Rev. at 40-41.

Because a historical analysis demonstrates that regulations on carriage of weapons in sensitive locations was understood to lie outside the scope of the Second Amendment at the time of ratification, such conduct is categorically unprotected, and no further review is necessary. *See Jordan G.*, 2015 IL 116834, ¶¶ 22-25.

B. If the Second Amendment applies, the challenged regulation is subject to intermediate scrutiny because it regulates conduct outside the core protections of the Second Amendment.

If some level of Second Amendment scrutiny is necessary, intermediate scrutiny should be used here because the regulated conduct falls outside the core protections of the Second Amendment. The trial court characterized the challenged regulation as flatly banning public carriage of firearms, but the statute is actually part of the well-established class of regulations that limit carriage in sensitive locations.

"The core protection of the second amendment is the 'right of law-abiding, responsible citizens to use arms in defense of hearth and home.'" *Fields*, 2014 IL App (1st) 130209, ¶ 57 (quoting *Heller*, 554 U.S. at 635) (emphasis in *Fields*). "Although the second amendment guarantee has *some* application in the very different context of possession of firearms in public, 'outside the home, firearms rights have always been more limited, because public safety interests often outweigh individual interests in self-defense.'" *Fields*, 2014 IL App (1st) 130209, ¶ 57 (quoting *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) (emphasis original)).

Although the Supreme Court in *Heller* did not tell lower courts what level of scrutiny to apply when addressing challenges to statutes that lie outside the core protections of the

Second Amendment, courts have held that intermediate scrutiny applies to such statutes, s*ee Williams*, 616 F.3d at 692, including statutes restricting public carriage. *See, e.g., Drake v. Filko*, 724 F.3d 426, 430, 430 n.5 (3d Cir. 2013); *Kachalsky v. Westchester*, 701 F.3d 81, 96 (2d Cir. 2012); *Masciandaro*, 638 F.3d at 471. This standard, recognizes that such regulations lie outside the core protection — defense of hearth and home — guaranteed by the Second Amendment, while remaining consistent with *Heller*'s admonishment that "[i]f all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." *Heller*, 554 U.S. at 628 n.27.

Under intermediate scrutiny, the statute's bar on carriage within 1000 feet of schools, parks, and other sensitive locations is constitutional. To survive a Second Amendment challenge, the People must show that the challenged regulation is substantially related to an important governmental objective. *See People v. Alcozer*, 241 Ill. 2d 248, 262 (2011); *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (applying intermediate scrutiny in Second Amendment case). The challenged statute here is substantially related to the important government interest in preventing harm to children and other vulnerable populations.

Protecting children is an important — indeed a compelling — state interest. *See, e.g., New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (holding that "it is evident beyond need for elaboration" that protecting children is a compelling government interest). Indeed, the Court has upheld laws aimed at protecting children even where they affect constitutionally protected rights. *See, e.g., FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978) (upholding regulation of indecent broadcasting in light of government's interest in well-being of

children). The challenged statute was enacted to advance this interest. During a nine-month period in 1988 and 1989, school shootings left eight elementary school students dead and 43 people injured. Amy Hetzner, *Where Angels Tread: Gun-Free School Zone Laws and an Individual Right to Bear Arms*, 95 Marq. L. Rev. 359, 360 (2011). Among the laws passed in the wake of this violence were the federal Gun-Free School Zones Act of 1990 and, shortly thereafter, Illinois's similar ban on carrying a weapon in schools, parks, and other areas frequented by children. In introducing the federal legislation, Senator Herb Kohl of Wisconsin pointed to the "growing problem . . . of firearms in our schools," and highlighted the case of Laurie Dann, who killed an eight-year-old boy and injured five other students at a Winnetka, Illinois, elementary school in May 1988. 130 Cong. Rec. 1165 (1990) (statement of Sen. Herb Kohl). It was in this atmosphere that the Illinois General Assembly passed the law extending the existing ban on drugs within 1000 feet of schools, parks, and public housing to also ban guns from these sensitive locations. Hetzner, 95 Marq. L. Rev. at 385. Arguing in favor of the challenged regulation, legislators pointed to the need to curtail increasing problems with violence. *Id.; see also People v. Daniels*, 307 Ill. App. 3d 917, 924 (2d Dist. 1999) (purpose of 720 ILCS 570/407, which increases penalties for delivery of controlled substances within 1000 feet of a school, park, or public housing, is protection of vulnerable populations, such as children). Indeed, during the 1992-93 school year following enactment of the legislation, 158 guns "were confiscated on or near public school grounds in Chicago." Hetzner, 95 Marq. L. Rev. at 385 (citing Andrew Gottesman, *Guns Are Shattering Quiet Around Schools in Suburbs*, Chicago Tribune (Sept. 23, 1993)).

Similarly, the government has substantial and distinctive interests in the other sensitive areas covered in sub-section (c)(1.5). For example, the State has a legitimate

interest in "protecting its judicial system," ensuring the "fair and orderly" administration of justice, and the "unhindered and untrammeled" operation of the courts. *Cox v. Louisiana*, 379 U.S. 559, 562 (1965) (rejecting First Amendment challenge to law banning picketing in or near courthouses). The State also has a legitimate interest in increased safety and security for residents of public housing facilities and passengers of public transportaion. *See, e.g.*, *People v. Lake*, 2015 IL App (4th) 130072, ¶ 44 (agreement between Danville Public Housing Authority and Danville police department advanced legitimate government interest in increased safety and security for residents of public housing community); *Chicago Transit Authority v. Amalgamated Transit Union, Local 241*, 399 Ill.App.3d 689, 696-97 (1st Dist. 2010) (recognizing government interest in safe and secure transportation of the public, especially children traveling to school).

The challenged regulation is substantially related to these interests. Both logic and empirical data establish a substantial relationship between banning carriage within 1000 feet of parks, schools, and other sensitive locations and the important government interest of protecting vulnerable populations such as children from gun violence:

> Although schools should be safe havens, equipping children with the skills and values needed to lead society into the future, they are actually primary locations for violence. In the last few months of the 1997-98 academic year, a dozen students and teachers were killed and dozens more wounded in shootings across the country. In a single incident in April 1999, two Colorado high school students killed twelve of their classmates and a teacher, and wounded several more. And these well-publicized tragedies are just the tip of the iceberg. Over a third of all high school students are regularly threatened with harm, and more than ten percent are actually attacked. A surprising twenty percent of all urban high school students have been threatened with guns. In 1993 alone, over a third of urban school districts reported a shooting or knifing. Furthermore, students are not the only ones in danger at school. Thousands of secondary school teachers are physically attacked each year, and thousands more are threatened with harm every day.

> A 1994 Gallup poll ranked school violence as America's primary concern in education.

Carl W. Chamberlain, *Johnny Can't Read 'Cause Jane's Got a Gun: The Effect of Guns in Schools, and Options After* Lopez, 8 Cornell J. L. & Pub. Pol'y, 281, 282-83 (1999). Furthermore, juvenile violence is inextricably linked to firearms, as demonstrated by national crime statistics from the years immediately preceding passage of Illinois's ban on carriage within 1000 feet of parks, schools, and public housing:

> Between 1980 and 1990, there was a 79% increase in the number of juveniles aged ten to seventeen who committed murder by using a firearm. By 1990, 82% of all homicides among teenagers fifteen- to nineteen-years-old involved firearms. Between 1982 and 1991, arrests for weapons violations (carrying, possessing, etc.) among juveniles increased almost 80%, while corresponding arrests among those eighteen years of age and older increased less than 13%. During those same nine years, juvenile arrests increased 71.7% for aggravated assault and 92.4% for other assaults. The corresponding arrests among individuals eighteen years of age and older increased 61.3% and 97.5%, respectively. These figures demonstrate the nexus between firearms and murder by youths. While arrests for general assaultive violence have increased at roughly equal rates among juveniles and persons over eighteen years of age, arrests for weapons violations and murder have skyrocketed among juveniles. Therefore, it is not the upsurge of generally violent behavior alone, but the increased lethality (due to firearms) of that behavior among juveniles, that is causing such devastating effects.

Hattie Ruttenberg, *The Limited Promise of Public Health Methodologies to Prevent Youth Violence*, 103 YALE L. J. 1885, 1892 (1994). Gun violence near schools, parks, and other sensitive locations endangers the large numbers of children who frequent these places, and prohibiting guns near them is substantially related to the important government interest in protecting these children.

This conclusion is consistent with *Heller*'s identification of school zone prohibitions as presumptively lawful, as well as other court decisions upholding statutes containing similar 1000-foot restrictions. *See United States v. Redwood*, No. 16 CR 00080, 2016 WL

3498082, slip op. at 6 (N.D. ILL. Aug. 18, 2016) (upholding federal ban on carriage within 1000 feet of a school); *Hall v. Garcia*, No. C 10-03799 RS, 2011 WL 995933, slip op. at 5 (N.D. Cal. Mar. 17, 2011) (upholding California ban on carriage within 1000 feet of a school). Additionally, the Court has upheld other 1000-foot bans aimed at protecting children from harm, even where those bans implicated constitutional rights. *See City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 48 (1986) (ban on adult theaters within 1000 feet of a school held to be a constitutional restriction of First Amendment rights). These holdings are persuasive authority showing that the Illinois ban is similarly constitutional.

For these reasons, even if the challenged regulation falls within the scope of the Second Amendment, the ban on carriage within 1000 feet of parks, schools, and other sensitive locations is constitutional because it is substantially related to the State's important interest in protecting children from gun violence.

C. Defendant's Facial Challenge to the Statute Fails Because It Is Unquestionably Not a Comprehensive Ban in Much of the State.

The trial court held that the thousand-foot restrictions on carriage were "a near comprehensive ban":

> The practical effect is that a person cannot leave his house with his licensed firearm because he would constantly be in jeopardy of accidentally and unknowingly entering within a thousand feet of a school, public park, public transportation facility, or residential property owned, operated or managed by public housing agency [ ].

R82. But this, of course, is not the case in much of the State, where many miles separate one sensitive location from the next. *See generally, e.g.*, *People v. Clark*, 406 Ill. App. 3d 622, 632-33 (2d Dist. 2010) (courts can take judicial notice of geographical facts and information from sites such as Map Quest and Google Maps). A facial challenge to a statute requires the

challenger to show that there is no set of circumstances under which the statute could be constitutionally enforced. *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Hill v. Cowan*, 202 Ill. 2d 151, 157 (2002). The possibility that there are some places in Illinois where the thousand-foot restrictions function as a near comprehensive ban is insufficient to sustain a facial challenge to the statute. *See id.* And, a statute cannot be struck down as overbroad outside of the First Amendment context. *Salerno*, 481 U.S. at 745; *In re C.E.*, 161 Ill. 2d 200, 211 (1994). And the First Amendment is not implicated here. Therefore, even if there might be a set of circumstances under which the challenged statute could not be constitutionally enforced, it survives the facial challenge made here.

Nor should this Court recharacterize defendant's claim as an as-applied challenge. *See People v. One 1998 GMC*, 2011 IL 110236, ¶¶ 57-69 (declining to recharacterize party's facial challenge to statute). In this case, defendant's § 2-1401 petition, filed more than two years after his guilty plea would have been untimely had it raised an as-applied challenge; unlike facial challenges, as applied challenges are subject to the usual rules of forfeiture. *See People v. Thompson*, 2015 IL 118151, ¶ 39 (holding defendant's as-applied challenge forfeited where § 2-1401 petition was untimely and claim was raised for the first time on appeal). The distinction is logical: in a facial challenge such as this one, the facts related to the individual defendant are irrelevant, whereas in an as-applied challenge it is paramount that the record be sufficiently developed regarding the facts and circumstances of the defendant. *Id.* at ¶¶ 36-37. Here, because defendant has not raised a timely as-applied challenge in the trial court no such record has been developed. Furthermore, defendant would have been prohibited from raising such a challenge in his petition below and could not do so now in a successive petition under the two-year limitations period in § 2-1401.

Therefore, this Court should not recharacterize defendant's claim as an as applied challenge. *Id.* at ¶ 39; *see also Mosley*, 2015 IL 115872, ¶¶ 47-49 (court may not find statute unconstitutional as applied without evidentiary hearing and finding of fact; absent these, "the constitutional challenge must be facial").

III. The Circuit Court Had Jurisdiction Only to Rule on the Constitutionality of Violations of 720 ILCS 5/24-1(a)(4), (c)(1.5) Within 1000 Feet of a Park.

Subsection (c)(1.5) provides that a violation of subsections (a)(4), (a)(9) and (a)(10) in the designated locations is a Class 3 felony. Defendant pleaded guilty only to a violation of subsection (a)(4) within 1000 feet of a park. C22. Therefore, the circuit court lacked jurisdiction to rule on the constitutionality of other subsections, or of applications of (a)(4) to other locations, such as within 1000 feet of a school.

As this Court recently reaffirmed, a circuit court lacks jurisdiction to rule on the constitutionality of a statute under which the defendant was not charged. *People v. Mosley*, 2015 IL 115872, ¶ 11 ("courts do not rule on the constitutionality of a statute where its provisions do not affect the parties, and decide constitutional questions only to the extent required by the issues in the case") (internal citations omitted); *see also Exelon Corp. v. Dep't of Revenue*, 234 Ill. 2d 266, 296 (2009) ("A court cannot rule on the constitutionality of a statute that is not before it, nor can the court rule on the merits of a case over which it lacks jurisdiction.") (Thomas, J., specially concurring). The circuit court apparently recognized that some parts of (c)(1.5) are separate and severable, finding unconstitutional only the conduct banned by (a)(4) and (a)(10) within 1000 feet of schools, parks, courthouses, public housing, and public transportation facilities, rather than striking down all related provisions, such as the conduct banned by (a)(9) or restrictions on possession in

a school. *See* R85. But provisions banning carriage within 1000 feet of a school or courthouse, for example, were no more before the court than the conduct banned by subsection (a)(9); defendant did not plead guilty to those crimes. Accordingly, the circuit court had jurisdiction to rule only on the constitutionality of (a)(4) to carriage of a firearm within 1000 feet of a park, and its order must be vacated to the extent it invalidated any other portion of the statute. *See Mosley*, 2015 IL 115872, ¶ 12 (vacating circuit court orders to extent they find statutory provisions not before the court unconstitutional).

IV. All Other Portions of the Statute Are Severable From the Challenged Provision.

Should this Court agree that the ban on carriage within 1000 feet of a park is unconstitutional, then, pursuant to the Statute on Statutes, the remaining question is whether the invalid provision is severable, i.e., whether it is essentially and inseparably connected in substance to the remaining provisions, such that the legislature would not have enacted the remaining provisions absent the invalid one. *See Jordan G.*, 2015 IL 116834, ¶ 18. The unconstitutional portion of a statute may be severed "if what remains is complete in and of itself, and is capable of being executed wholly independently of the severed portion." *Id.* (quoting *Mosley*, 2015 IL 115872, ¶ 30). Here, there is no question that the General Assembly would have passed a ban on carriage within 1000 feet of a school without a similar ban on carriage within 1000 feet of a park. The legislature chose to protect children in a variety of sensitive locations, and they certainly would have chosen to protect them at school and on their way to school on public transportation even if they could not also do so near parks. Nor was the General Assembly's interest in providing increased safety and security for residents of public housing and passengers on public transportation, or its interest in ensuring the unhindered and untrammeled operation of the courts, tethered to its interest in

protecting children near parks. Indeed, as for some of the other areas protected with 1000 foot bans under subsection (c)(1.5), those bans were passed in separate legislation. *See, e.g.*, Public Act 86-465 (eff. Jan. 1, 1990) (adding carriage ban in public housing to existing ban on carriage in schools); Public Act 87-930 (eff. Jan. 1, 1993) (adding carriage ban in parks and creating carriage ban within 1000 feet of schools, parks and public housing); Public Act 88-156 (eff. Jul. 28, 1993) (adding carriage ban within 1000 feet of courthouses); Public Act 96-41 (eff. Jan. 1, 2010) (adding carriage ban within 1000 feet of public transportation facility). Thus, it is clear that the ban on carriage within 1000 feet of a park is not so essentially and inseparably connected in substance to the other bans in subsection (c)(1.5) that the General Assembly would not have passed them independently of one another. Nor is there any reason why the ban on carriage within 1000 feet of a school, for example, could not be enforced wholly independently of the ban on carriage within 1000 feet of a park. *See, e.g., Jordan G.*, 2015 IL 116834, ¶ 19 (AUUW without a FOID card and AUUW under 21 both severable from AUUW's unconstitutional aggravating factors, even though each must operate in conjunction with subsections (a)(1) and (a)(2) of the AUUW statute to form a substantive offense).

Therefore, even if this Court finds that criminalizing a violation of (a)(4) within 1000 feet of a park violates the Second Amendment, it should nevertheless hold that the remaining Class 3 felonies specified in subsection (c)(1.5) are severable.

V. The People Should Be Permitted to Reinstate *Nolle Prossed* Charges Against Defendant Even Though the Three-Year Statute of Limitations Has Run.

The circuit court granted the People leave to reinstate the three charges it agreed to *nolle prosequi* as part of defendant's negotiated plea agreement. Subsequently, in *People v.*

Shinaul, 2017 IL 120162, this Court held that where the statute of limitations has run, it acts as a complete bar on reinstating such charges following a defendant's successful motion to vacate a guilty plea. Thus, under *Shinaul* the circuit court's order cannot stand. But this case demonstrates why *Shinaul* should be reconsidered because it "allows defendants to circumvent negotiated plea agreements without any consequences to their voluntary choices and without ensuring the protection of the public." *Shinaul*, 2017 IL 120162, ¶ 24 (Theis, J., dissenting).

Here, the People *nolle prossed* several valid gun charges — possession of a firearm by a street gang member, AUUW without a FOID card, and AUUW under age twenty-one, C3-C6 — in exchange for defendant's guilty plea. The People also agreed to a sentence of probation. C22-C23. Before defendant even committed his crimes, the Seventh Circuit had held that subsections (a)(4) and (a)(10) of UUW violated the Second Amendment because they established a comprehensive ban on carrying a weapon. *See Moore*, 702 F.3d at 942. Nevertheless, defendant entered into the plea agreement, pleading guilty to a violation of (a)(4) within 1000 feet of a park. Not until November 5, 2015, more than two years after pleading guilty and nearly three years after *Moore* was decided, did defendant file a § 2-1401 petition alleging that UUW within 1000 feet of a park is unconstitutional under the Second Amendment. C78. By then, multiple petitions to revoke defendant's probation were pending, and the three-year limitations period on the *nolle prossed* charges had nearly run. By the time the circuit court vacated defendant's guilty plea and conviction, the limitations period had expired.

Before *Shinaul*, this Court consistently applied contract principles when interpreting negotiated plea agreements. *Shinaul*, 2017 IL 120162, ¶ 34 (Theis, J., dissenting) (citing *In*

re Derrico G., 2014 IL 114463; *People v. Donelson*, 2013 IL 113603). When a defendant enters a fully negotiated guilty plea, both the People and the defendant must be bound by the terms of the agreement. *Id.* (citing *People v. Evans*, 174 Ill. 2d 320, 327 (1996)). "It would be inconsistent with constitutional concerns of fundamental fairness to allow a defendant to hold the State to its part of the bargain while unilaterally modifying a part of the agreement." *Id.* Further, "the State is much less likely to enter into plea negotiations if it realizes its decision to dismiss [charges under a plea agreement] is irrevocable while the defendant's decision to plead is revocable." *Id.* (quoting *People v. McCutcheon*, 68 Ill. 2d 101, 107 (1977)).

On facts similar to those presented here — where the defendant pleaded guilty to charges under the subsection of the AUUW statute held unconstitutional in *Aguilar* and the People *nolle prossed* other valid gun charges — Justice Theis concluded:

> I would hold that under the frustration of purpose doctrine, when defendant chose to vacate his conviction, the State was then discharged of its obligation under the plea agreement to dismiss the other eight charges, restoring the parties to the positions they held prior to the entry of the plea and prior to the dismissal of the nol-prossed charges.
>
> Under this construct, upon restoration of the status quo ante, the statute of limitations does not bar the State from prosecuting the charges that had been nol-prossed under the plea agreement.

Shinaul, 2017 IL 120162, ¶¶ 38, 39 (Theis, J., dissenting).

This case illustrates why Justice Theis was correct. Assuming, arguendo, that defendant is right that the ban on carriage within 1000 feet of a park is facially unconstitutional, he is entitled to vacatur of his conviction. *See, e.g., People v. McFadden*, 2016 IL 117424, ¶ 17 ("A declaration that a statute is void *ab initio* means that the statute was constitutionally infirm from the moment of its enactment and, therefore, is

unenforceable."). Nevertheless, defendant chose to wait more than three years after his crime to seek vacatur of his conviction despite the fact that the basis for his claim was available to him at the time he entered his guilty plea. Vacatur of defendant's conviction without leave to reinstate the *nolle prossed* charges would unilaterally modify the parties' agreement and eliminate the People's basis for entering into the agreement. Additionally, defendant pursued his claim only in the face of several pending petitions to revoke his probation. As Justice Theis correctly reasoned:

> Restoring the parties to the same position they held after the charges were filed and before the plea agreement was entered does not frustrate the purpose of the limitations period under these circumstances. To hold otherwise would allow defendant to escape the consequences of a felony conviction and circumvent the underlying purpose of the bargain without allowing the State to rescind its part of the bargain.

Shinaul, 2017 IL 120162, ¶ 41 (Theis, J., dissenting).

If this Court holds that 720 ILCS 5/24-1(a)(4), (c)(1.5) is uncontitutional, it should also reconsider its recent decision in *Shinaul* for the reasons explained in Justice Theis's dissent, and allow the People to reinstate the *nolle prossed* charges in this case.

CONCLUSION

This Court should reverse the judgment of the circuit court and reinstate defendant's conviction. Alternatively, if the Court vacates defendant's conviction, it should reconsider *Shinaul* and allow the People to reinstate the *nolle prossed* charges.

March 17, 2017

Respectfully submitted,

LISA MADIGAN
Attorney General of Illinois

DAVID L. FRANKLIN
Solicitor General

MICHAEL M. GLICK
GARSON S. FISCHER
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 814-2566
gfischer@atg.state.il.us

Attorneys for Plaintiff-Appellant
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) 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 twenty-two pages.

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

APPENDIX

TABLE OF CONTENTS TO APPENDIX

Index to the Record on Appeal

DIRECT APPEAL TO THE SUPREME COURT OF ILLINOIS
FROM THE CIRCUIT COURT
OF THE SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, v. JULIO CHAIREZ, Defendant.	)	No. 13-CF-317 The Honorable John A. Barsanti, Judge Presiding

NOTICE OF APPEAL

Pursuant to Illinois Supreme Court Rules 302 and 612, plaintiff, People of the State of Illinois, directly appeals from the July 29, 2016 order of the Circuit Court of the Sixteenth Judicial Circuit, Kane County, Illinois, declaring 720 ILCS 5/24-1(a)(4)(c)1.5 unconstitutional, and respectfully requests that the Supreme Court of Illinois reverse that order, and grant whatever other relief it deems warranted.

On April 24, 2013, the defendant entered a negotiated guilty plea to unlawful use of a weapon under 720 ILCS 5/24-1(a)(4)(c)1.5, a class 3 felony and was sentenced to a period of probation. On November 5, 2015, the defendant filed a Petition for Relief from Judgment, 735 ILCS 5/2-1401, alleging that the statute he pled guilty to was unconstitional. The petition was filed more than two years after the plea. The court originally denied the motion on March 4, 2016, but invited the defense to file another motion which was filed on April 15, 2016, again alleging that the statute to which he pled was unconstitutional. After a hearing, the Court declared the statute

unconstitutional on July 29, 2016. (Pursuant to Supreme Court Rule 303 (b)(3), transcript dated July 29, 2016, see page 8 and beyond.)

Respectfully submitted,

Joseph H. McMahon
Attorney General of Illinois

BY: _____

Jody P. Gleason
Assistant State's Attorney
37W777 Rt. 38 Suite 300
St. Charles, Il 60175
(630)232-3500

VERIFICATION BY CERTIFICATION

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, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that she verily believes the same to be true.

_____

Jody P. Gleason
Assistant State's Attorney

STATE OF ILLINOIS)
) ss.
COUNTY OF KANE)

PROOF OF FILING AND SERVICE

The undersigned, being first duly sworn upon oath, deposes and states that on August 29, 2016, the original and two copies of the attached **Notice of Appeal** were filed with the Clerk, Kane County Circuit Court, and one copy was served upon the following, by placement in the United States mail box at the Kane County Judicial Center, 37W777 Route 38, St. Charles, IL 60174, in an envelope bearing sufficient first-class postage:

Kelli Childress
Kane Co. Public Defender
37W777 Rt. 38
St. Charles, Il 60175

Lisa Madigan
Illinois Attorney General
100 W. Randolph St.
Chicago, Il 60601

Christy DeCh

SUBSCRIBED and SWORN to
before me on August 29, 2016

Susie DeChristopher
Notary Public

OFFICIAL SEAL
SUSIE DECHRISTOPHER
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:08/29/17

STATE OF ILLINOIS)

) ss:

COUNTY OF K A N E)

IN THE CIRCUIT COURT FOR THE
SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff,	)	
vs.	)	Gen. No. 13 CF 317
JULIO C. CHAIREZ, JR., Defendant.	)	

TRANSCRIPT of the Report of Proceedings had at the hearing in the above-entitled case before the HONORABLE JUDGE JOHN A. BARSANTI, at the Kane County Judicial Center, St. Charles, Illinois, on the 29th day of July, A. D., 2016.

PRESENT:

MR. JOSEPH MC MAHON,
State's Attorney for Kane County, by:
MS. LAURA MAGLIO,
Assistant State's Attorney,

appeared on behalf of the People of the State of Illinois.

MS. KELLI CHILDRESS,
Public Defender for Kane County, by:
MS. JILLIAN WEISS,
Assistant Public Defender,

appeared on behalf of the Defendant.

JEANINE H. FASSNACHT, CSR, RPR, OCR

(Whereupon, the following proceedings were had in open court:)

THE COURT: Okay. People of the State of Illinois versus Chairez, C-h-a-i-r-e-z, 13-CF-317; names for the record, please?

MS. MAGLIO: Laura Maglio, People.

MS. WEISS: Jillian Weiss for the Defendant who's present here, not in custody.

THE COURT: All right. I'm ready to render a decision. There will need to be some explanation. I made a decision on this at a previous date, and after that date, the Defense came back, I don't know if the State joined in this or not, it could be I don't recall, but the Defense informed the Court that there were issues that had been left undecided by the Court at the time, and then we set this back again for the Court to take a look at it again, which I did do; and I have do confess that my original ruling did leave some issues undecided in this matter, and I can't lay the blame to anybody but myself. I -- and I read these Motions, the original time before the original decision, I neglected to -- I neglected to understand the Defendant's Motions completely. I felt that they were much more identical than they actually were on the second reading, and I'm giving you that

background because I reconsidered my rulings from the first time. I'm going to go, I'm going to make -- I'm going to re-rule on everything. I'm going to make the record clear on that because in my view, because I had not completely ruled on all of the issues that the Defendant had argued on the -- argued on these Motions the first time, I believe there was dispositive. Upon second reading, I don't believe -- I don't think that they were dispositive, so I'm reconsidering all of my -- I went over all of the issues all over again, and make ruling -- I'm going to make rulings today which to me are the final rulings in this particular matter now.

If the State would take issue with that, I mean, the State can do what they want on this, depending on when we get through this whole thing how this thing plays out but now I'm ruling on two Motions, again, if I'm wrong on this, someone will tell me I'm sure.

Petition for Relief from Judgment hyphen Unconstitutional Charge and then Petition for Relief from Judgment-hyphen-Inadequate Factual Basis. Those are the two Motions filed?

MS. WEISS: Those are the two original ones and there's a third one filed later based upon essentially the Court's suggestion that I look into the issue about the probable cause.

THE COURT: So that would be the third issue which a -- so we have two, these two Motions plus the issue concerning the lack of a probable cause determination, right?

MS. WEISS: Yes.

THE COURT: Okay. Okay. I'll read this into the record this first section concerning the background.

The Defendant, Chairez, pleaded guilty to unlawful use of weapons on 4-24-13. Judgment was entered on the pleading conviction on April 24th, '13 and placed upon probation. The Defendant now has petitions to revoke his probation pending against him. I previously ruled and this is somewhat of an explanation I just gave you. I previously ruled on several issues in this case. After -- after ruling, the Defendant informed the Court that several issues remained that I had not ruled upon and I then revisited all the Motions and all the issues.

Defendant filed these two Motions under 75 ILCS -- 735 ILCS 5/2-1401. At the same time I did mention before early on in this that in my review of the records, and the files, I found that there had been no probable cause determination before the plea of guilty in this matter, there was no Grand Jury Indictment, there was no Preliminary Hearing held and there was no Waiver in the record of a Preliminary Hearing -- uhm -- continuing. As I had not

completely ruled on these issues, I have reconsidered all the issues again and I'll rule on all the issues today; and in addition to the two motions filed, the Defendant also brought another issue out to the attention of the parties for lack of probable cause finding or Waiver of Preliminary Hearing in this case. As stated above, my intent is to issue a final -- I'll call it a "universal ruling" as to all the issues today.

All right. Let's talk about the lack of a probable cause determination as required under 735 ILCS 5/ 109-3. I find that while the Statute requires a probable cause determination through a Grand Jury proceeding Preliminary Hearing, or Waiver of Preliminary Hearing, there is no indication in the record of any of the above. I find this failure renders the Defendant's plea voidable, not void, as no mention to the -- withdraw the guilty plea was within the Statute of the period -- no mention that there was a withdrawal -- Motion to Withdraw the guilty plea within the statutory period. I find Defendant waived that issue. I find that the Court had the jurisdiction and authority to accept the guilty plea. I do not find the guilty plea to be void, so I denied the Defendant -- the Motion by the Defendant and the issue brought by the Court concerning the lack of a probable cause determination at that time.

Next, going to the timeliness of the

Defendant's 1401 Motion, 735 ILCS 5/2-1401, "The Statute the Defendant files his Motion under which he files these Motions, has a filing window --" I'm quoting -- "not later than two years after the entry of the order on the Judgment. In the instant case, the Defendant's Motion -- Motions are filed outside of that two-year window. The exception to this Rule is an attack on a void judgment. A void Judgment is a judgment entered by a Court without the jurisdiction to enter the Judgment. A void order can be attacked at any time which brings it outside -- could bring it outside of the window on a 1401 Motion", which these Motions are. That can be attacked at any time. The Defendant raises generally two issues in the Motions. Number 1, an inadequate factual basis for the Defendant's plea of guilty on April 24, 2013, and the unconstitutionality of the Unlawful Use of Weapons Statute which -- which is 720 ILCS 5/24-1; and there are subsections to that, I don't think it's necessary to go into that deeply at this time. The Defendant argues either or both of these issues would -- if found for the Defendant would render the Judgment of conviction void and attackable outside of the two-year window. The first decision which the Court needs to make here is whether the April 24, 2013 Judgment of Conviction and Sentence are void. First I'm going to deal with the inadequate factual basis argument. I find the

Defendant pleading guilty to Count Number 2 of the Complaint alleging a violation of 720 ILCS 5/24-1(a)(4), which I refer to or I'll refer to as (a)(4). I find the language of Count 2 more closely tracks 720 ILCS 5/24-1(a)(10), so I'm referring to two different sections of that UUW Statute which is (a)(4) and (A)(10), and I find that the transcript of the factual basis supports an (a)(4)conviction.

On the cases of People versus Porter and Phillips, I don't have have those copies here -- all right, just give me a second.

(Whereupon, there was a brief pause in the hearing; and the following proceedings were had in open court:)

THE COURT: All right. I need to take a short recess.

(Whereupon, a short recess was taken.)

THE COURT: All right. I'll give you the citations, Porter is 61 Il., App., 3d., 941; Billops, B-i-l-l-o-p-s, 16 Il., App., 3d., 892. On the authority of Porter and Billops, I find that the factual basis supports the charge for which the Defendant pleaded guilty. At the pleas, the Court was presented by the parties with a plea of guilty document which

stated that the Defendant pleaded guilty to (a)(4), and I find that the factual basis sufficiently supported that plea. I find the Court did have the authority to enter that Judgment of Conviction when viewed in the light of this argument presented by the Defendant in the 1401 Petition, based on the inadequate factual basis, so that's my ruling on that issue.

Now I want to go to the unconstitutional charge. This was the Motion filed entitled: Petition for Relief from Judgment, Unconstitutional Charge.

Defendant's Petition as it relates to this Motion is as follows: The Defendant was convicted in this numbered matter 13-CF-317 on April 24, 2013, and placed upon probation. The State has alleged Defendant has violated his probation in this matter. After Defendant's conviction -- after the Defendant's conviction, the Supreme Court of Illinois decided People versus Aguilar, and that decision is dated and actually I think that's re-dated at 12-19 of 2013, that's 2 Northeast 3d., 321; and after the Defendant's conviction, People versus Mosley was decided, M-o-s-l-e-y, and that date is 6-5-15, 33 Northeast 3d., 137. Aguilar and Mosley found different section of the Aggravated Unlawful Use of Weapon Statute facially unconstitutional, specifically Section 24-1.6(a)(1) in Aguilar, and 24-1.6(a)(2) in Mosley,

again they also incorporate some of the sentencing issues Statutes also.

Both cases also include Section A(3)(a) in their findings of unconstitutionality. After Aguilar and Mosley, the Illinois Legislature added language in 720 ILCS 5/24-1.6, that's the Aggravated Unlawful Use of Weapons Statute, to exempt those who possess a valid firearm, conceal carry card. The new language became effective on July 9th of 2013, and that would be after the date of the Defendant was pleading guilty. The language in those addresses the constituional problems found in Aguilar and Mosley and as of now, remedied the near -- and this is language used in the cases -- the near comprehensive ban on possessing a weapon for self-defense purposes.

Since Aguilar and Mosley, any convictions under the 720 ILCS 24-1.6(a)(1) and (2) before Amendment would be void and attackable under 735 ILCS 5/2-1401 as stated by the Defendant in the Defendant's Motion, which is -- I'll quote from the Defendant's Motion which I incorporated into my decision: "When the Statute is held facially unconstitutional, as was in Aguilar, the Statute is said to be void ab initio citing People versus Burns, which is at 2013 IL 114122 out of the First District in 2013, that's a Lexus cite; and People versus Blair, 2013 IL 114122

again Illinois 2013.

"A Statute declared void ab initio --" and this is the quotes -- "was unconstitutionally infirm from the moment of it's enactment is therefore unenforceable. A trial court is without jurisdiction to enter a conviction against a defendant based on actions that do not constitute a criminal offense", cited People versus Dunmore, 2013 IL App (1st) 12170. In Dunmore, the First District Appellate Court vacated convictions under 24-1.6(a)(1),(a)(3)(a) as being void, so that's discussing -- I think that that law is correct -- discussing the concept of an unconstitutional Statute is void from the beginning; in other words, ab initio, is unconstitutionally unfirm.

Now the Defendant argues that the Defendant was convicted originally on 4-24-13 of either 720 ILCS 24-1(a)(4) or 24-1-(a)(10), of course I just talked about the issue concerning which one of those he was actually convicted under. My finding is that he was convicted under 24-1(a)(4) and due to confusion, inconsistency in the charging documents and the plea of guilty, I have found that the Defendant was convicted of 24-1(a)(4). The Statutory language of both 24-1(a)(4) and (a)(10) at the time of the Defendant's conviction are almost identical to the language found unconstitutional in -- under the Aggravated Unlawful Use of

Weapon Statute, again, which is 24-1.6(a)(1) and that would be Aguilar, and (2) which would be Mosley, and struck down by Aguilar and Mosley. Since the Defendant's conviction, the language in 720 ILCS 5/24-1(a)(4) and (a)(10), these are the Unlawful Use of Weapon Statutes, has been amended to include the conceal carry language which was added to 24-1.6. I need to explain that a little clear on this. So -- well 24-1.6 which is Aggravated Unlawful Use of Weapons, this is the Statute that Aguilar and Mosley attacked, and of which was found unconstitutional in Illinois, the 24-1.6. 24-1(a)(4) and (A)(10) are unlawful use of Weapon Statutes, not aggravated. The language added to 1.6 -- uhm -- is the same language that's added to 24-1(a)(4) and (a)(10) specifically, the language as -- and I'll call it "exception", but they go at from different angles, aggravated UUW doesn't go at it more as an exception, as it goes at it from the other angle as to how that can be legal, and in (a)(10) and (a)(4), the way that it's listed in (a)(10) and (a)(4) -- uhm -- there are sections from which are excused from the Statute as being not unlawful. Now I'm going to read this into the record, here, this is (a)(4); (a)(4) reads as follows: "A person commits the offense of unlawful use of weapons when he knowingly carries or possesses in any vehicle or concealed on or about his person except when on his own land or in his own

abode, legal dwelling, or fixed place of business or on the land or on the legal dwelling of another person as an invitee with that person's permission, any pistol, revolver, stun gun, taser or other firearm, except that this section (a)(4) does not apply to or affect transportation of weapons that meet one of the following conditions: single (i), are broken down in a non-functioning state or, double (ii), are not immediately accessible; or, triple (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".

Now (a)(10) is -- it has the same exact language as those triple or those different small "i's" as I just read, exactly the same language is used and the Statute, itself, prior to that is similar to the (a)(10); (a)(4)/(a)(10) Statute, and that's the Statute that was alive when the Defendant pleaded guilty, that (a)(4) and (a)(10), the way I just read it. Now since then -- uhm -- this Legislature added on to those exceptions; in other words, single small (i), double small (ii), triple small (iii) and there's another small (i) or small (v)(4) which adds the language concerning the Defendant would be accepted under those clauses if in addition to the ones I read, he also -- or would have a firearm -- concealed carry permit, and that's

the same language that has been added to 1.6 also, the same language concerning the permit. So after the Defendant was convicted of (a)(4) as I had ruled, then the Statute was changed to include the concealed carry language, which the Legislature in the State of Illinois at this point in time has indicated in their mind that that remedies the Aguilar and Mosley problem, and then placed it on (a)(4) and (a)(10), which were not the subject in Aguilar and Mosley in order to solve this similar problem that's been involved in.

So since Defendant's conviction the language in (a)(4) and (a)(10) has been amended to include the concealed carry language which was added to 24-1.6 after Aguilar and Mosley to address the Constitutional issues. Now the near comprehensive ban in the possession of a weapon for self-defense purposes decried in Aguilar and Mosley was still intact in 720 ILCS 2-1 when the Defendant pleaded guity on April 4, 2013. The Defendant argues and I agree, the only real difference between the Defendant's conviction in 24-1.6 which is the Aguilar and Mosley convictions is the addition of these languages in this particular charge within 1000 feet of a park language. This does not remove the Statute from the infirmities found in Aguilar and Mosley as Defendant argues. It is not a reasonable regulation on the Second Amendment which both Aguilar and Mosley recognize as

being constitutional. The 1000 feet language is again, I'm quoting the language, "In these cases a mere comprehensive ban on the Second Amendment Right", and the Defendant states in the Motion and again, I'm adopting the Defendant's -- I'm taking this out of the Defendant's argument and I'm finding as such. "Moore and Aguilar stand for the proposition that reasonable regulations on Second Amendment rights are acceptable but comprehensive bans are not.

The effect of the thousand foot language on guns rights is a near comprehensive ban. The practical effect is that a person cannot leave his house with his licensed firearm because he would constantly be in jeopardy of accidentally and unknowingly entering within a thousand feet of a school, public park, public transportation facility, or residential property owned, operated or managed by public housing agency". And that's quoting the cases.

"A blanket prohibition on carrying a gun in public prevents a person from defending himself anywhere except inside of his home; and so substantial a curtailment of the right of armed self-defense requires a greater showing of justification than merely that the public might benefit on balance from such a curtailment though there is no proof it would. In contrast where 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 since that's a lesser burden, state does not need to prove so strong a need".

Now -- and I'm going to -- to use or to explain this to a little greater degree. I find that the thousand feet in this particular situation is not similar to one -- the thousand feet rule as applied on cases involving narcotics because that's illegal ouside of a thousand feet, not -- and it doesn't make it illegal within a thousand feet, the thousand feet language in this case of course would -- uhm -- it would make it legal without the thousand feet and illegal within.

I find that the Defendant's argument and it convinces the Court where this thousand feet begins and where this thousand feet ends is not observable by someone who might be legally carrying with a concealed carry permit within those areas outside of the thousand feet legally can carry where this would end is not discernable by someone who's carrying a gun and may not be discernable at all unless someone is actually able to measure a thousand feet from these various different areas which are cited in the Statute. So in essence, I agree with the Defendant's argument. I -- in essence, what you're saying is that he cannot validly and -- uhm -- carry a weapon within these areas of which

Aguilar and Mosley and the new Statutes allow him to in this situation; first of all because of the Aguilar and Mosley language which is also almost identical as 24-1(a)(4) and (a)(10) which is almost identical, and the fact that adding this -- uhm -- prohibition of a thousand feet does not clear up that problem. It's the same language found unconstitutional in Aguilar and Mosley, the one thousand feet doesn't change that problem. This is when the Defendant was convicted of this charge. Currently it's different. Currently 24-A -- 1(a)(4) and (a)(10) has the language concerning concealed carry, which does I believe and the Legislature believes at this point in time, solves that problem. This problem -- that language did not exist when the Defendant was found guilty of -- as I found 24-1 (a)(4) that language was not in there, so we're dealing with the exact language in Mosley and Aguilar and only thing additional is the one thousand feet. I don't think that makes such a specific area which allows the Defendant the ability to bypass those areas when carrying a weapon -- uhm -- carrying a weapon in self-defense; and on that basis, I find, then, according to this old Statute again, again the Statute is no longer applicable today, that's the part I'm talking about. After the Defendant was convicted of either (a)(4) or (a)(10), I find (a)(4) but I think it applies to

both, on 4-24-13, the Supreme Court of Illinois in Aguilar and Mosley and others found language identical to the language in (a)(4) and (a)(10) to be facially unconstitutional. The language concerning one thousand feet the Defendant's charge, does not rescue the Statute. I find 720 ILCS 5/21-1 (a)(4) and (a)(10), along with the language of the one thousand feet in the Statute as it existed on 4-24-13 to be a near comprehensive ban on the Defendant's Second Amendment rights. I find that the Defendant's conviction in 13-CF-317 to be void and attackable any time under 735 ILCS 5/2-1401. I hereby grant the Defendant's Motion from Relief from Judgment-hyphen-Unconstitutional charge and vacate the Defendant's conviction for unlawful use of weapons, dated 4-24-13.

Obviously, any Petition to Revoke Probation cannot stand as the Defendant is not on probation to the vacation of the original conviction. I find -- at this point in time -- well, let's take it from that point. I'm granting the Defendant's Motion to Vacate that -- uhm -- conviction. In doing that, I'm finding the charge at that -- the charge that was available at that time that he pleaded guilty to is unconstitutional as per Aguilar and Mosley, and is void ad initio as the cases that I originally cited in this matter.

Now, I'm going to read from Supreme Court Rule

18 and 19, primarily 18, and it's entitled Findings of Unconstitutionality. "A Court shall not find unconstitutional a statute, ordinance, regulation for other law unless, (a) the Court makes the finding in a written order or opinion or in an oral statement on the record that is transcribed; (b) such order, opinion, clearly identifies what portion of the statute, ordinance, regulation, or other law is being held unconstitutional; (c) such order or opinion clearly sets forth the specific grounds for the finding of unconstitutionality including --" this would be (c)(1), "the constituional provision upon which the finding of unconstitutionality is based; (c) (2) whether the Statute, ordinance, regulation or other law is being unconstitutional on its face as applied to the case, sub judice, or both; (3) that Statute, ordinance, regluation or other law being held unconstitutional cannot reasonably be construed in manner that would preserve its validity", and now Subsection 4, that, "The finding of unconstitutionality is necessary to the decision or judgment rendered, and that such decision or judgment cannot rest upon an alternative ground; and (5) that the notice required by Rule 19 has been served, and that those served with such notice have been given adequate time and opportunity under the circumstances to defend the statute, the ordinance, regulation or other law challenged."

Now Rule 19, I'm not going to read Rule 19. What Rule 19 basically says is if the State's Attorney is not a party to this action, the State's Attorney has to be given notice or the Attorney General has to be given notice that the Counsel for the Defendant is seeking to hold the Statute unconstitutional, and it does say that in the Defendant's Motion that you're seeking to have this finding be found unconstitutional, but the State's Attorney is a party to this; so I don't think that it's required to give notice to the Attorney General in this matter, but this is what I intend to do: I've -- you've heard my ruling at this point in time, I don't know -- I think -- and I -- maybe the parties can correct me if I'm wrong, I don't know that the State has any authority to not take an appeal on this. I don't know that the State does, and this appeal would go to the Supreme Court, I believe, on the finding of unconstitutionality. I'm going to continue this to a date out in a week or so of which time or two weeks or so when I'm -- I'm going to enter an order answering these issues that Rule 18 requires me to answer, to put this at issue. Now I don't -- I'm unaware if the State can choose not to go further at this particular point in time. My read of this and my understanding would be that I don't know that you can -- I don't know that you can stop it at this point, I'm

not sure; I mean, I would continue this to a date certain where we can address that issue also on this matter. If you want to file a Motion to Reconsider, I am making this finding now, but if you want to file a Motion -- I'm addressing this to the State -- if you want to file a Motion addressing my finding on that, I'll allow that and we can -- and then we can have another issue. I'll let the Defense respond if they wish to do so on the State's Motion to Reconsider. I'm not filing the Rule 18 finding yet, so I'll wait until the State files a Motion to Reconsider and take it from that point going forward.

State, do you want to respond or anything you want to add to that?

MS. MAGLIO: No, Judge.

THE COURT: Counsel.

MS. WEISS: No.

THE COURT: So let's take a date. I'm going to take this a couple weeks out so I'm going to go to August -- I'm going to go to the 19th -- uhm -- State are you available on the 19th?

MS. MAGLIO: Uhm-hum.

THE COURT: We can do this in the morning if you're going to file a Motion to Reconsider, we'll set a date for hearing on that if and when you file that, and Counsel's ready at

that point in time?

MS. WEISS: Yes.

THE COURT: All right. So we'll continue this to August 19th, 9:00 a.m. for the Court to file Rule 18 order on the findings of unconstitutionality, and if the State files a Motion to Reconsider, we'll set that for hearing at that time.

Anything else we need to address today?

MS. MAGLIO: There's a companion case, Judge, and I'm not sure if it was before Your Honor on today's date, but we would ask to continue that to that same date.

THE COURT: I have 13-CF -- that's this one -- 13 -- I have a 15-CF-697 which this is prejudgment, right?

MS. WEISS: It is prejudgment.

THE COURT: All right, and that -- we'll continue that case also to that date.

MS. MAGLIO: Order to come.

THE COURT: All right, thank you.

MS. WEISS: Thank you, Judge.

(Which were all the proceedings had at the hearing of the above-entitled case, at the time and place hereinbefore set forth.)

* * * *

STATE OF ILLINOIS)
) ss:
COUNTY OF K A N E)

I hereby certify that I reported stenographically the proceedings had at the hearing of the above-entitled cause, and that the above and foregoing is a true and correct transcript of my stenographic notes so taken to the best of my ability, at the time and place hereinbefore set forth.

Official Court Reporter
State License No. 84-2232
16th Judicial Circuit of Illinois

STATE OF ILLINOIS)
) ss
COUNTY OF KANE)

IN THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff,)
)
vs.)
)
)
Julio Chairez) Case No.: 13 CF 317
)
) Hon. John A. Barsanti
)
)
Defendant.)

Order

Now Before the Court an Order under the direction of Rules 18 and19 of the Supreme Court of Illinois.

Under Supreme Court Rule 19 the Court finds notice is not necessary as the Kane County State's Attorneys Office has been a party in this proceeding since its inception and has had an opportunity to defend the statute challenged.

The Court has previously given an oral order on the record of the court reporter detailing the reasons behind the Court's finding of unconstitutionality on July 29, 2016.

Supreme Court Rule 18 requires the Court to make certain findings when a Court finds a statute unconstitutional. The findings not addressed in the July 29, 2016 oral order will be addressed in this order.

The Court finds 720 ILCS 5/24-1(a)(4)(c)1.5 unconstitutional for reasons previously stated of record.

The Court finds the statute to be in violation of the Second and Fourteenth Amendments to the Constitution of the United States.

The Court finds the statute cannot be reasonably construed in a manner that would preserve its validity.

The Court finds the ruling of unconstitutionality is necessary to the decision and judgment of the Court and cannot rest upon an alternative theory or ground.

Circuit Judge

9/7/16

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on March 17, 2017, the foregoing **Brief and Appendix of Plaintiff-Appellant** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and copies were served upon the following, by placement in the United States mail at 100 West Randolph Street, Chicago, Illinois 60601, in envelopes bearing sufficient first-class postage:

Thomas A. Lilien
Office of the State Appellate
Defender
One Douglas Avenue
Second Floor
Elgin, Illinois 60120

Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail a copy of the motion to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

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