No. 129906

IN THE SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	**On leave to appeal from the Illinois Appellate Court, Fifth District,**
Plaintiff-Appellee,	)	**No. 5-22-0048**
vs.	)	**There on appeal from the Circuit Court of Madison**
JOSEPH C. ROTHE,	)	**County, Illinois,**
Defendant-Appellant.	)	**No. 05-CF-1433**
	)	**Hon. Janet L. Heflin, presiding**

DEFENDANT-APPELLANT'S REPLY BRIEF

E. King Poor
Christopher E. Gay
QUARLES & BRADY LLP
300 North LaSalle Street, Suite 4000
Chicago, Illinois 60654
(312) 715-5000
king.poor@quarles.com
christopher.gay@quarles.com

Counsel for Defendant-Appellant,
Joseph C. Rothe

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CYNTHIA A. GRANT
SUPREME COURT CLERK

POINTS AND AUTHORITIES

INTRODUCTION

The State's brief makes three basic arguments. First, it contends that Rothe's reliance on three cases, *People v. Lewis*, 175 Ill.2d 412 (1996), *People v. Hauschild,* 226 Ill. 2d 63 (2007) and *People v. Clemons*, 2012 IL 107821 as settled law that the armed robbery and armed violence statutes have identical elements is "misplaced." The State argues that *Lewis*, *Hauschild*, and *Clemons* dealt with Category I and II weapons under the armed violence statute, not Category III which is at issue here. That is distinction without a difference. The reasoning by which the Court found identical elements in these three cases applies equally to Category III.

Second, after assuming that *Lewis*, *Hauschild*, and *Clemons* were correctly decided, in its next argument, the State argues they were wrongly decided. It contends that *Lewis* and *Hauschild* misconstrued the identical elements test and *Clemons* should not have reaffirmed *Hauschild*. While the State refers to these decisions as making critical mistakes and does not use the word "overrule," it is effectively seeking to have these decisions overruled. But departing from *stare decisis* requires "special justification" and the State's arguments here, some of which it has already made before, are not special justification.

Third, if *Lewis*, *Hauschild*, and *Clemons* apply to Category III, then the only remaining question is whether a pipe wrench used to commit a robbery is a Category III weapon. Under existing law, two principles guide

the answer to that question. The first principle looks to whether the weapon shares the characteristics of one of the weapons listed in Category III, so as to be "of like character." Here, a pipe wrench, by its very design, has a bludgeon-like character: a heavy and larger head to grip and turn pipes at the end of a slender handle.

Under the second principle, how a weapon "of like character" was used, that is, to commit a crime, matters. But according to the State, it does not matter. It argues that even if a like-character weapon was used to commit a crime, if it has a legitimate use, then it must be excluded from the statutory definition. Such an argument is contrary to the State's own position prosecuting armed violence cases spanning 40 years where it has maintained that how a like-character weapon was used does in fact matter. And it is also contrary to the appellate decisions that have adopted the State's position in such cases.

Finally, the State's position produces an absurd and unjust result: Rothe's sentence would have been vacated if he had used a blackjack or other weapon specifically listed in Category III. But because he used a pipe wrench with bludgeon-like qualities, he continues to serve a life sentence.

As for the proper remedy, the State and Rothe both agree. He should be resentenced under the armed violence statute.

ARGUMENT

A. If the identical elements findings apply to Categories I and II, there is no reason to exclude Category III.

1) The identical elements test looks to the substance: different words that mean the same thing.

As shown in Rothe's opening brief, *Lewis*, *Hauschild*, and *Clemons* all held that the armed robbery and armed violence statutes had identical elements. (Br. at 9-16). The State's first argument is that these three cases do not apply here because the term "dangerous weapon other than a firearm" as used in the armed robbery statute (720 ILCS 5/18-2(a)(2))(2006)) is broader than the Category III definition of a "dangerous weapon" in the armed violence statute (720 ILCS 5/33A-1(c)(3)). (St. Br. at 11-16).

Rothe does not dispute that a "dangerous weapon" for armed robbery is broader than Category III. (Br. at 18). But he does dispute a proposition that no court has ever adopted—yet the State tries to advance here: that even if a weapon fits within Category III, the two statutes still do not have identical elements. (*Id.* at 18-19).

The State has already argued that there can be no identical elements if one definition is more specific.

When deciding *Lewis*, *Hauschild*, and *Clemons*, the Court was well aware that Category I lists certain types of firearms and Category II lists other types of firearms as well as non-firearms such as types of knives. These first two categories, like Category III, are more specific than the common law meaning of "dangerous weapon," in the armed robbery

statute. But in *Lewis*, the State argued that because these three categories of weapons have "distinct and separate offenses," the armed violence and armed robbery statutes do not have identical elements:

> Therefore, since the classification of the armed violence offense as well as the penalty are dependent upon the specific type or Category [that is, Category I, II, or III] of weapon used, the armed violence statute proscribes distinct and separate offenses than the armed robbery provisions. Clearly, these legislatively defined offenses do not contain "identical elements," as defendant contends and as *Christy* erroneously determined.

People v. Lewis, Reply Br. 1996 WL 33468154 at *18.

The Court rejected this argument. After comparing the elements of the two statutes and recognizing that under the armed violence statute "[d]angerous weapons are divided into three categories," it concluded: "Thus in this case, as in *Christy*, we are presented with two substantively identical offenses which, illogically, are punished with disparate penalties." *Lewis*, 175 Ill. 2d at 418.

In *Clemons*, the State again argued that "the elements of armed robbery with a firearm and armed violence while armed with a Category I or Category II weapon are not identical because they differ in specificity." (Clemons Br. at 15) (unavailable on Westlaw, but court may take judicial notice of its own records, *People v. Jackson*, 182 Ill.2d 30, 66 (1998)). This time, however, it argued that the armed violence statute was "broader" and that was reason enough for *Hauschild* to be overruled:

> . . . *Hauschild* extended the identical elements review to compare overlapping offenses rather than identical elements, stretching the identical elements test beyond its rationale. . . .

> By considering only those cases of armed violence in which the felony element is satisfied by robbery and the dangerous weapon element is satisfied by a firearm, *Hauschild* did not take into account the far broader definition of armed violence compared to the more specific armed robbery with a firearm.

Id. at 15-16.

The Court was unpersuaded by this argument and stated: "Thus, the identical elements test has never required that the two offenses be equally specific. Contrary to the State's argument, *Hauschild* did not break new ground in this area and did not expand the identical elements test." *Clemons*, 2012 IL 107821, ¶ 23.

What matters is the substance of the elements

As *Clemons* made clear, what matters is the substance of the elements being compared, not whether there is an exact match as to how they are worded. The Court's most recent identical-elements decision in *People v. Johanson*, 2024 IL 129425 reinforces that an identical-elements analysis looks to the substance, not the form of the two statutes being compared. In *Johanson*, the Court found no identical elements when comparing two sex offense statutes because one required "touching or fondling" and the other required "direct contact." *Id.* ¶ 14. For that reason, the Court found the defendant's reliance on *People v. Christy*, 139 Ill.2d 172 (1990), *Lewis*, *Hauschild*, and *Clemons* was misplaced and explained that "the statutes in question [in those four cases] involved the use of different words that meant the same thing. Here, the elements of contact and sexual conduct do not mean the same thing." *Id.* ¶ 16.

Because Category I and II weapons and those in the armed robbery mean "the same thing," *Lewis*, *Hauschild*, and *Clemons* held that these elements were identical. It did not matter that Categories I and II were more or less specific than armed robbery. The substance of the elements mattered, not that "different words" were used.

The same reasoning applies equally to Category III. The State argues that Category III is part of another statute, claiming that *Lewis*, *Hauschild,* and *Clemons* involved "*other* pairs of offenses defined by *other* statutes." (St. Br. at 18) (emphasis in brief). Yet when the armed violence statute is read as a whole, Category III cannot be said to be part another statute. Indeed, *Lewis*, *Hauschild*, and *Clemons* each recognized that all three categories were part of the one definition of a "dangerous weapon" in the same statute. *Lewis*, 175 Ill.2d at 418 ("Dangerous weapons are divided into three categories"); *Clemons*, 2012 IL 107821, ¶ 22 (quoting *Hauschild* that a "dangerous weapon" means "armed with a Category I, Category II, or Category III weapon").

Category III is every bit as much a part of the same statute as Category I and II. Though *Lewis*, *Hauschild*, and *Clemons* dealt with Category I and II, that is distinction without a real difference. Each category is more specific than the common law definition for armed robbery. And the same identical-elements analysis, based on substance rather than different wording, applies to all three categories.

2) What do *Ligon* and *Hernandez* hold and not hold?

The State relies on *People v. Ligon*, 2016 IL 118023 and *People v. Hernandez*, 2016 IL 118672 for the proposition that even if an object fits within the definition of Category III, there are still no identical elements. (St. Br. at 13-18). But such a proposition would mean overruling *Lewis*, *Hauschild*, and *Clemons*. And *Ligon* and *Hernandez* cannot be read as doing that.

The better reading of *Ligon* and *Hernandez* is far simpler and less dramatic. It is this: the broader common law definition of "dangerous weapon" in the armed robbery statute cannot be used to fit an object into the specific list of Category III. And that is fully consistent with the focus of both *Ligon* and *Hernandez*; namely, the BB gun in *Ligon* and tin snips in *Hernandez* did not come within the Category III definition. But neither decision states that even if an object did qualify as a Category III weapon, there would still be no identical elements.

Here, Rothe is not seeking to use the broad common law definition to support a pipe wrench being part of Category III. To the contrary, as discussed in his opening brief, he shows why a pipe wrench fits within Category III as a weapon "of like character." (Br. at 20-33).[1]

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[1] The State relies on a comment to Ill. Pattern Jury Instruction, 4.17 stating that it should not be used for cases, such as armed violence, in which the term "dangerous weapon" is "expressly defined." (St. Br. at 15). But the comment is simply stating essentially the same thing as discussed above—the broader common law definition cannot be used in place of the more specific statutory definitions.

3) There is no as-applied challenge here for the same reason there was none in *Lewis*, *Hauschild*, and *Clemons*.

The State also argues that Rothe is pursuing an as-applied challenge that is not recognized for an identical elements analysis. (St. Br. at 17-23). At the outset, the State and Rothe agree on this much: the identical element test is limited to comparing the elements of two statutes, not the conduct of an individual defendant. But Rothe does not contend that his own particular pipe wrench or his own individual conduct are part of the identical elements analysis. Rather, he maintains that any similar pipe wrench used to commit a robbery would fit within Category III.

Here, Rothe seeks to do nothing more than what the defendants did in *Lewis*, *Hauschild*, and *Clemons* when they identified the actual weapons that fit within Category I or II that were used to commit a felony. The State advances the notion that merely identifying the weapon used to commit a felony was, by itself, an as-applied challenge. (St. Br. at 19-20). That does not add up. Every case of armed robbery or armed violence must identify the actual weapon used to commit the crime in question. That does not make it an as-applied challenge.

In *Lewis*, *Hauschild*, and *Clemons*, the defendants identified the weapons they used as part of their proportionate penalties challenge. And since *Johnanson* has expressly reaffirmed that these decisions properly found identical elements, that eliminates any argument that these cases presented as-applied challenges. The same holds true here.

Rothe is doing nothing more than the defendants did in those three cases.

B. *Lewis*, *Hauschild*, and *Clemons* are settled law and should not be overruled.

1) None of these three cases mistakenly applied the identical elements test.

In the next section of its brief, the State turns to arguing that *Lewis*, *Hauschild*, and by extension *Clemons*, were wrongly decided. (St. Br. at 23-30). Though the State does not use the word "overrule," it claims (1) that *Lewis* "missed a critical difference," (2) *Hauschild* "made two errors," and (3) *Clemons* would not have reaffirmed *Hauschild* if only the State had made the same argument in *Clemons* that it now makes here. (St. Br. at 24-30 and n. 6). But arguing that these three cases committed critical errors and should not be followed is just another way of inviting that they be overruled without saying so. But *Lewis*, *Hauschild*, and *Clemons* were all decided correctly.

Lewis

The State argues that *Lewis* "missed a critical difference," supposedly because the armed robbery's common-law definition of "dangerous weapon" is broader than the specific list of weapons in Category III. (St. Br. at 24-25). As discussed above, the State made a similar broad-versus-specific argument in *Lewis* and that distinction does not keep the two statutes from having identical elements. That is all the more true with *Johanson* expressly stating that *Lewis*, *Hauschild*, and *Clemons*

each correctly found identical elements, because even though the elements of the two statutes were described with "different words," they still "meant the same thing." *Johanson*, 2024 IL 129425, ¶ 16.

Hauschild

Next, the State argues that *Hauschild* "made two errors." (St. Br. at 24). First, it claims that *Hauschild* "incorrectly identified" armed violence as predicated on Category I and II weapons and that "the identical elements test does not permit comparison of a single offense to a combination of offenses," and cites to *People v. Koppa*, 184 Ill.2d 159, 166-68 (1998) and *People v. Cherry*, 2016 IL 118728, ¶¶ 16-17 as "warn[ing]" against that. (St. Br. at 25-26). But a closer look at *Koppa* and *Cherry* show that they did not do what the State claims they did.

In *Clemons*, the Court discussed *Koppa*—and specifically the same pages 167-68 of *Koppa* cited in the State's brief—and concluded that it presented no reason to overrule *Hauschild*. 2012 IL 107821, ¶ 25. In fact, *Clemons* explained that in *Koppa*:

> [T]he armed violence charge contained an additional element not found in the other charged offenses of aggravated criminal sexual abuse and aggravated kidnapping. [citing *Koppa*, 184 Ill.2d at 167-68]. Unlike *Koppa*, the armed violence offense at issue here does not contain any additional element not contained in the armed robbery offense.

2012 IL 107821, ¶ 25.

Like *Koppa*, *Cherry* also has no bearing on whether *Hauschild* was wrongly decided. In *Cherry*, the issue was whether aggravated battery could serve as a predicate felony for armed violence (2016 IL 118728, ¶ 13)—not the issue here of whether armed robbery and armed violence had identical elements under the pre-2007 law. Moreover, the offense in *Cherry* was committed in 2010 (*id.*¶ 3), which was after Public Act 95-688 "remedied the disproportionality that existed between armed violence and armed robbery statutes." *Cherry*, 2016 IL 118728 ¶ 19 (quoting *People v. Blair*, 2013 IL 114122, ¶ 21). Put simply, *Cherry* did not deal with the pre-2007 statute at issue in *Hauschild* and in this case.

For its second error, the States argues that *Hauschild* failed to recognize that "firearm" under the armed robbery statute "included all firearms," while Categories I defined firearm "more narrowly." (St. Br. at 27). Category II also defined firearms more narrowly, but also "more broadly" by including non-firearms, such as blade weapons. (*Id.*) Such an argument is, however, just another reworking of the State's broad-versus-specific distinction, which as discussed above, does not defeat a finding of identical elements.

Clemons

As to *Clemons*, the States argues that when reaffirming *Hauschild,* the Court did not consider its current arguments about "*Hauschild*'s two interpretative errors." (St. Br. at 28-30, n. 6). But if the State had raised

these two supposed errors in *Clemons*, they would have been wrong then for the same reasons that they are wrong now, as discussed above.

As part of this same argument, the State claims that Rothe is suggesting that *Clemons* held "that offenses are identical if their elements overlap with respect to *some* defendants' conduct, regardless of whether one offense is defined more broadly than the other." (St. Br. at 29). The State argues that this would mean that "all aggravated or enhanced offenses would be identical to their to lesser-included offenses since they necessarily overlap. But *Clemons* did not purport to invalidate great swaths of the Criminal Code." (*Id.* at 29-30) (italics in brief, citing paragraph 24 of *Clemons* stating that burglary and residential burglary do not have identical elements)).

The State overlooks that in paragraph 24 of *Clemons,* which it cited, the Court rejected the very same argument as to *Hauschild* that it now tries to apply to Rothe:

> The State provides no reasoned basis for its contention that, pursuant to *Hauschild*, burglary and residential burglary, as well as many other lesser-included and greater offenses, will now be found to violate the proportionate penalties clause under the identical elements test . . . . Because the elements of burglary and residential burglary are not same (as would be the case of with other lesser-included and greater offenses), a proportionate penalties challenge could not succeed under the identical elements test. Nothing in *Hauschild* suggests it could.

2012 IL 107821, ¶ 24. In short, *Clemons* was not wrongly decided because it reaffirmed *Hauschild.*

2) Departing from *stare decisis* requires "special justification" and the State provides none.

Any attempt to overrule *Lewis*, *Hauschild*, or *Clemons* implicates the doctrine of *stare decisis* which ensures that "the law will not merely change erratically, but will develop in a principled and intelligible fashion." *People v. Bush*, 2023 IL 128747, ¶ 50 (internal quotation marks and citation omitted). While *stare decisis* is not an "inexorable command," any departure from it requires "special justification." *Id.* (internal quotation marks and citation omitted).

In *Clemons*, the Court discussed *stare decisis* when considering the State's argument "that *Hauschild* should be overruled because it misconstrued the armed violence statute and misapplied the identical elements test." 2012 IL 107821, ¶ 8. The Court stated that "prior decisions will not be overruled absent good cause or compelling reasons" and "[g]ood cause exists where, for example, the decisions are unworkable or badly reasoned." *Id.* ¶ 9 (internal quotation marks and citation omitted). *See also People v. Sharpe*, 216 Ill.2d 481, 520 (2005) (precedent will not be overturned "merely because the court is of the opinion that it might decide otherwise were the question a new one)." (internal quotation mark and citation omitted); *Wakulich v. Mraz*, 203 Ill.2d 223, 231 (2003) (good cause to overrule does not exist when identical argument for overruling already considered in another case).

Here, the State does not provide any special justification for overruling *Lewis*, *Hauschild,* or *Clemons*. In fact, as discussed, in *Lewis*

the State relied on basically the same argument that it makes here: that the two statutes did not have identical elements since the armed robbery statute was broader. But *Lewis*'s holding to the contrary has been settled law for 27 years. It was also reaffirmed in *Hauschild,* which in turn, was reaffirmed by *Clemons*. And as discussed, *Johanson* made clear that all three cases correctly found identical elements. The State's renewed arguments to overturn these cases fail to provide any special justification to depart from *stare decisis*.

C. A pipe wrench used to commit a robbery fits within Category III.

Since *Lewis*, *Hauschild*, and *Clemons* establish that the elements of the two statutes are identical, the one remaining issue is whether a pipe wrench used to commit a robbery is a Category III weapon "of like character." The State claims it is not, because any weapon that might have a legitimate use cannot be "of like character." (St. Br. at 31-37).

The State's position is wrong for three reasons: (1) the State has taken the opposite position in other armed violence cases spanning 40 years, (2) it would mean that appellate decisions affirming armed violence convictions based on that position were wrongly decided, and (3) it would produce absurd and unjust results. Two basic principles based on existing law avoid these problems. (*See* Rothe's Br. 27-32). Each is discussed below.

(1) Principle One: Is the object "of like character?"

The first principle asks if the object in question resembles one of the specific weapons listed in Category III so as to be "of like character." Applying that principle here, a pipe wrench has a bludgeon-like character. The famous Chicago architect, Louis Sullivan, observed that "form follows function." And the function of a pipe wrench means that its form will be bludgeon-like. A pipe wrench is defined by its characteristic larger and heavier head or "jaws" at the end of a handle. *The American Heritage Dictionary,* 4th ed. 2000 (p. 1336, pipe wrench: "A wrench with serrated jaws, one adjustable, for gripping and turning pipe."). That design resembles the definition of bludgeon: a "short, heavy club with one end weighted or thicker than the other." (Rothe Br. at 33 (quoting *Random House Dictionary*)).

Other objects, such as the tin snips in *Hernandez* do not share the same characteristics that makes a pipe wrench bludgeon-like. In particular, tin snips lack a heavier and a larger head at the end of a more slender handle that is characteristic of both a pipe wrench and a generic bludgeon.[2]

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[2] The State refers to pretrial descriptions of the weapon in this case by the victim and a witness as a "wrench or crowbar" or "metal object." (St. Br. at 5). At trial, the victim referred to it as a "pipe wrench" and the State referred to it as "huge economy-size pipe wrench or a pipe or a crowbar" (St. Br. at 5) and the appellate court twice referred to a "large red pipe wrench." *People v. Rothe*, 2023 IL App (5th) 220048-U, ¶ 5; *People v. Rothe*, 2014 IL App (5th) 1200552-U, ¶ 3. *See* Wikipedia picture of a standard red pipe wrench. https://en.wikipedia.org/wiki/Pipe_wrench (last visited July 18, 2024).

(2) Principle Two: How an object "of like character" was used—that is, to commit a crime, matters.

As discussed in Rothe's opening brief, in *People v. Villagran*, 2023 IL App (2d) 220186-U, ¶16, the court emphasized that neither *Ligon* nor *Hernandez* can be read to mean that how a defendant uses a lawful object is "irrelevant" to whether it comes within the armed violence statute's statutory definitions. (Br. at 24). The court in *Villagran* explained that a weapon may fit the armed violence definition in one of two ways: either (1) by being "per se a dangerous weapon," if specifically listed, or (2) by being "of like character" and used in a dangerous manner.

In making this distinction, the court relied on *People v. Hall*, 117 Ill.App.3d 788 (1st Dist. 1983), which adopted the State's argument that even if a knife did not have a blade of at least three inches so to be a per se dangerous weapon, it still qualified as a Category II weapon if it was of like character and was "used in a manner dangerous to the physical well-being of the individual threatened." *Villagran*, 2023 IL App (2d) 220186-U, ¶16 (quoting *Hall*, 117 Ill.App.3d at 803).

Moreover, in both *Hall* and *Villagran*, the defendants made the same argument that the State makes here—namely, that "how an object is used has no bearing on whether it is a dangerous weapon under the armed-violence statute." *Villagran*, 2023 IL App (2d) 220186-U, ¶¶15; *see also, Hall*, 117 Ill. App. at 802-03. Both *Hall* and *Villagran* rejected that argument. Also, the court in *Villagran* emphasized that *Hall* did not make

the specific list of weapons "superfluous," because "the [statutory] language in question distinguishes knives that are *per se* 'dangerous weapons' from those that are 'dangerous weapons' based on how they are used." 2023 IL App (2d) 220186-U, ¶ 17.

What is more, this Court cited *Hall* with approval, along with similar decisions, in *People v. Davis*, 199 Ill.2d 130 (2002). There, the Court held that a BB gun did not fit within Category I—first, because it did not fit the definition of a firearm, and second, because it did not fit within the catch-all phrase of "like nature" since that only applied to the blade-like weapons. (*Id.* at 139-40).[3]

Yet at the same time, *Davis* also recognized that when a defendant is charged with armed violence and "was armed with a weapon which was *not specifically listed* in the [armed violence] statute, reliance was placed on the 'any other dangerous weapon or instrument of like nature,' clause because the weapon was *of like nature* to the blade-type weapons listed." (*Id.* at 140) (emphasis added, citing *Hall* and other case law). In *Davis*, the Court also noted that the "metal pellet/BB pistol" at issue could not qualify as a "bludgeon" because it was not "of like character" to the other weapons listed in the blunt-force category (then Category II). 199 Ill.2d at

[3] The Category I mentioned in *Davis* refers to an older version of the armed violence statute when what are now Category II blade weapons were part of Category I and what are now Category III weapons were listed as Category II. 720 ILCS 5/33A-2 (West 1992).

141. Also, as noted in Rothe's opening brief, the BB gun pistol in *Davis* was not used as a bludgeon, but to shoot victims. (Br. at 25).

The State also notes that Category II refers to a "dangerous weapon or instrument of like character" and Category III refers to a "dangerous weapon of like character." (St. Br. at 36). But nothing suggests that by adding "instrument" to Category II, the legislature intended to create entirely different meanings for the same three words, "of like character," that are part of the same definition section of the same statute. The most natural reading of "instrument" is that it simply refers to knife blades longer than three inches, axes, and hatchets that are all specifically listed in Category II. The State cites no authority that it means anything more than that—such as that Category II includes objects with legitimate uses, but Category III excludes them. *See People v. Grever*, 222 Ill.2d 321, 331 (2006) (the same words in same statute should have same meaning unless the context indicates otherwise).

3) The State argues against its own position in appellate decisions spanning 40 years.

The identical elements issue in this case is rare, since it would only arise for crimes committed before Public Act 95-688 was enacted in 2007. As the Court pointed out in *Clemons* 12 years ago, the State conceded that there were "relatively few [such] cases are still pending." *Clemons*, 2012 IL 107821, ¶ 49. Twelve years later, there are likely even fewer such cases.

The rarity of this case makes the State arguing against the same position it has taken in appellate cases over the past 40 years stand out all the more. As Rothe discussed in in his opening brief, the State has argued or conceded in five different cases that objects with bludgeon-like qualities, even if they also had a legitimate use, came within the statutory definition of a dangerous weapon. (Br. at 27, noting baseball bat, crowbar, flashlight, and hammer).[4]

Further, as discussed above, the State's position here is also directly contrary to the position it took in *Hall* in 1983 and that it took in *Villagran* 40 years later. And if the State's position were adopted here, then the defendants in *Hall*, *Villagran*, and similar cases were wrongly convicted.

In the usual case, when seeking to enforce the armed violence statute, the State has done so based on the same position it has taken from *Hall* to *Villagran*. But in this case, the State urges a position completely to the contrary and one that undermines the statute's purpose. As the Court in *Davis* explained, the purpose of the armed

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[4] Rothe cited unpublished decisions to illustrate the cases in which the State has taken a position completely contrary to the one it takes here and the decisions that have or have not adopted that position. The State contends that this is not allowed under Sup. Ct. R. 23(e)(1). (St. Br. at 34 n.8). But as the court explained in *People v. Taylor*, 2022 IL App (5th) 180192, ¶ 38 n. 3, unpublished decisions may be cited, not as persuasive authority, but to illustrate how the parties and court have addressed particular issues, for example, in that case, how stipulations have been made in criminal cases.

violence statute is to "discourage those who contemplate a felonious act beforehand from carrying a weapon when they set forth to perform the act." 199 Ill.2d at 139 (internal quotation marks and citation omitted). But if the State's position were adopted here, then a person could avoid being charged with armed violence by selecting a like-character weapon that has a legitimate use. The State's position from *Hall* to *Villagran* avoids that outcome and is the correct one. The State's contrary position is not. *See People v Whitehead*, 2023 IL 128051, ¶18 (statutory interpretation includes "the reason for the law, the evil to remedied, and the purpose to be obtained").

4) Applying the existing law avoids absurd and unjust results.

The State tries to dismiss the absurd and unjust results flowing from its position by claiming that "there is nothing absurd about the legislature's decision not to criminalize playing golf." (St. Br. at 37). But Rothe has never suggested that the lawful use of any lawful object "of like character" would result any criminal liability. In fact, in his opening brief, Rothe quoted *City of Pekin v. Shindledecker*, 99 Ill.App.3d 571, 574 (3d Dist. 1981) that recognized that under the analogous unlawful use of weapons statute "[c]ommon sense must be the guide," which meant not being "oblivious to [an] article's everyday use," so as to avoid turning lawful objects, including a golf club, into "bludgeons." (Br. at 32). No, Rothe never suggested that playing golf is a criminal activity.

Yet the absurd and unjust results that follow from the State's position are real. If Rothe had used a blackjack (listed in Category III), his armed robbery sentence would be vacated. But because he used a pipe wrench, even with its bludgeon-like qualities, he would continue to serve a life sentence.

The State does concede that a baseball bat might be a considered a bludgeon-like weapon under Category III. (St. Br. 38, n. 10). It states that baseball bats are now considered as weapons in "popular culture." *Id.* Its only support for that popular culture is a Target store advertisement for a certain baseball bat. (*Id.*) And the only mention of "self-defense" is in the advertisement's header:

> Cold Steel 24 Inch Long Heavy Duty Multi Function Brooklyn Crusher Bat with 1 Inch Handle for Baseball, Self Defense, Home Defense, & Training, Black

The State then states that whether a baseball is a bludgeon "is a question for another day." *Id.* Actually, it is a question for now and in this case. For if a baseball bat is a Category III weapon, then so is a pipe wrench.

Neither such advertisement nor any other measure of popular culture establishes what weapons come within Category III. What is a weapon under the armed violence statute—with its century-old list in Category III—is determined not by popular culture, but existing law. Under that existing law, both a baseball bat and a pipe wrench qualify as bludgeon-like weapons under Category III.

D. The parties agree that the proper remedy is to resentence Rothe under the armed violence statute.

In the final section of its brief, the State agrees with Rothe that the proper remedy is to vacate Rothe's armed robbery conviction and resentence him under the armed violence statute. (St. Br. at 39-40).

The State adds that "[p]roviding this remedy would require the Court to modify the remedy it provided in *Hauschild*." (*Id.* at 40). The State then discusses why the remedy provided in *Hauschild* was wrong. (*Id.* at 40-41). But the remedy in *Hauschild* dealt with a firearm enhancement that had been found to be unconstitutional under the cross-comparison test, but was later was "revived" when the cross-comparison test was overruled. *See Hauschild*, 226 Ill.2d at 76. *Hauschild*, in turn, found that the revived firearm enhancement applied retroactively and that the "proper remedy is to remand for resentencing in accordance with the statute that it existed prior to the amendment." *Id.* at 88-89.

Yet that firearm-enhancement amendment has nothing to do with this case. As the court explained in *People v. Span*, 2011 IL App (1st) 083037, ¶110, when finding a proportionate penalties violation that did not involve the firearm enhancement—in that case, what appeared as a pipe wrench, *id.* at ¶ 20—the proper remedy was set forth in *People v. Christy*, 188 Ill. App.3d 330, 334 (3d Dist. 1989) which meant a resentencing under the armed violence statute. (Rothe Br. at 33-34 (citing *Span*)). Since the Court does not render advisory opinions as to issues not before it, there is no need to modify *Hauschild* to provide the

remedy in *Christy*. *In re Barbara H.*, 183 Ill.2d 482, 490-91 (1998) (court does not render advisory opinions).

CONCLUSION

Rothe's armed robbery sentence should be vacated and the case remanded for sentencing under the armed violence statute.

Respectfully submitted,

/s/E. King Poor

E. King Poor
Christopher E. Gay
QUARLES & BRADY LLP
300 North LaSalle Street, Suite 4000
Chicago, Illinois 60654
(312) 715-5000
king.poor@quarles.com
christopher.gay@quarles.com

Counsel for Joseph C. Rothe

RULE 341 CERTIFICATE OF COMPLIANCE
FOR DEFENDANT-APPELLANT'S REPLY BRIEF

I, E. King Poor, certifies that this brief conforms to the requirements of Rules 341(a) and (b). The word-count for this reply brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 5,662 words.

/s/*E. King Poor*

No. 129906

IN THE SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	**On leave to appeal from the Illinois Appellate Court, Fifth District,**
Plaintiff-Appellee,	**No. 5-22-0048**
vs.	
JOSEPH C. ROTHE,	**There on appeal from the Circuit Court of Madison**
Defendant-Appellant.	**County, Illinois,**
	No. 05-CF-1433
	Hon. Janet R. Heflin, presiding

NOTICE OF FILING AND CERTIFICATE OF SERVICE FOR DEFENDANT-APPELLANT'S REPLY BRIEF

Under penalties as provided under Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth below are true and correct.

I, E. King Poor, an attorney, certify that I have this day caused the Defendant-Appellant's Reply Brief to be filed electronically with the Clerk of the Court and served via EFileIL to all counsel of record to their email addresses on file with the Court:

Attorney General of Illinois
- Criminal Division
100 West Randolph Street,
12th Floor
Chicago IL 60601
eserve.criminalappeals@ilag.gov
Katherine.doersch@ilag.gov

State's Attorney Madison County
Madison Co. Administration Bldg.
157 North Main Street
Suite 402
Edwardsville, IL 62025
mrchism@co.madison.il.us.gov

State's Attorneys Appellate
Prosecutor
Fifth District
4114 N. Water Tower Place,
Suite C
Mt. Vernon, Illinois 62864
05dispos@ilsaap.org

Dated: July 19, 2024

By: */s/ E. King Poor*
E. King Poor