No. 127443

IN THE SUPREME COURT OF ILLINOIS

People of the State of Illinois, Respondent-Appellee, v. **Demetrius Johnson**, Petitioner-Appellant.	Appeal from the Appellate Court of Illinois, First District, No. 1-20-0912 Original Appeal from the Circuit Court of Cook County, No. 06 CR 18368(1) Hon. LeRoy K. Martin, Jr., Judge, Presiding

APPELLANT'S OPENING BRIEF

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POINTS AND AUTHORITIES

INTRODUCTORY PARAGRAPH AND NATURE OF THE CASE

In 1991, at the tender age of 15, the Appellant, Demetrius Johnson, was literally abducted by one of the most corrupt officers in the history of the City of Chicago: former homicide Detective Reynaldo Guevara. *See People v. Martinez*, 2021 IL App (1st) 190490, ¶64 (referring to Guevara as "a malignant blight on the Chicago Police Department and the judicial system"); *People v. Montanez*, 2016 IL App (1st) 133726, ¶ 1 (examining the evidence presented and concluding that Guevara committed "profoundly alarming acts of misconduct"). Guevara's false arrest—and subsequent fabrication of evidence and perjury—caused an innocent child's murder conviction and thirteen years in prison. This wrongful conviction was only remedied when the long-buried truth surfaced 28 years later in 2019.

There is no actual dispute about any of these facts. It is simply a reality. Guevara's manipulation and misconduct is proven by documentary evidence, Guevara's perjury is apparent in the trial record, and Johnson was certified innocent of this murder in April 2021. C. 168-206; Sup4 C. 4; Sup6 R. 12-13. As Johnson himself aptly described his lifetime ordeal: "I've been through a lot dealing with this situation. I feel like I've been dragged by the devil." Sup6 R. 16.

There is also no dispute that in August 2006, not long after Johnson was released from wrongfully spending his teens and most of his twenties in the Illinois Department of Corrections, he was arrested and convicted for being a felon in possession of a firearm. *People v. Johnson*, 2021 IL App (1st)

200912, ¶ 2. The only predicate felony for this unlawful use of a weapon by a felon (UUWF) conviction was the since-vacated wrongful murder conviction. This case concerns that UUWF conviction—the only conviction (felony or misdemeanor) on Johnson's record. C. 410-14.

After his 2019 exoneration from the murder conviction, Johnson moved to vacate the UUWF conviction under 735 ILCS 5/2-1401. The State objected and moved to dismiss, which the circuit court granted. The First District Appellate Court affirmed. *Johnson*, 2021 IL App (1st) 200912, ¶ 21. The appropriateness of this ruling is now before this Court.

No issue is raised concerning the charging instrument. The case concerns the legal sufficiency of Johnson's section 2-1401 pleading.

QUESTIONS PRESENTED FOR REVIEW

1. Long after Demetrius Johnson's UUWF conviction, he was adjudicated innocent of the constitutionally invalid predicate offense. Under these circumstances, is Johnson's UUWF conviction statutorily or constitutionally invalid?
2. In light of the new evidence that led to relief from the predicate conviction and a finding of innocence, does section 2-1401 separately require vacating the UUWF conviction as well?

JURISDICTIONAL STATEMENT

This Court has jurisdiction under Illinois Supreme Court Rule 315. The First District Appellate Court issued its decision on June 11, 2021. Appellant filed a timely petition for leave to appeal on July 16, 2021, which this Court allowed on September 29, 2021.

STATUTES INVOLVED

This case involves a petition filed pursuant to 735 ILCS 5/2-1401 and the Unlawful Use of a Weapon by a Felon statute, 720 ILCS 5/24-1.1. A copy of the text of these statutes are included in the appendix pursuant to Illinois Supreme Court Rule 341(h)(5).

STATEMENT OF FACTS

Demetrius Johnson was convicted in September 2006 for unlawful use or possession of a weapon by a felon in violation of 720 ILCS 5/24-1.1(a) ("UUWF conviction"). C. 395. The predicate offense—indeed, the only available predicate offense—was Johnson's now-vacated conviction in Case No. 91 CR 19833 related to the murder of Edwin Fred. C. 395.

Nearly three decades after 15-year-old Johnson's murder arrest, a police report surfaced that proved homicide detective Reynaldo Guevara's perjury and misconduct secured Johnson's wrongful conviction. Sup3 C. 5-7; C. 197, 206. Johnson's murder conviction was promptly vacated, and he was certified innocent of this murder in April 2021. Sup4 C. 4.

With the predicate offense vacated, Johnson filed a petition for relief from judgment pursuant to 735 ILCS 5/2-1401 seeking to vacate the only

crime remaining on his record—the UUWF conviction. C. 395, 410–14. On July 27, 2020, the circuit court granted the State's motion to dismiss the petition, R. 27–36, and the appellate court affirmed. *People v. Johnson*, 2021 IL App (1st) 200912. This Court allowed Johnson's petition for leave to appeal.

A. The Predicate Offense

Demetrius Johnson was 15 years old on June 12, 1991, the day a gunman shot and killed Edwin Fred and shot and wounded Raul Ortiz. Sup. C. 11. Aby Gonzalez was right next to his close friends Fred and Ortiz when the gunman opened fire. Sup. C. 28. After the shooting, the gunmen fled one way, but then turned back and crossed right in front of Gonzalez again, giving him a second look at the shooter. *Id.* Gonzalez was able to immediately identify the gunman as Bryan Johns (or "Little D") because Gonzalez knew Johns. *Id.*

Immediately after the shooting, the police arrived at the scene looking for Johns, whom Officer Daryl Daley knew as "Little D." C. 172. Officer Daley saw Johns exiting a van near the scene. C. 172. Officer Daley arrested him and recovered a gun from the van. C. 172. Police took Johns to the scene, where Gonzalez saw him in police custody. Sup. C. 28.

Later that night, Johns was placed in a lineup viewed by Gonzalez. The lineup was conducted by Detectives William Erickson and Guevara. Gonzalez identified Johns in the lineup as the perpetrator. Sup. C. 29.

Two different reports were created relating to the single lineup conducted the night of the shooting. These reports will be referred to as the "Guevara report" and the "Erickson report."

The Erickson report lists Detective Erickson as the reporting officer and notes that Guevara was present for the lineup. C. 205–06. It notes that a lineup was conducted on June 12, 1991, at 10:30 p.m. C. 205-06. The Erickson report lists the suspect as Bryan Johns and includes Aby Gonzalez and Rosa Burgos (discussed below) as amongst the eyewitnesses viewing the lineup. C. 205–06. The Erickson report accurately reports that Gonzalez viewed the lineup and identified Bryan Johns "as the offender in said homicide." C. 205–06; *see also* Sup. C. 29 (Aby Gonzalez confirming that he viewed a lineup the night of the shooting and identified Bryan Johns).

The Erickson lineup report was not placed in a retention file. It was never turned over to Demetrius Johnson's trial attorney, Johnson himself, or the Cook County State's Attorney's Office. C. 181–83. Instead, it was hidden from public view for nearly three decades. C. 181–83.

The Guevara report lists Detective Guevara as the first reporting officer, notes Detective Erickson as present, and was signed by Guevara.[1] C.

[1] The report also includes a signature for Detective Erickson. However, the Erickson report also includes his signature, and that signature looks nothing like the signature on the Guevara report. *Compare* C. 202 *with* C. 205. *See also* C. 174. Johnson alleges Guevara forged Erickson's signature on the Guevara report. Sup3 C. 5-7. Erickson is deceased. Sup2. C. 14.

202–03.[2] The Guevara report states that, *inter alia*, Aby Gonzalez and Rosa Burgos viewed a lineup on June 12, 1991, at 11:00 p.m. and did **not** identify anyone. C. 202–03 (emphasis added). The report indicates that "[b]ecause the results of the line-up was negative," Johns was released from custody. C. 202–03. This report was placed in the official police file called the "permanent retention file." C. 202-03. Johns was, in fact, released from custody.

Five weeks after Fred's murder, Guevara asked Officer Daley for a picture of Demetrius Johnson's brother. C. 176. That picture was shown to a woman named Elba Burgos, who had previously told police she had seen a man running with a gun after the shooting. C. 176. According to Guevara, Elba said it looked like the man she saw running with a gun five weeks earlier but was not him. C. 176. Four days later, Guevara brought Elba a picture of Johnson and she supposedly identified him. C. 176. Elba later testified she had "four to five seconds" to view the man she saw running five weeks prior to her identification. C. 178.

A week later, or six weeks after the shooting, Elba Burgos, Rosa Burgos, and Ricardo Burgos[3] purportedly picked Johnson out of a lineup Guevara conducted. C. 176. These supposed identifications occurred despite the fact that none of them gave any meaningful contemporaneous description

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[2] The Guevara and Erickson reports are marked confidential pursuant to a federal protective order in the *Rivera v. Guevara* lawsuit; they became public, however, when they were admitted into evidence at that trial in 2018. C. 171.

[3] All three Burgoses—despite their common surname—are apparently unrelated. C 173. Throughout this brief they are identified by their first names.

of the perpetrator near the time of the shooting, they had a limited viewing opportunity, and all of them were trying to identify a stranger they had never seen before. Sup3 C. 14. Nevertheless, the three testified at Johnson's trial and identified him.

During Rosa Burgos' testimony—which the State later called the "most decisive" and "important" of the identifications, Sup2 C. 14-15, Rosa admitted that she "had trouble distinguishing black people because all those people look alike." C. 177. Rosa also told Johnson's public defender prior to trial that "everything happened so fast and that she wasn't sure." C. 177. Rosa further explained that a police officer told witnesses during the lineup on the day of the shooting (*i.e.*, the Bryan Johns lineup—Johnson was not in any lineup until six weeks later) that they identified the wrong person. C. 177. This statement from Rosa, of course, is corroborated: as noted, Rosa is listed as viewing a lineup on the night of the shooting on the accurate Erickson report documenting Aby Gonzalez's identification of Johns as well the fabricated Guevara report. C. 202-05.

As for Ricardo, he was in a moving car and saw a man for seconds. The first thing he told police was that the man was Hispanic. Sup3 C. 14. (Both Johnson and Johns (for that matter) are Black.) Regardless, Ricardo has since recanted his identification and any inculpatory testimony: He never saw the shooting and only heard shots, only saw the man running from behind, and could not even identify the man's race let alone face. Sup. C. 5–9.

And his trial testimony had already documented Guevara's misconduct—Ricardo testified that nine days after the shooting (and weeks before his lineup identification of Johnson), Guevara showed him two photos and Ricardo supposedly identified Johnson, yet Guevara never documented this identification procedure in any report. C. 178.

Johnson had a uniquely credible alibi. Two witnesses, Madalia Reyes and Elizabeth Martinez, testified that they were with Johnson watching Michael Jordan's Chicago Bulls clinch their first NBA Championship at the time the shooting occurred, and Johnson never left the house while the game was on television. C. 178. The woman had a particular memory of this day because they were not basketball fans, so they did not regularly watch Bulls games but did so that evening. C. 178. They also remembered that classmates, including Martinez's sister, were particularly invested in the Bulls winning that Wednesday night because if they did not win, the next game would have been on Friday, which was the Clemente High School graduation, and they would miss the game. C. 178–79. Business records were entered into evidence confirming the Bulls 1991 championship basketball game was ongoing at the time of the shooting. C. 179–80. Both women also testified that Johnson never went by the nickname "Little D." C. 179.

At Johnson's trial, Guevara and Officer Daley both falsely testified that Bryan Johns was not identified in the single lineup on the night of the shooting. C. 179. Guevara explicitly (and falsely) testified that Aby Gonzalez

did not identify Bryan Johns in that lineup. C. 180. In response to the defense's closing argument that Bryan Johns—who all acknowledged went by the nickname "Little D" and was sought and arrested the night of the shooting (in possession of a firearm)—was a viable alternative suspect, the State strenuously (but unwittingly) argued that Aby Gonzalez did not identify Johns. C. 181.

Johnson, just 15 years old when arrested, was convicted and sentenced to 25 years in prison. C. 181. He maintained his innocence in a subsequent unsuccessful post-conviction filing. C. 181–82. He was released from prison in 2004. C. 182.

In 2012, a wrongfully convicted man named Jacques Rivera brought a civil rights lawsuit against, *inter alia*, Guevara and the City of Chicago. C. 182. During discovery in that federal lawsuit, the long-hidden Erickson report from Johnson's case was disclosed under a protective order. C. 182. At the May 2018 Rivera federal trial (which resulted in a $17 million verdict for Rivera against Guevara, his partner, and his supervisor, *see* C. 244), the Erickson report was admitted into evidence as Plaintiff's Exhibit 154P. This was the first time the hidden report became a public document. C. 183. Johnson himself only learned about the report a year and a half later when he retained counsel. C. 183.

On September 11, 2019, six days after first learning about the secret and undisclosed Erickson report, Johnson sought relief from his nearly three-

decade-old murder conviction. C. 167. Just two months later, on November 12, 2019, the State indicated it had no objection to the requested relief, and the circuit court vacated Johnson's conviction. C. 442. One month later, on December 20, 2019, all charges were dismissed. C. 396. Cook County State's Attorney Kim Foxx herself has called Johnson's conviction "false" and touted Johnson's endorsement in her re-election campaign to show her dedication to "overturning wrongful convictions." Sup. C. 12.

Johnson subsequently filed a petition for a certificate of innocence. After significant briefing, Sup2 C. 1-32; Sup3 C. 1-157, and lengthy arguments, Sup5. R. 1-64, Presiding Cook County Judge Erica L. Reddick granted Johnson's petition, finding that Johnson proved that he was innocent of the Fred murder by a preponderance of the evidence. Sup4 C. 4. Judge Reddick commented that she was aware of "numerous cases" like this one where Guevara committed misconduct, Sup6 R 12-13, and noted that the evidence that was presented both at trial and post-conviction demonstrated the unreliability of the State's evidence from trial. Sup6 R. 13. The State did not appeal.

B. The UUWF Case

On August 11, 2006, several years after Johnson was released from custody on the wrongful murder conviction, but before his wrongful conviction had been vacated, he was arrested for unlawful use of a weapon by a felon in violation of 720 ILCS 5/24-1.1(a). C. 395. According to the police

report, he was found with a weapon during a traffic stop. C. 23. Johnson told the police he kept it for protection. C. 23. He was arrested, at least in part, because of his now-vacated murder conviction. C. 23.

Johnson pled guilty to UUWF based on the predicate 1991 murder conviction. C. 404. This was the only available predicate offense. To this day, with his murder conviction now vacated, Johnson has no other felony or misdemeanor convictions. C. 410–14.

On January 30, 2020, shortly after the murder charges were dismissed, Johnson filed a section 2-1401 petition seeking to vacate the UUW conviction. C. 395. The State filed a written motion to dismiss, C. 444–49, and Johnson filed a written response. C. 453–58. On July 21, 2020, the circuit court heard arguments on the State's motion to dismiss, R. 2–25, and on July 27, 2020, the court granted the State's motion in an oral ruling. R. 27–36.

The appellate court affirmed, relying on *People v. McFadden*, 2016 IL 117424, in lieu of *In re N.G.*, 2018 IL 121939. *Johnson*, 2021 IL App (1st) 200912, ¶15. The First District held that *N.G.* is limited to situations where the predicate felony is void, not voidable. *Johnson*, 2021 IL App (1st) 200912, ¶ 15. The First District also refused to consider equitable relief in the interests of justice. According to the First District, this Court's admonition in *People v. Lawton*, 212 Ill.2d 285, 297–98 (2004), to apply section 2-1401 with versatility "to prevent enforcement of a judgment when doing so would be unfair, unjust, or unconscionable" does not provide for substantive equitable

relief; rather, it is limited to providing a procedural vehicle where one is otherwise unavailable. 2021 IL App (1st) 200912, ¶ 19.

This Court granted Johnson leave to appeal.

STANDARD OF REVIEW

The circuit court granted the State's motion to dismiss the section 2-1401 petition on the pleadings. This Court's review of this legal decision is *de novo*. *People v. Vincent*, 226 Ill.2d 1, 14-18 (2007).

This is distinct, however, from a review of a lower court's exercise of its equitable powers, as described *infra* Argument II.C, which generally should be reviewed for an abuse of discretion. *Warren County Soil and Water Conservation Dist. v. Walters*, 2015 IL 117783, ¶ 52. However, in this case, neither the circuit nor appellate courts considered acting purely in equity, with the appellate court specifically holding it was not permitted to do. *Johnson*, 2021 IL App (1st) 200912, ¶ 19. This, too, is a legal conclusion, which must be reviewed *de novo*. *See Jackson v. Board of Election Com'rs of City of Chicago*, 2012 IL 11928, ¶ 47 (noting that *de novo* review applies where historical facts are established but there is a dispute about whether governing legal principles were correctly applied). Since no court exercised discretion on this issue, there is no alleged abuse of discretion to review, and *de novo* review applies to all issues in this brief.

ARGUMENT

I. With his predicate conviction vacated and dismissed, Demetrius Johnson's UUWF conviction must also be vacated.

The unlawful use of a weapon by a felon (UUWF) statute in effect at the time of Demetrius Johnson's arrest prohibited a convicted felon from possessing a firearm. *See* 720 ILCS 5/24-1.1(a) (West 2006). In 2016 in *People v. McFadden*, 2016 IL 117424, ¶ 48, this Court held that a strict, plain reading of that statute meant that a defendant's "felon status" at the time of arrest is all that matters. *McFadden* held that even where the predicate felony later was vacated—indeed, even where it was void—the UUWF conviction must remain. However, a mere two years later, recognizing the "gravity of interests at stake," this Court abandoned the strict "felon status" framework, explaining that *McFadden* "took the wrong analytical path." *See In re N.G.*, 2018 IL 121939, ¶¶ 23, 75. This case presents this Court an opportunity to determine and apply the appropriate analytical framework when a predicate felony is vacated after a UUWF conviction. Applying the proper framework should result in reversing the circuit and appellate court opinions and granting Johnson relief.

A. This Court should abandon the "felon status" framework entirely and vacate Demetrius Johnson's UUWF conviction where the predicate felony was vacated and constitutionally invalid.

1. Multiple jurisdictions have interpreted similar statutes to require relief from a UUWF conviction whenever a predicate is vacated, and this Court should follow suit.

Appellant begins by pointing out there are two linear analytical paths this Court could apply to these types of situations. The first, of course, is simply to apply the "felon status" framework adopted by *McFadden* and live with the consequences. That framework, however, was quickly abandoned and rejected when a rote application to the *N.G.* facts led to the unconscionable result of a parent losing his rights because of a UUWF conviction that rested on a void predicate. If anything, the extraordinary facts of this case again show that a strict application of the *McFadden* "felon status" rule is unwarranted and unjust. This Court plainly should not revert to the strict *McFadden* "felon status" framework.

On the flip side, however, this Court could apply a strict rule that whenever a predicate offense is vacated—for whatever reason—a petitioner can get relief from an UUWF conviction. This would be far from an unprecedented result. For example, in *State v. Gore*, 101 Wash.2d 481, 485-88 (1984), the Washington Supreme Court appears to have adopted that framework, or at minimum adopted that framework whenever the predicate felony was vacated for a reason pertaining to its "constitutional validity."

In *Gore*, the Appellant's predicate burglary conviction was reversed on direct appeal for insufficient evidence. *Id.* at 487. The *Gore* court interpreted an analogous UUWF statute, RCW 9.41.040, which prohibited those "convicted" from possessing a firearm, as requiring the conviction be "constitutionally valid." *Id.* at 485. Since the predicate burglary conviction

lacked sufficient evidence, it was constitutionally invalid, and the UUWF conviction, accordingly, was vacated. *Id.* at 488.

A pair of Florida cases ruled similarly when interpreting its felon in possession of a weapon statute, Fla. St. § 790.23. In *State v. Snyder*, 673 So.2d 9, 11 (Fla. 1996), the Florida Supreme Court held that the prohibition on a felon possessing a firearm applies while direct appeal is pending. However, citing *Gore*, the *Snyder* court noted that "fairness requires that he or she be permitted to attack a conviction for possession of a firearm when the predicate felony conviction is subsequently reversed on appeal" and that "such a defendant is entitled to relief" through Florida's post-conviction procedures. *Snyder*, 673 So.2d at 11. In *Johnson v. State*, 664 So.2d 986, 988 (Fla. DCA 4th 1995), decided a year before *Snyder*, a lower Florida appellate court relied on *Gore* and held the same, reversing a possession of a firearm by a convicted felon under analogous facts.

The Colorado Supreme Court, too, reached the identical conclusion in *People v. Quintana*, 707 P.2d 355 (Colo. 1985). In that prosecution for possession of a weapon by a previous offender, the trial court examined the predicate felony (a guilty plea) and concluded it was both constitutionally invalid and obtained in violation of a state rule. *Id.* at 356. Nevertheless, the trial court refused to dismiss the pending weapon charge based on that predicate felony. *Id*. The Colorado Supreme Court reversed. Applying the rule of lenity to its statutory analysis of the weapons statute, Co. St. § 18-12-

108(1), it held that "a valid underlying conviction is required if the purpose of the statute—to limit possession of firearms by persons, who, by virtue of their prior felony record, are likely to abuse the right to bear arms—is to be accomplished." *Id.* at 359.

A California appellate court reached the same result in *People v. Howie*, 137 Cal. App. 3d 258 (2d Dist. Ct. of Apl. 1982).[4] In that case, while charges were pending against the defendant for being a convicted felon in possession of a firearm, Ca. Penal § 12021 (1982), a different court entered an order vacating the predicate felony as unconstitutional. *Id.* The jury convicted the defendant of the weapon offense, but on appeal, the Court held "that a successful collateral attack on the constitutionality of a prior felony conviction does state a complete defense" to the felon in possession of a firearm offense. *Id.* at 893.

The Illinois UUWF statute, 720 ILCS 5/24-1.1(a), uses the identical "convicted" language at issue in the Washington, Florida, Colorado, and California statutes. Like *Gore* and the other decisions, this Court, too, could interpret that language as requiring a "constitutionally valid" predicate conviction. Doing so, of course, would lead to a straightforward and just

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[4] On January 5, 1983, the *Howie* decision was ordered not to be officially published.

The *McFadden* court relied on a different—and subsequent—California decision: *People v. Harty*, 173 Cal. App. 3d 493 (4th Dist. Ct. of Apl. 1985). *See McFadden*, 2016 IL 117424, ¶ 30 (citing *Harty*). In *Harty*, however, the actual predicate conviction was still intact; *Howie* is far more similar to the instant case as, like *Howie*, the predicate conviction at issue here was fully vacated at the time the gun possession matter was adjudicated.

result. After all, there is nothing constitutionally valid about Johnson's predicate murder conviction. It was tainted by a corrupt former Chicago detective—and his fabrication of evidence and perjury. When the constitutional invalidity was brought to the court's attention, both the State and the circuit court quickly agreed and vacated the conviction. Sup2 C. 10. There is, accordingly, no real dispute on this question, and an application of this framework should easily lead this Court to conclude that it must vacate Johnson's UUWF conviction, too.

2. The federal statute interpreted in *Lewis* differs substantially from Illinois' UUWF statute.

Gore, *Snyder*, *Johnson*, *Quintana*, and *Howie* were decided after the U.S. Supreme Court's decision in *Lewis v. United States*, 445 U.S. 55, 60-62 (1980), on which both the State and the First District relied. *Johnson*, 2021 IL App (1st) 200912, ¶ 13. The courts correctly noted they were not bound by *Lewis*, which interpreted a federal statute. *See e.g., Gore*, 101 Wash.2d at 485-87; *Quintana*, 707 P.2d at 358; *Howie*, 137 Cal. App.3d 258. Indeed, most if not all state court cases that have grappled with this issue have concluded the same. *See e.g.*, *State v. Mangum*, 214 Ariz. 165, 171 (2007) ("*Lewis* is factually distinguishable from this case, involved a federal statute, and 'is not binding upon' our interpretation of Arizona's prohibited possessor laws.").

Accord State v. Portsche, 256 Neb. 926, 937 (2000). The same, of course, is true here.[5] *See McFadden*, 2016 IL 117424, ¶ 28.

In deciding not to follow the conclusion in *Lewis*, the *Quintana* and *Howie* courts highlighted the differences between their state statutes and the federal statute at issue in *Lewis*. For example, *Quintana* explained that *Lewis* strictly applied the "felon status" rule even to constitutionally invalid convictions in part because there was a robust set of general and specific exceptions articulated in the federal statute, and constitutionally invalid convictions were not one of them. *Quintana*, 707 P.2d at 358; *see also Lewis*, 445 U.S. at 61-62 (highlighting that the existence of statutory exceptions, without listing constitutionally invalid convictions, supports the interpretation). The Colorado statute at issue in *Quintana* lacked significant exceptions, so the *Lewis* analysis was inapplicable. 707 P.2d at 358 (citing Co. St. § 18-12-108).

Howie highlighted the same distinction, while also noting the federal scheme prohibits gun possession not just by convicted felons but also those merely under indictment for a felony. 137 Cal. App.3d 258 ("[I]n stark contrast to the federal statutory scheme, the 1953 enactment . . . contains no exceptions to the general proscription imposed on convicted felons. . . and no companion sections imposing a similar disability of persons under felony

[5] Appellant notes that there are other states that have followed *Lewis* and interpreted their UUWF-like statutes as strict "felony status" offenses. *See Mangum*, 214 Ariz. at 173, fn. 8 (*Mangum* so holding and citing other cases).

indictment."). Accordingly, unlike the California counterpart, the federal statute indicated an intent for broad applicability. The *Howie* court also highlighted that the California Penal Code had never proscribed an exception in any other statute for a constitutionally invalid conviction, so nothing could be inferred from the legislature's failure to include it there. 137 Cal. App.3d 258.

These same rationales apply to the Illinois statutory scheme. There are only minimal exceptions to the prohibition in the Illinois statute, so nothing can be taken from the failure to include constitutionally invalid convictions. *See* 720 ILCS 5/24-1.1(a), (c) (limited articulated exceptions to specific authorization by the Illinois State police or Department of Corrections). This is contrasted with the broad exceptions in the federal statute, which exempted, for example, those who had been pardoned and limited the definition of "felony" for purposes of that specific statute. *Lewis*, 445 U.S. at 61-62. What's more, unlike the broader federal statutory scheme and in line with the rationale of *Howie*, Illinois never has proscribed gun possession for those merely charged with a felony. Appellant, moreover, cannot find any statute in the Illinois Criminal Code that lists an exception for a constitutionally invalid conviction, so nothing can be inferred from the legislature's failure to include such an exception in this statute. *See Howie*, 137 Cal. App.3d 258. Accordingly, for the same reasons as *Quintana* and *Howie*, this Court should follow the reasoning and holdings of the

Washington, Florida, Colorado, and California courts interpreting their felon-in-possession statutes. *See People v. Smith*, 236 Ill.2d 162, 167 (2010) (explaining that courts should interpret a statute's plain meaning by considering the provision in its entirety). A vacated or constitutionally invalid predicate cannot support the conviction.

Johnson recognizes that in *McFadden* the majority found sufficient similarities between the federal and state statutes and chose to follow the *Lewis* analysis. *McFadden*, 2016 IL 117424, at ¶ 29. The *McFadden* court, however, did not appear to consider the significant statutory differences outlined above, or the principles of statutory interpretation highlighted in *Gore*, *Quintana*, *Howie*, and, to some extent, *Snyder* and *Johnson*. Upon consideration of these factors, this Court should align itself with the Washington, Florida, Colorado, and California courts' interpretation of similar statutes and prohibit criminalization in its entirety when a predicate felony is vacated or constitutionally invalid. *See also N.G.*, 2018 IL 121939, ¶ 78 (citing multiple out of jurisdiction cases while explaining that "[e]ven if *Lewis* could somehow be construed to justify the result in *McFadden*," the Court would not follow it in that case).

Such a result is particularly warranted where this Court initially took the opposite strict "felon status" approach in *McFadden*, but a majority of this Court quickly acknowledged in *N.G.* that such an application led to an unconscionable result. *N.G.*, 2018 IL 121939, at ¶ 23; *see also U.S. v. Bryant*,

579 U.S. 140, 136 S. Ct. 1954, 1962 (2016) (quoting *Burgett v. Texas*, 389 U.S. 109, 115 (1967) (holding that the use of a "constitutionally infirm conviction" without the benefit of counsel to establish a prior-crimes predicate "would cause 'the accused in effect to suffer anew'" from a prior deprivation of a constitutional right)). As discussed further *infra*, this case is yet another example of why a strict application is both unworkable and unjust. This Court should overrule *McFadden* in its entirety and interpret the statute with lenity to avoid criminalizing individuals whose predicate felonies no longer exist, or, at minimum, were constitutionally invalid. Such an interpretation, of course, would cause this Court to reverse and vacate Demetrius Johnson's unlawful use of a weapon by a felon conviction.

B. Alternatively, this Court should hold that a court must evaluate the totality of the circumstances when adjudicating the continued viability of a UUWF conviction after the predicate felony is vacated. Doing so here should cause this Court to vacate Johnson's conviction or, at minimum, remand to the circuit court.

The *N.G.* court made clear from the very outset of its analysis that it was abandoning the strict "felon status" *McFadden* framework from just two years prior because of "the gravity of interests at stake," including Second Amendment rights and the termination of a biological father's parental rights. *N.*G., 2018 IL 121939, at ¶ 23; *see also People v. Hanna*, 207 Ill.2d 486, 497 (2003) (explaining that where a "plain or literal meaning of a statute produces absurd results, the literal reading should yield"). The majority was obviously troubled that a "constitutionally invalid conviction" could have such

drastic effect. *Id.* at ¶ 31. *See also id.* at ¶ 61 ("DCFS was asking the court to hold, in effect, that a person's fundamental rights to parenthood may be terminated based on conduct protected by the second amendment and therefore beyond the power of the state to punish. That such is not the case should be self-evident."). It therefore held that a void predicate felony—or one based on a facially unconstitutional statute—could not support parental termination. *Id.* at ¶ 42.

N.G., of course, is not on all fours with this case. Johnson's constitutionally invalid murder conviction was not void; it was voidable. And parental rights are not at issue. That said, nothing in *N.G.* holds that *only* when the predicate felony is void or parental rights are at issue should a court intervene. Rather, *N.G.* explicitly noted lower appellate courts' broad interpretation of the applicability of *McFadden* in other circumstances was "clearly becoming a pressurized issue." *N.G.*, 2018 IL 121939, ¶ 74, fn. 3. "The further we extend *McFadden*'s reach, the less justification we have for following *Lewis* down the wrong analytical path." *N.G.*, at ¶ 74, fn. 3. "Simply put, the analysis in *McFadden* not only took the wrong analytical path, it failed to recognize that the other path existed." *Id.* at ¶ 75.

Short of the approach advocated *supra* I.A, one other analytical path would be a true consideration of all factors and interests at stake, such as those highlighted in *McFadden* and *N.G.* These could include (1) the reliability of the vacated conviction or whether it was an offense at all (*i.e.*,

void or voidable); (2) whether the purpose of the UUWF statute is being effectuated; (3) whether the vacated predicate felony was being used to impose criminal or civil sanctions, or, if criminal, to define an offense or impose an aggravating factor; (4) the "gravity of the interests" at stake; or (5) any other relevant, case-specific factor. Such an approach would be entirely consistent with the concerns emanating from *N.G*, which noted both that the "[r]eliability of the convictions [] matters a great deal, *id.* at ¶ 79, and that *McFadden* and *Lewis* were "premised on concerns over effectuating the purposes of those statues, namely, protecting the public from dangerous persons who are seeking to obtain firearms." *N.G.*, 2018 IL 121939, ¶ 78 (citing *McFadden* at ¶¶ 29-30; *Lewis*, 445 U.S. at 67). Indeed, the *N.G.* court rejected *McFadden* in part because its application to its facts "would not advance any firearms-related public safety concerns." *Id.* at ¶ 78. Rather, all it would do would deprive an individual of a fundamental right. *Id.* And, as noted, *N.G.* repeatedly highlighted that its decision was informed by the serious consequences at issue, including the deprivation of both fundamental constitutional and parental rights. *Id.* at ¶ 23, 31, 61.

An application of this approach to these facts should cause this Court to grant relief. Overwhelmingly, the most significant fact is that Demetrius Johnson is entirely factually innocent of the predicate offense. Sup4 C. 4. The *N.G.* result is based predominantly on the fact that the paternal father's conviction did not actually involve criminal conduct. 2018 IL 121939, ¶ 39

(noting because the statute under which the father was convicted was facially unconstitutional and void, "the conduct it sanctioned was never a crime at all"). Johnson's judicial innocence finding, too, demonstrates he did not commit a crime.

With his factual innocence established and the unreliability of his conviction an adjudicated fact, the concerns and purposes underlying the strict "felon status" application of the statute deteriorate. From *Lewis* to *McFadden* to *N.G.*, the U.S. Supreme Court and this Court have reasoned that the strict "felon status" application to the UUWF statutes at issue were necessary to protect the public from *criminals* obtaining firearms. *Lewis*, 445 U.S. at 67; *McFadden*, at ¶¶ 29-30; *N.G.* at ¶ 78. But Johnson was no criminal: he was an innocent boy framed by a corrupt detective.

So, too, of another concern emanating from these decisions: the petitioner's obligation to vacate the conviction before he obtains a firearm. *See e.g.*, *McFadden*, at ¶ 30 (citing cases and concluding "[t]here is nothing absurd or unjust or unreasonable about requiring a person who believes he has been wrongly convicted of a felony to clear his status through the judicial process before being allowed to possess a firearm"). The *McFadden* dissent already highlighted the practical difficulties of a "vacate first" requirement and how it perpetuates the injustice already inflicted on those who committed no actual crime. *McFadden*, at ¶¶ 63-65 (Kilbride, J., dissenting). Those

concerns grow astronomically when, as here, the very evidence available to effectuate the relief are hidden by state actors.

The State itself admits the "obvious" *Brady v. Maryland*, 373 U.S. 83 (1963), violation in relation to Johnson's predicate murder offense. Sup2 C. 10 (State noting, in its response to Johnson's Certificate of Innocence Petitioner that in 2019 it "[r]ecogniz[ed] the obvious *Brady* violation that had occurred" and took remedial action to agree to vacate the conviction). Yet the State identifies no legitimate justification for why it is seeking to maintain Johnson's felony status—and the consequences that stem from that—based on the intentional and fraudulent misconduct committed by its own government actor against an innocent 15-year-old boy.

Accordingly, these additional facts do make it absurd, unjust, and unreasonable, *see McFadden*, at ¶ 30, to continue to maintain Johnson's UUWF conviction—the practical result of which will prohibit Johnson from exercising his fundamental Second Amendment rights for the rest of his life. *People v. Aguilar*, 2013 IL 112116. Had the State itself not withheld the very evidence of his innocence for murder for so long, Johnson would never have been proscribed from possessing the very firearm that led to his UUWF conviction, which, in turn, as noted, now forbids him in perpetuity from ever exercising the Second Amendment rights that any other law-abiding citizen could otherwise. *See People v. Beaman*, 229 Ill.2d 56, 73 (2008) (explaining to

comply with *Brady*, the prosecutor has a duty to learn of favorable evidence known to the police). The circularity itself highlights the absurdity.

This Court should flatly reject the First District's refusal to consider Johnson's innocence. *Johnson*, 2021 IL App (1st) 200912, ¶ 18. The First District's rationale was that the innocence certification was not issued until after the dismissal of the section 2-1401 petition. *Id.* But as *N.G.* made clear, it is well within an appellate court's authority to take judicial notice of court records. 2018 IL 121939, ¶ 32. And even though the *N.G.* dissenting opinion and dissent upon rehearing took significant issue with the majority's actions in that regard, that was based on the fact that *N.G.* contained no "supplemented appellate record" at all. *N.G.*, at ¶¶ 109-110, 156 (Theis, J., dissenting). Here, after the circuit court took judicial notice, Ill. R. Evid. 201, of the court file related to the predicate felony at Johnson's request, R. 29-36, both parties repeatedly, without objection, supplemented the record with all proceedings and documents related to the certificate of innocence. *See* SupC, Sup2 C, Sup3 C, Sup4 C, Sup5 R, and Sup6 R. The actual record of this case, accordingly, plainly demonstrates Johnson's adjudicated factual innocence of the murder.

These very facts—that the circuit court took judicial notice of the court file and the evidence was supplemented into this record without objection as that court file grew—differentiates this case from *Whittmanhart, Inc. v. CA, Inc.*, 402 Ill. App. 3d 848, 852 (1st Dist. 2010), and *Kessler v. Zekman*, 250 Ill.

App. 3d 172, 189 (1st Dist. 1993), upon which the First District relied. In both those cases, the petitioning parties sought to rely on subsequent evidence from a court file that was never judicially noticed nor ever supplemented into the appellate record. Johnson both requested and was granted judicial notice, R. 29-36, and supplemented the record (as did the State, for that matter). But regardless, the *N.G.* majority establishes that the circuit court's subsequent order finding Johnson innocent of the predicate murder offense is properly considered under the court's discretion to exercise judicial notice of court files.

Ultimately, the gravity of the interests at stake are sky high. The conviction at issue here is the only felony in Johnson's otherwise unblemished life—a not insignificant achievement given that he literally spent his teens and twenties locked up with individuals with histories of criminal conduct. *See* Jennifer E. Copp*, The Impact of Incarceration on the Risk of Violent Recidivism*, 103 Marq. L. Rev. 775 (2020) (noting that initial research suggests imprisonment could increase the risk of future criminal behavior). Regardless, according to the National Inventory of Collateral Consequences of Conviction, this single ill-begotten UUWF felony conviction on Johnson's record comes with 701 different collateral consequences simply in the state of Illinois.[6] If federal consequences are included, 1,136 are listed.[7] These

[6] *See* National Inventory of Collateral Consequences of Conviction, Search Tool, Filtered by Jurisdiction (Illinois) and Offense Type (Any Felony), available at https://niccc.nationalreentryresourcecenter.org/consequences

consequences include the fundamental Second Amendment rights that any other non-felonious citizen would enjoy that Johnson cannot and will not unless this Court vacates his conviction. *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010); *Coram v. State of Illinois*, 2013 IL 113867, ¶ 49. Given the facts of this case, these lifetime consequences on Johnson are entirely unjust.

Removal of the conviction would improve Johnson's job prospects, housing choices, and life in general immensely. Needless to say, after being "dragged by the devil," Sup6 R. 16, and spending 13 plus years wrongfully incarcerated due to the State agent's misconduct, the interests are even more compelling.

An analytical approach to this issue that considers the totality of all factors obviously should result in the vacatur of Johnson's UUWF conviction. This Court should so order, or, if this Court deems necessary, remand to the circuit court to weigh all factors and make a determination.

(last accessed Nov. 12, 2021). This cite includes statutory references referencing the collateral consequence at issue.

[7] *See id.*, Search Tool, Filtered by Jurisdiction (Illinois) and Offense Type (Any Felony), Include Federal Consequences, available at https://niccc.nationalreentryresourcecenter.org/consequences (last accessed Nov. 12, 2021).

C. Applied to the facts of this case, the legislative scheme that would have required Johnson to invalidate his murder conviction prior to possessing a firearm violates due process and the Second Amendment.

The *Lewis* and *McFadden* courts rejected the applied due process and Second Amendment arguments presented to them, U.S. Const. Amends. II, XIV; Ill. Const. 1970, art. I, § 2. But Johnson's factual innocence of the predicate murder and Guevara's misconduct in securing Johnson's wrongful conviction turns the tables on those analyses.

An applied due process challenge to a statute requires a party to demonstrate its application is unconstitutional to the party's particular circumstances, meaning the specific facts at issue are relevant. *Napleton v. Village of Hindsale*, 229 Ill.2d 296, 306 (2008). The Second Amendment rights at issue here are fundamental. *McDonald*, 561 U.S. 742 (2010); *Coram*, 2013 IL 113867, ¶ 49. Strict scrutiny of the statute applies to fundamental rights. *Napleton*, 229 Ill.2d at 307. That means the governmental measures must be necessary to serve a compelling state interest and narrowly tailored to that interest using the least restrictive means. *Id.*

Both *McFadden* and *Lewis* applied a rational basis test. *See McFadden*, at ¶ 24 (quoting *Lewis*, 445 U.S. at 66) (explaining that the legislatures "'could rationally conclude that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit the possession of a firearm'"). The cases highlighted that a legislative scheme that required a successful court challenge to vacate the conviction prior to possessing a

firearm was rational. *McFadden*, at ¶ 24; *Lewis*, 445 U.S. at 67. But *Lewis* long-predated *McDonald*, 561 U.S. 742, and the U.S. Supreme Court's firm conclusion that Second Amendment rights are fundamental. And *McFadden* addressed the constitutional issues in passing and without the benefit of a fully developed argument. *See* 2016 IL 117424, at ¶ 34. *McDonald* confirms that strict scrutiny, not rational basis, should apply, as gun possession is a fundamental right.

There is, of course, no compelling (or constitutional) state interest in making a previously wrongfully convicted innocent teenager a lifelong felon where—but for his wrongful conviction—he would have been merely exercising his right to bear arms. Any interest the Government could envision would seem to plainly violate the Second Amendment under *Aguilar*, 2013 IL 112116, ¶ 1. What's more, limiting relief *only* to those who vacate first is not narrowly tailored or the least restrictive means—once the acknowledgement of that wrongful predicate conviction comes to light, the UUWF conviction should be properly vacated to ensure a constitutional scheme. To that end, the UUWF statute as applied to the facts of this case, and this Appellant, are unconstitutional when the proper strict scrutiny standard is applied.

But even if a rational basis test did apply, the result remains the same. Simply put, under the unique facts of this case, the continued application of the statute to Johnson is irrational. *McFadden* and *Lewis* assert that

requiring a successful court challenge to vacate a constitutionally infirm conviction prior to possessing a firearm is rational. *McFadden*, at ¶ 24; *Lewis*, 445 U.S. at 67. That may be true, in most case, but it is not rational when state actors spend three decades hiding the evidence of innocence, and the constitutional infirmity of the predicate conviction, and then the State later refuses to vacate the UUWF conviction itself. Of course, it plainly violates the Second Amendment to prohibit a person who has never committed an actual felony from possessing a firearm. *Aguilar*, 2013 IL 112116, ¶ 1. *See also McFadden*, at ¶ 36 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (noting that the as-applied challenge failed because the Second Amendment protection applies only to "law-abiding responsible citizens"). Accordingly, applying any standard, the UUWF statute cannot continue to survive an as-applied constitutional challenge.

D. Conclusion

There are serious constitutional concerns about the application of the UUWF statute to Johnson. *See supra* Argument I.C. Courts owe a duty to construe a statute to affirm its constitutionality and validity, if reasonably possible. *People v. Shephard*, 152 Ill.2d 489, 499 (1992). Appellant offers two reasonable ways the statute can be construed to ensure it remains constitutional as applied to these facts. *See supra* Argument I.A-B. Either requires reversal of the circuit and appellate court opinions, as does the constitutional argument raised *supra* Argument I.C.

II. Section 2-1401 alone empowers this Court to grant relief.

A. Legal Standard

Although usually characterized as a civil remedy, the remedial powers of 735 ILCS 5/2-1401 are also used in criminal cases. *People v. Haynes*, 192 Ill.2d 437, 460-61 (2000). A section 2-1401 petition seeks to bring facts to the attention of a court that would have precluded entry of a final judgment had the facts been known. *Id.* at 461.

A fact-specific challenge to a final judgment, like the instant one, requires a petitioner to establish (1) the existence of a meritorious defense in the original action; (2) due diligence in presenting the defense or claim in the original action; and (3) due diligence in filing the section 2-1401 petition. *Smith v. Airoom, Inc.*, 114 Ill.2d 209, 220-21 (1986). A petitioner's section 2-1401 burden is the preponderance of the evidence. *Id.* at 221.

Ordinarily, section 2-1401 petitions must be filed within two years of entry of the final order. 735 ILCS 5/2-1401(c). Where the grounds for relief, however, are fraudulently concealed, the statute of limitations are tolled. *People v. Pinkonsly*, 207 Ill.2d 555, 562 (2003). The "failure to comply with the obligation of full and truthful disclosure" amounts to fraudulent concealment "as a matter of law." *Ostendorf v. International Harvester Co.*, 89 Ill.2d 273, 282 (1982).

B. Demetrius Johnson meets the standards for section 2-1401 relief.

1. Johnson would not have been arrested, let alone convicted, had his defense to the UUWF conviction not been fraudulently concealed from him.

Johnson's defense to the predicate murder conviction was intentionally and fraudulently concealed from him for nearly three decades. There is no dispute on that question. Sup2 C. 10 (State calling it an "obvious" *Brady* violation). That is why, when the evidence surfaced, both the State and the circuit court acted quickly to vacate his murder conviction.

The same evidence, however, was no less fraudulently concealed from him in the context of the 2006 UUWF conviction. As the rulings in the murder case clearly demonstrate, had disgraced former homicide detective Reynaldo Guevara's perjury and fabrication of evidence been disclosed to Johnson at any time prior to his August 11, 2006, arrest for UUWF, Johnson would have quickly succeeded in vacating the murder conviction. Without the predicate conviction, his conduct in August 2006 of possessing a firearm would not have been criminal; accordingly, he would not have been arrested, let alone convicted of the offense. That is a clear and meritorious defense to the UUWF conviction. *See Airoom*, 114 Ill.2d at 220-21.

The Guevara-led *Brady* violation, of course, is fraudulent concealment as a matter of law. *See Ostendorf*, 89 Ill.2d at 282. It was the State's burden to reveal its agent's fabrication to Johnson. *Gatto v. Walgreen Drug Co.*, 61 Ill.2d 513, 522 (1975) ("The gist of the action is fraudulently producing a false

impression upon the mind of the other party; and, if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendants, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff.") Had the State revealed the truth at any time prior to Johnson's August 2006 arrest, he could have and would have acted promptly to vacate the predicate murder, and there would be no criminal conduct in Johnson's 2006 possession of a gun.

2. Johnson acted diligently in both bringing his section 2-1401 petition and at the time of the UUWF charges.

Mostly unbeknownst to anyone but corrupt detective Guevara, a key eyewitness to the murder, Aby Gonzalez, identified an alternative suspect on the day of the shooting as the killer of his close friend. Guevara then created a false *official* report, indicating that Gonzalez did **not** identify the alternative suspect. Guevara then only put the false *official* report in the permanent retention file, and only that *official* report was distributed to the parties involved in Johnson's murder case, including the prosecution. *See e.g.*, C. 186-87. These facts were hidden until 2018. C. 182-83.

Johnson and his murder trial counsel acted reasonably and diligently in trying to obtain this hidden information. They relied on the normal criminal discovery process to obtain the police file from the State. Johnson is not at fault for any delay when Guevara intentionally hid the exculpatory report from prosecutors and lied about it under oath. *See Airoom*, 114 Ill.2d

at 222 (holding that to meet the diligence requirement pertaining to the original action, the petitioner must show "under the circumstances he acted reasonably, and not negligently"). Moreover, there is no basis to conclude that Johnson failed to meet any sort of additional diligence requirement prior to the UUWF conviction. *See People v. Walker*, 211 Ill.2d 317, 337 (2004) (explaining that in a UUWF prosecution, the predicate felony need not be an adjudicated issue). Regardless, the evidence was still hidden in 2006 so no amount of additional diligence could have discovered it.

Johnson, moreover, acted diligently in filing the section 2-1401 petition at issue. He filed it just over two months after his murder conviction was vacated, C. 395, which is the earliest possible time he could have. *See People v. Davis*, 2012 IL App (4th) 110305, ¶ 20 (holding that filing a petition four months after the facts became available established diligence). Given these facts, this Court can grant relief under a straight-forward application of section 2-1401 and should reverse the circuit and appellate courts holding otherwise.

C. This Court should invoke its equitable powers and vacate Johnson's conviction or remand to the circuit court to consider doing so.

If this Court determines there is no legal statutory or constitutional basis to afford Johnson relief, it should consider the question of whether section 2-1401 allows courts to grant equitable relief in the interests of justice. The answer should be yes, albeit with cautions that this type of

discretionary relief should be utilized only in rare circumstances. For all the reasons stated throughout this brief, however, this case presents that rare situation where equitable relief is justified.

Whether section 2-1401 permits purely equitable relief involves analysis and interpretation of the statute itself, which reads, in relevant part, as follows:

> (a) Relief from final orders and judgments, after 30 days from the entry thereof, may be had upon petition as provided in this Section. Writs of error coram nobis and coram vobis, bills of review and bills in the nature of bills of review are abolished. All relief heretofore obtainable and the grounds for such relief heretofore available, whether by any of the foregoing remedies or otherwise, shall be available in every case, by proceedings hereunder, regardless of the nature of the order or judgment from which relief is sought or of the proceedings in which it was entered. Except as provided in the Illinois Parentage Act of 2015, there shall be no distinction between actions and other proceedings, statutory or otherwise, as to availability of relief, grounds for relief or the relief obtainable.

735 ILCS 5/2-1401(a).

The plain language of this section states clearly that the statute "abolished" prior common law writs, such as coram nobis, coram vobis, and bills of review. The next sentence, however, states equally clearly that the availability of these common law writs, as well as "[a]ll relief heretofore available, whether by any of the foregoing remedies or otherwise," is available through this statute and in every case regardless of its nature. *See Warren County Soil and Water Conservation Dist. v. Walters*, 2015 IL 117783, ¶ 35 (explaining that section 2-1401 is the "statutory analog to the common

law writ"). Accordingly, if any of these common law writs allowed courts to act purely in equity or the interests of justice, the plain language of section 2-1401 establishes it would remain available. *See People v. Fiveash*, 2015 IL 117669, ¶ 11 (the plain language is the "critical starting point for the resolution of any question of statutory construction" and is the "most reliable indicator" of the legislature's intent).

This Court, in *Ellman v. De Ruiter*, 412 Ill. 285, 289-90 (1952), addressed this very issue as it pertains to coram nobis. In that case, counsel for a civil plaintiff "willfully concealed" from defendant's counsel that plaintiff received a default judgment against the defendant. *Id.* at 289. The deception continued until after the statutory term for contesting the judgment had passed. *Id.* at 286-88. Upon learning late, the defendant moved to vacate the judgment. The lower court granted the motion, but the appellate court reversed. *Id.* at 289. As this Court summarized, the appellate court "felt defendant was entitled to relief but that it was powerless to grant it under the statutory motion which has been substituted for the writ of error coram nobis." *Id.* at 290.

The *Ellman* court traced the roots of coram nobis and its replacement with this statutory remedy and concluded that, "it is our opinion that there has been a fusion sufficient to enable a court of law, when the occasion demands it, to apply equitable principles in administering the summary relief available under the motion which has been substituted for writ of error coram

nobis." *Id.* at 353. The *Ellman* court went on: "Stated different, it is our belief that the motion may, under our present practice, be addressed to the equitable powers of the court, when the exercise of such power is necessary to prevent injustice." *Id.* at 353-54. In the context of that case, "[t]o prevent a failure of justice," this Court held that "it is within the spirit of the Civil Practice Act, and within the scope of the function of the motion which has replaced the writ of error coram nobis," that defendant's motion to vacate the default judgment be granted. *Id.* at 294. *See also Charles Austin, Ltd. v. Food Services, Inc.*, 2014 IL App (1st) 132384, ¶ 18 (describing *Ellman* as this Court "vacat[ing] a default judgment on the basis of the court's equitable powers to prevent an injustice").

The *Ellman* court highlighted that the equitable remedy should be utilized rarely. It noted that it knew of only one case before it where it was utilized in an equitably analogous way. *Ellman*, 412 Ill. at 292 (citing *Nikola v. Campus Towers Apartment Bldg. Corp.*, 303 Ill. App. 516 (1st Dist. 1940). And *Nikola*, itself, is highly instructive as it dug deep into the original enactment of this statute—and the historical British roots of writs of coram nobis and coram vobis—to conclude a court can act purely in equity under this provision. 303 Ill. App. at 523-28.

The *Nikola* court began by explaining that the writ "issued out of chancery" and "was often used as a procedural device to prevent a failure of justice" in common law since courts of law could otherwise only review legal

errors. *Id.* at 523-24. But then, the Illinois Practice Act of 1871 abolished coram nobis in its entirety and courts of law could not act in equity for some time, including while the statutory language remained similar in the 1907 and 1933 Acts. *Id.* at 524. However, after section 72 of the Civil Practice Act was enacted, "[t]he courts of Illinois, although they refused to recognize the writ [of coram nobis] itself, have encouraged the development of its statutory equivalent and permitted its use in new situations wherever such was consonant with the history of its common-law antecedent." *Id.* at 525. Ultimately, "the expansion of the use of the equivalent of the writ can be traced to the tendency of the courts of law to apply equitable principles wherever necessary to prevent injustice." *Id.* "[T]he Civil Practice Act," which includes this statutory section, Laws of 1955, p. 2270, "has expanded the scope" of the prior Act to allow courts of law, in appropriate circumstances, to act purely in equity. *Id.*

Applying these principles to the facts in *Nikola*, the court held that even though neither Section 72 nor apparently any other provision permitted a result favoring defendant, principles of equity did. *Id.* at 526-27. The Court, accordingly, followed equitable principles and ruled for the defendant. *See also Messick v. Mohr*, 292 Ill. App. 69, 74 (3d Dist. 1937) ("There is no fixed time that is held to apply to bar of actions in equity. Where it is necessary to prevent fraud or great hardship, courts of equity will grant relief, even after the statute of limitations applicable to actions at law has run, and, in other

cases, courts of equity may, *in order to accomplish a proper result,* bar the action in a shorter time than that prescribed by the statute.") (emphasis added).

In *Elfman v. Evanston Bus Co.*, 27 Ill. 2d 609, 613 (1963) (citing Laws of 1955, p. 2270), this Court explained that the legislature adopted the *Ellman* equitable relief interpretation in 1955. This Court explicitly stated that since then "it has become certain that a petition filed under section 72 . . . invokes the equitable powers of the court, as justice and fairness require." *Id*. Subsequently, this Court in *Lubbers v. Norfold and Western Ry. Co.*, 105 Ill.2d 201, 210 (1984), cited *Ellman* for the proposition that the statute was "'addressed to the equitable powers of the court, when the exercise of such power is necessary to prevent injustice,'" particularly so when the prevailing party "engaged in fraudulent conduct designed to conceal the evidence." (quoting *Elfman*). This Court in *Airoom* reiterated these equitable principles. *See* 114 Ill.2d at 225 (citations omitted) ("Because a section 2-1401 petition is addressed to equitable powers, courts have not considered themselves strictly bound by precedent, and where justice and good conscience may require it a default judgment may be vacated even though the requirement of due diligence has not been satisfied.) So, too, did *People v. Lawton*, 212 Ill.2d 285, 298-99 (2004), which stated that section 2-1401 must "be construed liberally" so that relief can be granted "when necessary to achieve justice," which "under the law is this court's highest obligation."

Only in *People v. Vincent*, 226 Ill.2d 1, 15-16 (2007), did this Court stray from these equitable principles. In *Vincent*, the court held that *de novo*, as opposed to abuse of discretion, was the appropriate standard in reviewing a section 2-1401 petition. In commenting on prior courts' use of the abuse of discretion standard, the *Vincent* court stated it was "the result of an erroneous belief that a section 2-1401 petition 'invokes the equitable powers of the court, as justice and fairness require.'" (quoting *Elfman*, 27 Ill.2d at 613). *See Warren County Soil*, 2015 IL 117783, ¶ 45 (calling this comment from *Vincent* "dicta"). The *Vincent* Court noted that observation was true only under the common law writs, which section 2-1401 abolished.

The *Vincent* Court, however, ignored the next sentence of section 2-1401 that establishes that while common law writs are abolished, the relief "heretofore obtainable" by those common law writs are allowed via the statutory remedy. *See Warren County Soil*, 2015 IL 117783, at ¶ 35. As *Ellman* established, which the *Vincent* court failed to cite, purely equitable rulings not based in law, though rare, were available via the common law writs. *See* 412 Ill. at 290-91.

To the extent there is any lingering confusion, the unanimous decision after *Vincent* in *Warren County Soil* clarified. Under section 2-1401, there are purely legal challenges, like those at issue in *Lawton* or *Vincent*. *See Warren County Soil*, 2015 IL 117783, at ¶¶ 41-44. But there are also fact-dependent challenges like those at issue in *Airoom*. *See Warren County Soil*, 2015 IL

117783, at ¶ 40. And importantly, in a fact-specific challenge, like this case, equitable considerations may be considered. *Id.* at ¶ 51.

Lastly, Appellant highlights that an interpretation of section 2-1401 that enables the rare use of equitable discretion is consistent with a prosecutor's duty, above all else, to ensure justice is done. *See Berger v. U.S.*, 295 U.S. 78, 88 (1935). Imagine a scenario where new information surfaced that caused a prosecutor to conclude justice warranted relief, even where there were no legal grounds. An interpretation of section 2-1401 that prohibited equitable relief in entirety would leave even the prosecutor without recourse to correct an injustice, although the prosecutor's ethical duties would require it. Il. R. Prof. Conduct 3.8, Special Responsibilities of a Prosecutor ("The duty of a public prosecutor is to seek justice, not merely to convict."). Appellant, therefore, trusts that the State is motivated to ensure an interpretation of section 2-1401 that allows rare equitable relief remains so that prosecutors may continue to comply with their ethical duties without hindrance.

The record reflects that the circuit court never considered exercising purely equitable relief, despite an urging to do so by Johnson. C. 457-58. As noted, the First District erroneously refused to consider doing so either. *Johnson*, 2021 IL App (1st) 200912, ¶ 19.

This case screams out for equitable relief. Johnson was an innocent (factually and emotionally) child when he was literally kidnapped and

imprisoned by a "malignant blight" from the Chicago police department. *Martinez*, 2021 IL App (1st) 190490, at ¶ 64. He spent 13 years in prison based on appalling misconduct. Johnson lost his mother shortly after his imprisonment. After his release, he acquired a firearm because he was concerned for his safety. C. 23. This would have been an exercise of his fundamental Second Amendment rights if not for his wrongful conviction caused by a corrupt State agent. Nevertheless, he was made to suffer yet again with a three-and-half-year sentence of more imprisonment. And since his release from that imprisonment more than two decades ago, Johnson has led an entirely law-abiding life, with no felony or misdemeanor on his record. C. 410-14.

Given these facts, Johnson maintains that it would be an abuse of discretion to fail to use the equitable powers of section 2-1401 to vacate this conviction. No further facts need developing, and remand is not necessary. *People v. Jimerson*, 166 Ill. 2d 211, 230-31 (1995) (holding that remanding is unnecessary where the record provides "ample evidence" to support the remedy). Alternatively, this Court should remand and order the circuit court to exercise its discretion to determine whether equitable relief is appropriate.

CONCLUSION

For the foregoing reasons, Demetrius Johnson respectfully requests that this Court vacate his conviction or remand to the circuit court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel for Appellant hereby certifies that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding the pages required for 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 appended to the brief under Rule 342(a), is 44 pages.

Respectfully submitted,

/s/ Joshua Tepfer
Attorney for Demetrius Johnson

No. 127443

IN THE SUPREME COURT OF ILLINOIS

People of the State of Illinois, Respondent-Appellee, v. **Demetrius Johnson**, Petitioner-Appellant.	Appeal from the Appellate Court of Illinois, First District, No. 1-20-0912 Original Appeal from the Circuit Court of Cook County, No. 06 CR 18368(1) Hon. LeRoy K. Martin, Jr., Judge, Presiding

NOTICE OF FILING AND PROOF OF SERVICE

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PLEASE TAKE NOTICE that on December 8, 2021, Petitioner-Appellant Demetrius Johnson filed via the Odyssey E-File system in the Supreme Court of Illinois the Appellant's Opening Brief, a copy of which is hereby served upon you.

DATED: December 8, 2021

Respectfully submitted,

/s/ Joshua A. Tepfer
Attorney for Petitioner

Joshua Tepfer
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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of October 2021, I caused a copy of the foregoing Proof of Service and accompanying Appellant's Opening Brief to be served on the following via the Court's Odyssey E-File and Serve system:

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VERIFICATION BY CERTIFICATION

Under penalties as provided by the law pursuant to section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements in this instrument are true and correct.

DATED: December 8, 2021

/s/ Joshua Tepfer
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No. 127443

IN THE SUPREME COURT OF ILLINOIS

People of the State of Illinois, Respondent-Appellee, v. **Demetrius Johnson**, Petitioner-Appellant.	Appeal from the Appellate Court of Illinois, First District, No. 1-20-0912 Original Appeal from the Circuit Court of Cook County, No. 06 CR 18368(1) Hon. LeRoy K. Martin, Jr., Judge, Presiding

APPENDIX

Joshua Tepfer
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2021 IL App (1st) 200912

FIFTH DIVISION
Order filed: June 11, 2021

No. 1-20-0912

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, v. DEMETRIUS JOHNSON. Petitioner-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County No. O6 CR 18368(1) Honorable LeRoy K. Martin, Jr., Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court, with opinion.
Presiding Justice Delort and Justice Rochford concurred in the judgment and opinion.

OPINION

¶ 1 The petitioner, Demetrius Johnson, appeals from an order of the circuit court of Cook County, dismissing his section 2-1401 (735 ILCS 5/2-1401 (West 2018)) petition to vacate his 2006 conviction for unlawful use of a weapon by a felon (UUWF) (720 ILCS 5/24-1.1 (West 2004)). For the reasons which follow, we affirm the judgment of the circuit court.

¶ 2 The facts of this case are not in dispute. In 1991, the petitioner was charged with the murder of Edwin Fred. At trial, he interposed an alibi defense. However, on November 23, 1992, he was convicted and subsequently sentenced to 25 years' imprisonment. Following his release from prison in 2004, the petitioner was arrested on August 11, 2006, and charged with UUWF. The predicate offense was the petitioner's 1992 murder conviction. On September 12, 2006, the petitioner pled guilty to UUWF and was sentenced to 3 years and 6 months' incarceration. The petitioner did not seek to withdraw his guilty plea and did not appeal his UUWF conviction or sentence.

¶ 3 On September 11, 2019, the petitioner filed a section 2-1401 petition requesting that the circuit court vacate his 1992 murder conviction and grant him a new trial. The petitioner alleged, *inter alia*, that during his trial: the police withheld from both the defense and the State a report stating that, on the night of Fred's murder, a witness identified an individual named Bryan Johns in a lineup as the person who shot Fred; and two police officers falsely testified that Johns was not identified in a lineup as the person who shot Fred. The petitioner also alleged that one of the police officers who was present during the lineup at which Johns was identified authored a report falsely stating that the results of the lineup were "negative." On November 12, 2019, with the agreement of the State, the circuit court granted the petitioner's section 2-1401 petition, vacated his 1992 murder conviction, reinstated the original charges against him, and ordered a new trial. In December 2019, the State dismissed all charges against the petitioner that arose out of the 1991 murder of Fred.

¶ 4 On January 30, 2020, the petitioner filed the section 2-1401 petition that is the subject of the instant appeal. In that petition, he argued that, because his 1992 murder conviction—the predicate offense to the UUWF charge to which he pled guilty— had been vacated and the charges

dismissed, his September 12, 2006 UUWF conviction should be vacated. On March 11, 2020, the State filed a motion to dismiss the section 2-1401 petition, and on July 27, 2020, the circuit court granted the State's motion and dismissed the petition. This appeal followed. Subsequent to the filing of this appeal, the circuit court entered an order on April 7, 2021, granting the petitioner's innocence petition on the murder offense.

¶ 5 In urging reversal of the circuit court's order dismissing his section 2-1401 petition, the petitioner argues that when, as in this case, the predicate felony to a charge and conviction of UUWF is vacated in a manner that negates guilt, the UUWF conviction based on that predicate felony "should be vacated as a matter of law." In support of the argument, the petitioner relies almost exclusively on the supreme court's decision in *In re N.G.*, 2018 IL 121939.

¶ 6 In support of the circuit court's order dismissing the petitioner's section 2-1401 petition, the State argues that, it is only when a prior conviction under a statute later declared facially unconstitutional that served as the predicate offense, that a UUWF conviction based on that predicate felony conviction should be vacated. The State correctly asserts that the first-degree murder statute under which the petitioner was convicted in 1992 has never been held to be facially unconstitutional. According to the State, the 2019 vacation of the petitioner's 1992 murder conviction did not vitiate his status as a convicted felon in 2006 when he was arrested and convicted of possession of a weapon in violation of the UUWF statute. It argues, therefore, that the 2019 vacation of the petitioner's 1992 murder conviction cannot serve as the basis for a collateral challenge to his 2006 UUWF conviction.

¶ 7 As the petitioner's section 2-1401 petition was dismissed on the pleadings, our review is *de novo*. *People v. Vincent*, 226 Ill.2d 1, 18 (2007). In conducting that review we must resolve the question of whether a conviction for UUWF is subject to a successful collateral challenge when

the predicate felony conviction upon which the UUWF conviction was dependent has been subsequently vacated for reasons other than facial unconstitutionality and the underlying charge dismissed. The issue is one of law that is also subject to *de novo* review. See *People v. Reed*, 2020 IL 124940, ¶ 20.

¶ 8 We begin our analysis with the language of the UUWF statute pursuant to which the petitioner was convicted. The statute states the following:

> "It is unlawful for a person to knowingly possess on or about his person or on his land or in his own abode or fixed place of business any weapon prohibited under Section 24-1 of this Act or any firearm or any firearm ammunition if the person has been convicted of a felony under the laws of this State or any other jurisdiction. 720 ILCS 5/24-1.1(a) (West 2004).

¶ 9 When analyzing a statute, our primary objective is to ascertain and give effect to the intent of the legislature. *People v. Wise*, 2021 IL 125392, ¶ 23. The most reliable indicator of legislative intent is the language of the statute itself. *Id.* "When the language of the statute is clear and unambiguous, we must apply it as written, without resort to aids of statutory construction." (Internal quotation marks omitted.) *Id.*

¶ 10 By its clear language, the UUWF statute's proscription is directed unambiguously at any person who "has been convicted of a felony under the laws of this State or any other jurisdiction." Nothing in the language of the statute suggests that the legislature intended any restriction on the scope of the term "convicted" or to limit its coverage to persons whose convictions are not subject to collateral attack. See *Lewis v. United States*, 445 U.S 55, 60 (1980).

¶ 11 In the case of *In re N.G.*, 2018 IL 121939, however, the supreme court held that a conviction under a facially unconstitutional statute is void and cannot serve as a predicate offense

in any subsequent proceedings, either civil or criminal, and any conviction or finding dependent upon a conviction under a facially unconstitutional statute must be vacated. *Id.* ¶¶ 31, 33, 42, 74. The supreme court reasoned that, when a predicate conviction is based upon a facially unconstitutional statute, that conviction is not only erroneous, it is void. *Id.* ¶¶ 37, 38. A facially unconstitutional statute is treated as having never existed. *Id.* ¶ 50.

¶ 12 The petitioner concedes that the statute pursuant to which he was convicted in 1992 "is not unconstitutional on its face." Nevertheless, he argues that, "[a]lthough [*In re*] *N.G.* concerned a conviction that was void because the statute of conviction was held facially unconstitutional *** its holding applies to any substantive constitutional error." According to the petitioner, "the reasoning of the Illinois Supreme Court in *In re N.G.* indicates *** [that] when a conviction arises from unconstitutional misconduct that negates the defendant's culpability for the crime, that conviction should not be given legal force in subsequent criminal proceedings." He concludes that, because his 1992 "murder conviction was vacated under circumstances that negate his guilt, his UUW[F] conviction based on that prior offense should be vacated as a matter of law."

¶ 13 The State argues that the rule announced in *In re N.G.* applies only to convictions dependent upon prior convictions under laws held to be facially unconstitutional and urges this court to reject the petitioner's attempt to extend the reasoning in *In re N.G.* to include circumstances, such as present in this case, where a predicate conviction has been vacated for "individualized procedural reasons." Relying upon the Supreme Court's decision in *Lewis v. United States*, 445 U.S 55, 60-62 (1980), the State asserts that "the status of the prior felony conviction at the time that the defendant possesses the firearm controls, regardless of whether that prior conviction might later be invalidated." See also *United States v Lee*, 72 F.3d 55, 58 (7th Cir. 1995). The State argues that "under [*In re*] *N.G.* and *Lewis*, because it was the status of petitioner's

prior conviction at the time he possessed the firearm that controlled, regardless of whether that prior conviction is later vacated on procedural ground, there is no basis to vacate his UUWF conviction which was predicated on a prior conviction under the facially valid first degree murder statute." We agree with the State.

¶ 14 We believe that the UUWF statute is dependent upon an individual's status as a convicted felon at the time that he possessed a firearm. The fact that the predicate felony conviction is subsequently vacated for reasons other than voidness does not alter the individual's status as a convicted felon on the date he was apprehended with a firearm. The focus of the UUWF statute is not on the reliability of the predicate conviction but, rather, on the mere fact of its existence. See *Lewis*, 445 U.S at 67.

¶ 15 Convictions based upon facially unconstitutional statutes are void and must, therefore, be treated as if nonexistent. Whereas, a conviction based upon a constitutionally valid statute, even one procured by perjured testimony, is voidable, not void. No judgment, including a judgment of conviction is deemed vacated until a court so declares. *In re N.G.*, 2018 IL 121939, ¶ 52; *People v. McFadden*, 2016 IL 117424, ¶ 31. A judgment of a court having jurisdiction over the parties and the subject matter, even though erroneous, is valid until vacated or reversed. *Malone v. Cosentino*, 99 Ill. 2d 29, 32 (1983). The fact that the petitioner's 1992 murder conviction was voidable and not void factually distinguishes this case from in *In re N.G.* When, as in *In re N.G.*, the predicate conviction is based upon a facially unconstitutional statute, the conviction is void and can give rise to no criminal status or any legal impediment. *In re N.G.*, 2018 IL 121939, ¶ 73. When, as in this case, the predicate conviction is based upon a valid statute, it may be voidable by reason of a constitutionally deficient procedure, but it is not void. Such a conviction is valid until it has been declared otherwise by direct appeal or collateral attack. *McFadden*, 2016 IL 117424, ¶

31. We conclude, therefore, that when the predicate conviction is based upon a facially unconstitutional statute, the rule and rationale in *In re N.G.* is applicable to a collateral proceeding seeking a vacation of a dependent conviction. When, as in this case, the predicate conviction, although erroneous, is based upon a valid statute, the rule and rationale of the supreme court in *McFadden* is applicable in any collateral proceeding addressed to a dependent conviction.

¶ 16 The petitioner's 1992 conviction for the murder of Fred was based upon a constitutionally valid statute. At the time of his 2006 arrest and conviction for UUWF, his 1992 conviction, the predicate conviction, had not been vacated or reversed. As a consequence, his status in 2006 was that of a convicted felon, and the subsequent vacation of the 1992 conviction did not alter that status. We conclude, therefore, that when the petitioner was arrested in 2006, he was a convicted felon, satisfying the status element of the UUWF statute, and his plea of guilty established his possession of a weapon. Both elements of the UUWF statute were satisfied, and the subsequent vacation of his 1992 murder conviction provides no basis for collateral relief from his UUWF conviction.

¶ 17 In his reply brief, the petitioner advised this court that on April 7, 2021, subsequent to the filing of the instant appeal, the circuit court granted his innocence petition and issued a certificate of innocence for Fred's murder. He argues that the certificate of innocence negated his culpability for Fred's murder and his UUWF conviction dependent upon that conviction "must be vacated." Unfortunately, we must reject the argument in the context of this appeal.

¶ 18 The appellate court is a court of error, not a court of original jurisdiction. The propriety of the circuit court's dismissal of the petitioner's section 2-1401 petition must be judged based on the record before the circuit court, not based on events occurring subsequently. As an appellate court, we cannot consider on review evidence that was not before the circuit court. *Whittmanhart, Inc.*,

v. CA, Inc., 402 Ill. App. 3d 848, 852 (2010); *Kessler v. Zekman*, 250 Ill. App. 172, 189 (1993). The petitioner's certificate of innocence was not issued until 8 months after the circuit court dismissed his section 2-1401 petition and he filed the instant appeal. We cannot consider the certificate of innocence in determining the propriety of the circuit court's July 27, 2020 order dismissing the petitioner's section 2-1401 petition.

¶ 19 In the alternative, the petitioner also argues that, even if he was not entitled to relief as a matter of law, his UUWF conviction should have been vacated "in the interests of justice." He bases the argument upon the supreme court's holding in *People v. Lawton*, 212 Ill. 2d 285, 297-98 (2004), that "[o]ne of the guiding principles in the administration of section 2-1401 relief is that the petition invokes the equitable powers of the circuit court to prevent enforcement of a judgment when doing so would be unfair, unjust, or unconscionable," and that the purpose of section 2-1401 is to grant relief when necessary to achieve justice. See also *People v. Mathis*, 357 Ill. App. 3d 45, 50 (2005). However, the holdings in this regard in both *Lawton* and *Mathis* were articulated in support of the use of section 2-1401 as a vehicle to raise a challenge to a judgment when no other procedural vehicle was available. See *Lawton*, 212 Ill. 2d at 297-98; *Mathis*, 357 Ill. App. 3d at 50. Neither case stands for the proposition that relief may be granted under section 2-1401 when the relief sought is legally unavailable, nor has our research found support for such a proposition. In this case, the petitioner does not request that we find that section 2-1401 could be used as a procedural vehicle when no other procedural vehicle was available to him; rather, he requests that we use the holdings in *Lawton* and *Mathis* to provide relief to which he was not entitled as a matter of law. This we decline to do.

¶ 20 Based upon the foregoing analysis, we affirm the circuit court's dismissal of the petitioner's section 2-1401 petition collaterally attacking his 2006 conviction for UUWF.

¶ 21 Affirmed.

STATE OF ILLINOIS)
) SS.
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff,
vs.
DEMETRIUS JOHNSON,
Defendant.

No. 06 CR 18368-01

REPORT OF VIDEO-CONFERENCE PROCEEDINGS had at the hearing in the above-entitled cause before the HONORABLE LEROY K. MARTIN, JR., Judge of said court, on the 27th day of July, 2020.

PRESENT:

HON. KIMBERLY M. FOXX,
State's Attorney of Cook County, by:
MS. CAROL ROGALA, Assistant State's Attorney,
appeared on behalf of the People;

MR. JOHN HAZINSKI, and
MR. JOSHUA TEPFER,
appeared on behalf of the Defendant.

CHRISTINA L. ANDERSON
Official Court Reporter
CSR #084-004722

THE COURT: I'm going to call the matter of Demetrius Johnson. This case was up last week. The court heard argument from Ms. Rogala and from Mr. Hazinski.

Did I pronounce your name correctly?

Would both of you introduce yourselves for the record, please.

MS. ROGALA: Good morning, Judge. Assistant State's Attorney Carol Rogala, R-o-g-a-l-a, on behalf of the People.

MR. HAZINSKI: Good morning, your Honor. John Hazinski, that's H-a-z-i-n-s-k-i, on behalf of Mr. Johnson.

THE COURT: Thank you.

Mr. Tepfer?

MR. TEPFER: Yes. Good morning, your Honor. Joshua Tepfer, T-e-p-f-e-r, for Demetrius Johnson who is present on Zoom as well.

THE COURT: Yes.

MR. TEPFER: Just for the record, your Honor, I'm going to be handling any proceedings today on behalf of Mr. Johnson, if that's okay.

THE COURT: Certainly. Were there any other proceedings today other than the court's ruling?

MR. TEPFER: Your Honor, I did just want to make one request prior to the ruling.

THE COURT: Sure.

MR. TEPFER: I did want to ask this court to take judicial notice of the court file in 91 CR 19833-01 that has been discussed very much during these proceedings, of course. That is the predicate offense that was vacated under Rule 201. And People v. Davis, 65 Ill. 2d 157, an Illinois Supreme Court decision from 1976. It seems very appropriate to take judicial notice of court files, as the court can and should in this case.

The reason, if I may, is that there has been a lot of discussion and dispute about the predicate offense in this case, what is appropriate, if it's -- as Mr. Hazinski and Ms. Rogala spoke about -- whether it's sort of a binary idea, whether it is -- if it's void, if the predicate offense that's vacated, if it's void, then it doesn't count. But if it's not void, our position has been that you consider whether or not the accuracy and the fundamental fairness of the prior proceeding -- that's what we maintain that N.G. requires.

For the record, there is pending certificate of innocence proceedings in that 91 CR 91 case that's

the predicate offense. So I do think that it's very appropriate for our position that you must consider the accuracy of those proceedings, that the court take that under judicial notice, and that that becomes part of the record in the event the case goes up for appeal.

THE COURT: Ms. Rogala, is there anything --

MS. ROGALA: Judge, I'm a bit taken aback this morning. I received from Mr. Tepfer his request at 8:30 this morning with a copy of the case of People vs. Davis.

Unfortunately I have had some technical difficulties in getting in on the Zoom this morning. So I was not aware that he had made this request or provided that case law. I have not had an opportunity to read the case law other than the very beginning of it, which kind of seems to be apples and oranges. Because what I can see from that case is, it involves a prior ruling by a judge on the same case. I can be mistaken about that because, again, as I said, I have not had an opportunity to fully read the case. So I don't have anymore of a response than that, Judge.

THE COURT: Mr. Tepfer, I'm inclined to agree with Ms. Rogala, in as much as this is new for me as well. Also, you're raising an issue about a possible

certificate of innocence in that case. If you're relying on the filing of that certificate of innocence, then it would seem to me maybe your 2-1401 in this matter is premature, if you're trying to rely upon a certificate of innocence which may or may not be granted in that particular case.

This is a little -- I agree with Ms. Rogala, in as much as this is a little different, putting this in a little bit of a different posture than where we left it on Friday.

To that, you say what, Mr. Tepfer?

MR. TEPFER: I think what I'm asking is not for this court to take judicial notice that there's going to be a certificate of innocence granted. What I'm asking this court to do, and which is proper under 201, is take judicial notice of a court file.

The 2-1401 petition in the '91 case was attached to our 2-1401 petition in this current 2006 case. But there was some -- since that filing, there was a ruling vacating that conviction and there was a certificate of innocence filing with some additional exhibits.

I think for purposes of our argument and our record, I think it's appropriate to simply take judicial

notice of that filing. So it's an easily obtainable -- I believe the standard is easily obtainable court record, that the court record itself is reliable enough to take judicial notice.

THE COURT: So that I'm clear, you're asking me to take judicial notice of the fact that a certificate of innocence was filed in the 91 CR case? Is that what you're doing?

MR. TEPFER: I'm asking you to take judicial notice of the entire court file, essentially for all of the proceedings that have been filed in that case and that record, so that in the event this 2006 case needs to be appealed that the '91 court file can be part of the record.

THE COURT: I see. Haven't we -- hasn't the '91 cas been front and center in this argument and in this dispute?

MR. TEPFER: Absolutely. That's why I formally want the judicial notice to be taken of it.

THE COURT: I see. So the case that Ms. Rogala has discussed, is that some case that you submitted to the court -- that you asked the court to look at in making its decision in this matter?

MR. TEPFER: I did not, your Honor. I sent that

case to Ms. Rogala this morning, just alerting her that I was going to make this request to ask the court to take judicial notice.

THE COURT: I see.

MR. TEPFER: I had another case -- I sent her a copy of that order -- in the Second District where there was a proceeding where the court -- the trial court took judicial notice of a totally separate court file in the proceeding and then sua sponte the Second District ordered that other court file be made part of the court file because the lower court took judicial notice of it.

THE COURT: I see. I see.

Anything else you want to add, Ms. Rogala?

MS. ROGALA: Again, Judge, he's filing it just this morning. We were in front of the court last week. I don't think it's fair. We're talking about fundamental fairness for Mr. Johnson. I don't think it's fair to the State to send a case asking to, frankly, incorporate a completely different case into the argument before this court. And I think that what the defense is actually trying to do is incorporate arguments that were not presented to this court that they can make on appeal, which the State would not have been able to prepare for. So I don't think it's appropriate to

submit this kind of case law and to make this request at this time.

THE COURT: I see. I see. I will tell you, Ms. Rogala, as I mentioned to Mr. Tepfer -- and I certainly see your point -- it seems to me, in as much as, in my opinion, much of the discussion that we had on Friday about this matter rested in great part on the 1991 case. I certainly see your point. And perhaps whether or not it should be included may be an argument for another day.

I think, frankly, that it is germane to this particular issue and certainly I had to consider it and gave it a great deal of thought in deciding whether or not to grant your motion to dismiss this 2-1401, Ms. Rogala. I certainly understand your point, but I don't see it as being terribly prejudicial, in as much as I think that the case itself, that '91 case itself, is very germane to these proceedings.

In essence -- and I was prepared to talk about it and I'll just touch on it briefly in making my ruling. In essence, that is the predicate offense. That is why we're here in Mr. Johnson's 2-1401 filing, that the predicate offense didn't exist at this time of his guilty plea in the 2006 case based upon the eventual

vacature of his conviction in the 91 CR case. I won't waste a great deal of time.

My thought on the matter is this. I am inclined to agree with Ms. Rogala. I think that there is a distinction. And I've been reading In Re: N.G. I think there is a distinction between a conviction that is predicated and based upon a statute that was void from its beginning, versus a defendant who claims that his conviction should be vacated because the predicate offense was eventually overturned.

We've bandied about the term Pandora's box in describing what could happen. I'll paraphrase you, I think, Ms. Rogala. But Ms. Rogala discussed how each defendant or every defendant whoever had his conviction vacated could argue that any subsequent conviction or time that was enhanced because based upon a conviction that was eventually vacated would ultimately lead to this filing -- somebody is clicking on their keyboard and they need to mute themselves. Thank you.

So I am of the opinion that the State is correct in this matter. I am inclined, Ms. Rogala, to grant your motion. I believe that, as you have argued, that in as much as the predicate offense in this case was not void, in as much as at the time Mr. Johnson

pled, his conviction was in effect and he was not eligible to have a firearm or possess a firearm at that time. I agree and, therefore, I am going to grant the State's motion to dismiss.

I know, Mr. Tepfer, you have somewhat made a career on challenging this court's findings, and I suppose, Mr. Tepfer, this will be -- this matter will only add to that bonfire. But nonetheless, that is how I see the matter and I am going to grant the motion. There you have it.

MR. TEPFER: Thank you very much, your Honor.

I'm sorry. And I don't want to push it. Did you end up granting the motion to take judicial notice?

THE COURT: Yes. Granting that motion.

MR. TEPFER: Okay. Thank you very much, your Honor.

THE COURT: Thank you.

(Which were all the proceedings had in the above-entitled cause.)

STATE OF ILLINOIS)
) SS.
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT-CRIMINAL DIVISION

I, Christina L. Anderson, an Official Court Reporter for the Circuit Court of Cook County, Illinois, Judicial Circuit of Illinois, do hereby certify that I reported in shorthand the proceedings had on the hearing in the above-entitled cause; that I thereafter caused the foregoing to be transcribed into computer-aided transcription, which I hereby certify to be a true and accurate transcript of the proceedings had before the Honorable LeRoy K. Martin, Jr., Judge of said court.

Christina Anderson

Christina Anderson
CSR No. 084-004722
Official Court Reporter
Circuit Court of Cook County
County Department
Criminal Division

Date: September 30, 2020.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Respondent,	)	
	)	
v.	)	No. 06 CR 18368(01)
	)	
DEMETRIUS JOHNSON	)	
	)	Hon. LeRoy K. Martin, Jr.
Petitioner.	)	presiding.

NOTICE OF FILING

TO: Carol Rogala, Assistant State's Attorney
Post-Conviction Unit
2650 S. California Avenue
Chicago, IL 60608

Please take notice that on July 28, 2020, I caused to be filed the attached **NOTICE OF APPEAL** with the Clerk of the Circuit Court of Cook County via hand-delivery, a copy of which is hereby served on you.

Respectfully Submitted,

/s/Joshua Tepfer
Joshua Tepfer

Joshua Tepfer
John Hazinski
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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Respondent,	)	
	)	
v.	)	No. 06 CR 18368(01)
	)	
DEMETRIUS JOHNSON	)	
	)	Hon. LeRoy K. Martin, Jr.
Petitioner.	)	presiding.

NOTICE OF APPEAL

An appeal is taken from the order or judgment described below.

(1) Court to which appeal is taken: Illinois Appellate Court, First District

(2) Name of appellant and address to which notice should be sent:

Demetrius Johnson
805 N. 20th Avenue
Melrose Park, IL 60160

(3) Name and address of appellant's attorney:

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

(4) Date of judgement or order: July 27, 2020 – Granting State's Motion to Dismiss 2-1401 petition.

(5) Offenses of which convicted: Unlawful Use of a Weapon by a felon

(6) Sentence: 3 years and 6 months

(7) If appeal is not from conviction, nature of order appealed from: Dismissal of 2-1401 collateral petition

Respectfully Submitted,

/s/Joshua Tepfer
Attorney for Demetrius Johnson

Joshua Tepfer
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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of July 2020, I caused a copy of the foregoing Notice of Appeal be served on the following by hand-delivery and email:

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STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

735 ILCS 5/2-1401

§ 2–1401. Relief from judgments.

(a) Relief from final orders and judgments, after 30 days from the entry thereof, may be had upon petition as provided in this Section. Writs of error coram nobis and coram vobis, bills of review and bills in the nature of bills of review are abolished. All relief heretofore obtainable and the grounds for such relief heretofore available, whether by any of the foregoing remedies or otherwise, shall be available in every case, by proceedings hereunder, regardless of the nature of the order or judgment from which relief is sought or of the proceedings in which it was entered. Except as provided in the Illinois Parentage Act of 2015,[1] there shall be no distinction between actions and other proceedings, statutory or otherwise, as to availability of relief, grounds for relief or the relief obtainable.

(b) The petition must be filed in the same proceeding in which the order or judgment was entered but is not a continuation thereof. The petition must be supported by affidavit or other appropriate showing as to matters not of record. A petition to reopen a foreclosure proceeding must include as parties to the petition, but is not limited to, all parties in the original action in addition to the current record title holders of the property, current occupants, and any individual or entity that had a recorded interest in the property before the filing of the petition. All parties to the petition shall be notified as provided by rule.

(b–5) A movant may present a meritorious claim under this Section if the allegations in the petition establish each of the following by a preponderance of the evidence:

(1) the movant was convicted of a forcible felony;

(2) the movant's participation in the offense was related to him or her previously having been a victim of domestic violence as perpetrated by an intimate partner;

(3) no evidence of domestic violence against the movant was presented at the movant's sentencing hearing;

(4) the movant was unaware of the mitigating nature of the evidence of the domestic violence at the time of sentencing and could not have learned of its significance sooner through diligence; and

(5) the new evidence of domestic violence against the movant is material and noncumulative to other evidence offered at the sentencing hearing,

[1] 750 ILCS 46/101 et seq.

and is of such a conclusive character that it would likely change the sentence imposed by the original trial court.

Nothing in this subsection (b–5) shall prevent a movant from applying for any other relief under this Section or any other law otherwise available to him or her.

As used in this subsection (b–5):

"Domestic violence" means abuse as defined in Section 103 of the Illinois Domestic Violence Act of 1986.

"Forcible felony" has the meaning ascribed to the term in Section 2–8 of the Criminal Code of 2012.

"Intimate partner" means a spouse or former spouse, persons who have or allegedly have had a child in common, or persons who have or have had a dating or engagement relationship.

(c) Except as provided in Section 20b of the Adoption Act[2] and Section 2–32 of the Juvenile Court Act of 1987[3] or in a petition based upon Section 116–3 of the Code of Criminal Procedure of 1963,[4] or in a motion to vacate and expunge convictions under the Cannabis Control Act as provided by subsection (i) of Section 5.2 of the Criminal Identification Act, the petition must be filed not later than 2 years after the entry of the order or judgment. Time during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently concealed shall be excluded in computing the period of 2 years.

(d) The filing of a petition under this Section does not affect the order or judgment, or suspend its operation.

(e) Unless lack of jurisdiction affirmatively appears from the record proper, the vacation or modification of an order or judgment pursuant to the provisions of this Section does not affect the right, title or interest in or to any real or personal property of any person, not a party to the original action, acquired for value after the entry of the order or judgment but before the filing of the petition, nor affect any right of any person not a party to the original action under any certificate of sale issued before the filing of the petition, pursuant to a sale based on the order or judgment. When a petition is filed pursuant to this Section to reopen a foreclosure proceeding, notwithstanding the provisions of Section 15–1701 of this Code, the purchaser or successor purchaser of real property subject to a foreclosure sale who was not a party to the mortgage foreclosure proceedings is entitled to remain in possession of the property until the foreclosure action is defeated or the previously foreclosed defendant

[2] 750 ILCS 50/20b.
[3] 705 ILCS 405/3–32.
[4] 725 ILCS 5/116–3.

redeems from the foreclosure sale if the purchaser has been in possession of the property for more than 6 months.

(f) thing contained in this Section affects any existing right to relief from a void order or judgment, or to employ any existing method to procure that relief.

720 ILCS 5/24-1.1

§ 24–1.1. Unlawful Use or Possession of Weapons by Felons or Persons in the Custody of the Department of Corrections Facilities.

(a) It is unlawful for a person to knowingly possess on or about his person or on his land or in his own abode or fixed place of business any weapon prohibited under Section 24–1 of this Act or any firearm or any firearm ammunition if the person has been convicted of a felony under the laws of this State or any other jurisdiction. This Section shall not apply if the person has been granted relief by the Director of the Department of State Police under Section 10 of the Firearm Owners Identification Card Act.[1]

(b) It is unlawful for any person confined in a penal institution, which is a facility of the Illinois Department of Corrections, to possess any weapon prohibited under Section 24–1 of this Code or any firearm or firearm ammunition, regardless of the intent with which he possesses it.

(c) It shall be an affirmative defense to a violation of subsection (b), that such possession was specifically authorized by rule, regulation, or directive of the Illinois Department of Corrections or order issued pursuant thereto.

(d) The defense of necessity is not available to a person who is charged with a violation of subsection (b) of this Section.

(e) Sentence. Violation of this Section by a person not confined in a penal institution shall be a Class 3 felony for which the person shall be sentenced to no less than 2 years and no more than 10 years. A second or subsequent violation of this Section shall be a Class 2 felony for which the person shall be sentenced to a term of imprisonment of not less than 3 years and not more than 14 years, except as provided for in Section 5–4.5–110 of the Unified Code of Corrections. Violation of this Section by a person not confined in a penal institution who has been convicted of a forcible felony, a felony violation of Article 24 of this Code[2] or of the Firearm Owners Identification Card Act,[3] stalking or aggravated stalking, or a Class 2 or greater felony under the Illinois Controlled Substances Act,[4] the Cannabis Control Act,[5] or the

[1] 430 ILCS 65/10.
[2] 720 ILCS 5/24–1 et seq.
[3] 430 ILCS 65/0.01 et seq.
[4] 720 ILCS 570/100 et seq.
[5] 720 ILCS 550/1 et seq.

Methamphetamine Control and Community Protection Act is a Class 2 felony for which the person shall be sentenced to not less than 3 years and not more than 14 years, except as provided for in Section 5–4.5–110 of the Unified Code of Corrections. Violation of this Section by a person who is on parole or mandatory supervised release is a Class 2 felony for which the person shall be sentenced to not less than 3 years and not more than 14 years, except as provided for in Section 5–4.5–110 of the Unified Code of Corrections. Violation of this Section by a person not confined in a penal institution is a Class X felony when the firearm possessed is a machine gun. Any person who violates this Section while confined in a penal institution, which is a facility of the Illinois Department of Corrections, is guilty of a Class 1 felony, if he possesses any weapon prohibited under Section 24–1 of this Code regardless of the intent with which he possesses it, a Class X felony if he possesses any firearm, firearm ammunition or explosive, and a Class X felony for which the offender shall be sentenced to not less than 12 years and not more than 50 years when the firearm possessed is a machine gun. A violation of this Section while wearing or in possession of body armor as defined in Section 33F–1 is a Class X felony punishable by a term of imprisonment of not less than 10 years and not more than 40 years. The possession of each firearm or firearm ammunition in violation of this Section constitutes a single and separate violation.

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