

No.  
IN THE  
SUPREME COURT OF THE UNITED STATES

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JOVONTE BROWN, Petitioner,  
-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

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On Petition For Writ Of Certiorari  
To The Supreme Court Of Illinois

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PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Whether the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution preclude the use of prior convictions that violate the Second Amendment as predicate convictions to establish prior felony elements of recidivist and felon-in-possession-of-firearm statutes.

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The petitioner, Jovonte Brown, respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINION BELOW**

The decision of the Illinois Appellate Court (Appendix A) is reported at *People v. Brown*, 2017 IL App (1st) 122651-U (May 17, 2017), and is not published. Brown did not file a petition for rehearing. The order of the Illinois Supreme Court denying leave to appeal (Appendix B) is reported. *People v. Brown*, No. 122309; 2017 WL 4386450 (Ill. 2017).

**JURISDICTION**

On May 17, 2017, the Appellate Court of Illinois issued its decision. No petition for rehearing was filed. The Illinois Supreme Court denied a timely filed petition for leave to appeal on September 27, 2017. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### Second Amendment to the United States Constitution

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

### Fifth Amendment to the United States Constitution, Due Process Clause

No person shall be ... deprived of life, liberty, or property, without due process of law[.]

### Fourteenth Amendment to the United States Constitution, Due Process Clause

No state shall ... deprive any person of life, liberty, or property, without due process of law[.]

### 720 ILCS 5/24-1.6(a)(1)/(3)(a) Aggravated unlawful use of a weapon.

A person commits the offense of aggravated unlawful use of a weapon when he or she knowingly carries on or about his or her person or in any vehicle or concealed on or about his or her person except when on his or her land or in his or her abode, legal dwelling, or fixed place of business, or on the land or in the legal dwelling of another person as an invitee with that person's permission, any pistol, revolver, stun gun or taser or other firearm and the firearm possessed was uncased, loaded, and immediately accessible at the time of the offense. (held facially unconstitutional in *People v. Aguilar*, 2 N.E.2d 321 (Ill. 2013); *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012)).

**720 ILCS 24-1.7 Armed habitual criminal.**

(a) A person commits the offense of being an armed habitual criminal if he or she receives, sells, possesses, or transfers any firearm after having been convicted a total of 2 or more times of any combination of the following offenses:

(1) a forcible felony as defined in Section 2-8 of this Code;

(2) unlawful use of a weapon by a felon; aggravated unlawful use of a weapon; aggravated discharge of a firearm; vehicular hijacking; aggravated vehicular hijacking; aggravated battery of a child as described in Section 12-4.3 or subdivision (b)(1) of Section 12-3.05; intimidation; aggravated intimidation; gunrunning; home invasion; or aggravated battery with a firearm as described in Section 12-4.2 or subdivision (e)(1), (e)(2), (e)(3), or (e)(4) of Section 12-3.05; or

(3) any violation of the Illinois Controlled Substances Act or the Cannabis Control Act that is punishable as a Class 3 felony or higher.

(b) Sentence. Being an armed habitual criminal is a Class X felony.

## STATEMENT OF THE CASE

In 2008, Jovonte Brown was convicted of possessing a handgun under Illinois's aggravated unlawful use of a weapon ("AUUW") statute, which, at the time, banned possession of firearms outside the home. *People v. Brown*, No. 08CR0201601 (Ill. Cir. Ct., January 12, 2009); (R. Q98-99, R14) In 2011, Brown was arrested for possessing a handgun. (C. 8-12)

Illinois relied on Brown's prior AUUW to prove him guilty of armed habitual criminal ("AHC") and unlawful use of a weapon by a felon ("UUWF"). *People v. Brown*, 2017 IL App (1st) 122651-U, ¶¶2-7 (unpublished order); (see Appendix A)<sup>1</sup> Subsequently, the Illinois Supreme Court held that the subsection of the AUUW statute under which Brown had been convicted in 2008 was facially unconstitutional and void *ab initio* because it "amount[ed] to a wholesale statutory ban on the exercise of a personal right that is specifically named in and guaranteed by the United States Constitution, as construed by the United States Supreme Court." *People v. Aguilar*, 2 N.E.3d 321, 327-28 (2013). In a 2015 clarification of *Aguilar*, the Illinois Supreme Court declared that "[a]n unconstitutional statute does not 'become constitutional' simply because it is applied to a particular category of persons who could have been regulated had the legislature seen fit to do so." *People v. Burns*, -- N.E.3d --, 2015 WL 9227362, ¶129 (Ill. Sup. Ct. December 17, 2015).

On appeal in this case, Brown argued the State failed to prove him guilty beyond a reasonable doubt of AHC as one of the two predicate offenses the State relied upon, his 2008 AUUW conviction, had been rendered void *ab initio* and could be afforded no

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<sup>1</sup> At sentencing, the trial judge merged Brown's UUWF conviction into his AHC conviction. (R. S22)

legal recognition under *Aguilar, Burns*, and the precedent from this Court on which those cases relied. *People v. Brown*, 2015 IL App (1st) 122651-U. The Illinois Appellate Court agreed and vacated his conviction for AHC. *Brown*, 2015 IL App (1st) 122651-U at ¶¶ 13-17. The State then filed a petition for leave to appeal. *People v. Brown*, No. 119568. While the State's petition was pending, the Illinois Supreme Court held an unconstitutional AUUW conviction could serve as a predicate felony under Illinois's UUWF statute. *People v. McFadden*, 61 N.E.3d 74, 82-84 (Ill. 2016), *petition for cert. filed* (U.S. Dec. 22, 2016) (No. 16-7346) (Illinois was ordered to respond and did on April 14, 2017. McFadden filed a reply on April 28, 2017). *McFadden* relied on this Court's reasoning in *Lewis v. United States*, 445 U.S. 55 (1980), which upheld a federal felon-in-possession-of-firearm conviction even though the defendant's prior felony was constitutionally infirm under *Gideon v. Wainwright*. *McFadden*, 61 N.E.3d at 80-82. *McFadden* further held the Illinois UUWF statute "does not require the State to prove the predicate offense at trial" because the legislation is only "concerned with 'the role of that conviction as a disqualifying condition for the purpose of obtaining firearms.'" *Id.* at 82.

On September 28, 2016, the Illinois Supreme Court in the instant case denied the State's petition for leave to appeal and entered a supervisory order, directing the Appellate Court to vacate its judgment in *People v. Brown*, 2015 IL App (1st) 122651-U, and reconsider its decision in light of *People v. McFadden*, 2016 IL 117424.

On May 17, 2017, the Illinois Appellate Court relied on *McFadden* to hold that Brown's prior 2008 AUUW conviction could be used as the predicate offense for his AHC conviction. *Brown*, 2017 IL App (1st) 122651-U, ¶12-15. Brown timely filed a petition for leave to appeal in the Illinois Supreme Court, arguing his prior AUUW

conviction obtained pursuant to a statute that had been declared facially unconstitutional could not properly serve as the predicate felonies for AHC. The Illinois Supreme Court denied leave to appeal. *People v. Brown*, No. 122309; 2017 WL 4386450 (Ill. September 27, 2017). (Appendix B)

## REASON FOR GRANTING CERTIORARI

**This Court should grant review to determine whether the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution preclude the use of prior convictions that violate the Second Amendment as predicate convictions to establish prior felony elements of recidivist and felon-in-possession-of-firearm statutes.**

Jovonte Brown was convicted of armed habitual criminal (“AHC”—a recidivist offense) for possessing a gun after having two previous convictions, one for possessing a gun. Brown’s prior conviction for gun possession was obtained in reliance upon an Illinois statute rendered void *ab initio* pursuant to this Court’s decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). *People v. Aguilar*, 2 N.E.3d 321, 325-28 (Ill. 2013). Brown’s AHC conviction should have been reversed by the Illinois Appellate Court because, as this Court recently reiterated, “[a] conviction under an unconstitutional law ‘is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.’” *Montgomery v. Louisiana*, 136 S.Ct. 718, 730-31 (2016), quoting *Ex Parte Siebold*, 100 U.S. 371, 376-77 (1879).

Yet, instead of following *Montgomery*, or more than 135 years of jurisprudence following *Siebold*, the Illinois Appellate Court affirmed Brown’s convictions. *People v. Brown*, 2017 IL App (1st) 122651-U, ¶12-17 (unpublished order), citing *People v. McFadden*, 61 N.E.3d 74, 82-84 (Ill. 2016), cert. denied, 137 S. Ct. 2291 (2017).

This Court’s review is merited for three reasons. First, this case illustrates the conflicts within this Court’s jurisprudence about the constitutionality of using prior

convictions to prove the elements of a subsequent offense. Second, the rationale in *Lewis v. United States*, 445 U.S. 55 (1980), relied upon by *McFadden*, should be reexamined in light of this Court's decisions in *Heller* and *McDonald*. Third, the role that gun possession crimes play in racially disparate incarceration rates is an issue of national significance.<sup>2</sup> For all of these reasons, this Court should grant certiorari to decide whether the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution preclude the use of prior convictions that violate the Second Amendment as predicate convictions to establish prior felony elements of recidivist and felon-in-possession-of-firearm statutes.

**A. Review is needed to resolve a conflict in this Court's jurisprudence about the constitutionality of using prior convictions to prove the elements of a subsequent offense.**

"It is undisputed that a conviction obtained in violation of a defendant's Sixth Amendment right to counsel cannot be used in a subsequent proceeding 'either to support guilt or enhance punishment for another offense.'" *United States v. Bryant*, 136 S.Ct. 1954, 1962 (2016), quoting *Burgett v. Texas*, 389 U.S. 109, 115 (1967). This rule has "an important limitation" in that "an uncounseled misdemeanor conviction, valid under *Scott [v. Illinois]*, 440 U.S. 367 (1979)] because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction." *Bryant*, 136 S.Ct. at 1963, quoting *Nichols v. United States*, 511 U.S. 738, 748-49 (1994). But, as the Eighth Circuit Court of Appeals has pointed out, there is a conflict within this

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<sup>2</sup> See Benjamin Levin, *Guns and Drugs*, 84 *FORDHAM L. REV.* 2173, 2176-78 (April 2016) (arguing that "the legal treatment of gun possession is embedded in the same structure of criminal law and criminal law enforcement that has been critiqued in the drug context" for contributing to the mass incarceration of people from communities of color and lower-income urban communities) (hereinafter referred to as "Levin").

Court's jurisprudence about the constitutionality of using prior convictions to prove the elements of subsequent offenses. *United States v. Cavanaugh*, 643 F.3d 592, 602-03 (8th Cir. 2011).

Specifically, the Court of Appeals has opined that, broadly interpreted, *Lewis* “stands for the proposition that ‘status’ is all that matters and questions surrounding the reliability of the conviction imposing that status cannot justify barring the use of that conviction to prove the elements of a subsequent offense.” *Cavanaugh*, 643 F.3d at 603. *Lewis* thus directly conflicts with *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), which “stands for the proposition that certain constitutional infirmities in underlying proceedings make use of the judgment from such a proceeding infirm for the purpose of proving an element of a subsequent criminal charge.” *Cavanaugh*, 643 F.3d at 603. *Lewis* also conflicts with this Court's decision in *Montgomery v. Louisiana*, where this Court recently reiterated that “[a] conviction under an unconstitutional law ‘is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.’ ” 136 S.Ct. 718, 730 (2016), quoting *Ex parte Siebold*, 100 U.S. 371, 376-77 (1880).

The consequences of these unresolved conflicts within this Court's jurisprudence are well illustrated by this case that resulted from the Illinois Supreme Court's decision in *People v. McFadden*, 61 N.E.3d 74 (Ill. 2016). *McFadden* holds that under *Lewis* and its progeny, the fact of a felony conviction without any intervening vacatur or other affirmative action triggers the firearms disability[,]” under which “it is immaterial whether the predicate conviction ‘ultimately might turn out to be invalid for any reason.’ ” 61 N.E.3d at 81-82. The Illinois Appellate Court in the instant case followed *McFadden* to hold that Jovonte Brown's prior AUUW conviction sufficed to

prove him guilty of AHC even though the prior conviction was void because it violated his Second Amendment right to bear arms. *People v. Brown*, 2017 IL App (1st) 122651-U, ¶¶12-17 (unpublished order). Based on the rationale in *Lewis*, *Brown* thus stands convicted of an offense that is founded on nothing but a prior conviction rendered substantively unconstitutional under *Heller* and *McDonald*, even though such a result cannot be squared with *Mendoza-Lopez* or *Montgomery* and the long lines of authority on which these cases stand. This Court's review is necessary to resolve the conflict and correct the error in this case.

**B. *Lewis's* rationale should be reevaluated in light of *Heller* and *McDonald*, which recognize that the Second Amendment secures a fundamental right to bear arms for self-defense.**

In *Lewis*, this Court reaffirmed then-existing law providing that “the Second Amendment guarantees no right to keep and bear a firearm that does not have ‘some reasonable relationship to the preservation or efficiency of a well regulated militia.’ ” 445 U.S. at 65, note 8, quoting *United States v. Miller*, 307 U.S. 174, 178 (1939). Since then, however, this Court has determined that the Second Amendment actually protects an individual's right to possess a handgun for self-defense. *Heller*, 554 U.S. 570; *McDonald*, 561 U.S. 742. *Brown* maintains that prior convictions obtained in violation of an individual's Second Amendment right to bear arms may not constitutionally serve as proof of the prior-conviction elements of the recidivist and felon-in-possession-of-firearm statutes like the ones under which he was convicted. Review is thus warranted to consider how such a sea change in governing law affects the question presented: whether the due process provisions of the United States Constitution preclude the use of prior convictions that violate the Second Amendment

as predicate convictions to establish prior felony elements of recidivist and felony in possession statutes.

**C. This case presents an issue of national importance given the disproportionate impact that gun possession crimes have on minority groups.**

There is no question that “[i]ncarceration in America is concentrated among African American men[,] (THE PEW CHARITABLE TRUSTS, *Collateral Costs: Incarceration’s Effect on Economic Mobility*, 6, 8 (2010), available at [http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs\\_assets/2010/collateralcosts1.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2010/collateralcosts1.pdf))), where “one in nine black males between the ages of twenty and thirty-four is ‘behind bars.’” Anders Walker, *The New Jim Crow? Recovering the Progressive Origins of Mass Incarceration*, 41 HASTINGS CONST. L. Q. 845, 845 (Summer 2014). Indeed, “[i]n 2000, 54 percent of the state court defendants convicted for weapons crimes were black, as compared to 44 percent white.” Levin at 2194. The statistics for 2004 were nearly identical, and, as of December 31, 2013, the Bureau of Justice estimated that 24,400 black inmates were incarcerated for weapons charges compared to 13,900 Hispanic inmates and 11,200 white inmates. *Id.* at 2194-2195. The numbers are even more startling in Cook County, Illinois, where Brown was arrested, with 1,372 black inmates compared to 34 white inmates and 165 “other” inmates being imprisoned for the offense of unlawful use of a weapon in Fiscal Year 2014. Illinois Sentencing Policy Advisory Council, Fiscal Impact Analysis SB 1722, SA 3, Safe Neighborhoods Reform Act, 1, 12 (available at [http://www.icjia.state.il.us/spac/pdf/SB1722\\_SA3\\_Munoz\\_Safe\\_Neighborhoods\\_Reform\\_Act\\_Partial\\_Fiscal\\_Analysis.pdf](http://www.icjia.state.il.us/spac/pdf/SB1722_SA3_Munoz_Safe_Neighborhoods_Reform_Act_Partial_Fiscal_Analysis.pdf)).

This undeniable racial disparity is commonly attributed to collateral damage from the War on Drugs. Darren Lenard Hutchinson, “*Continually Reminded of Their*

*Inferior Position*”: *Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J.L. & POL’Y 23, 67-68 (2014); Michael Tonry, *The Social, Psychological, and Political Causes of Racial Disparities in the American Criminal Justice System*, 39 CRIME & JUST. 273, 274 (2010). As of 2011, however, prison admissions due to drug offenses had declined while “public order offenses”—including felon-in-possession-of-firearm offenses—had nearly doubled since 1981. Jonathan Simon, *Law’s Violence, the Strong State, and the Crisis of Mass Imprisonment*, 49 WAKE FOREST L. REV. 649, 663-664 (2014) (hereinafter referred to as “Simon”).

Such a glaring racial disparity in convictions is an issue of national importance that merits this Court’s review because even if gun possession offenses such as those at issue in this case “are not deliberately targeted on racial minorities, the fact that people already criminalized, and especially those already incarcerated, are more exposed to them assures that this category, if it continues to grow, will operate as a counterthrust to other forces aimed at decarceration and reducing disproportionality.” Simon at 665. This Court should therefore grant review.

**D. This case presents an excellent vehicle for this Court to decide the constitutionality of using prior void convictions as substantive evidence for a subsequent offense.**

This case presents a pure question of constitutional law. The facts here are clear, undisputed, and straightforward. Brown was convicted of AUUW in 2008. In 2012, the State then used this void conviction as a predicate felony to satisfy an essential elements of, and obtain Brown’s convictions for, AHC. In 2013, the AUUW offense of which he was convicted in 2008, was declared facially unconstitutional and void *ab initio*. This Court can thus decide the constitutionality of Illinois’s use of such void,

unconstitutional convictions without having to resolve any factual questions or procedural impediments.

## CONCLUSION

For the foregoing reasons, petitioner, Jovonte Brown, respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Supreme Court.

Respectfully submitted,

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