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Concealed Carry: Illinois Supremes Catch Up on the Second Amendment

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The Illinois Supreme Court has finally joined the rest of the nation in recognizing Second Amendment rights, including the ability to carry a concealed weapon in public.

Concealed Carry Law in Illinois. In a decision on September 12 in *Illinois v. Aguilar*,[1] the Illinois court threw out as unconstitutional a state statute that made the "aggravated unlawful use of a weapon" a felony. But the "aggravated unlawful use of a weapon" was defined as a legal gun owner carrying "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 or fixed place of business any pistol, revolver, stun gun or taser or other firearm" if it is "uncased, loaded and immediately accessible."[2]

Illinois's law had already been found unconstitutional by a federal court, the Seventh Circuit Court of Appeals, in *Moore v. Madigan*, which found that it was effectively "a flat ban on carrying ready-to-use guns outside the home."[3] But the federal appeals court stayed its mandate for 180 days to allow the Illinois legislature to craft a new gun law imposing "reasonable limitations, consistent with the public safety and the Second Amendment."[4] The state implemented a new law in July to permit concealed carry when the legislature overrode the veto of Illinois Governor Pat Quinn (D) on the final day of the court-imposed deadline.

Illinois was the last state in the country to eradicate its ban on concealed carry, but already some elected officials in Chicago "are attempting an end run around" the new state law.[5] The new law will allow anyone with an Illinois "Firearm Owner's Identification" card to obtain a concealed-carry permit once he or she has passed a background check, taken 16 hours of gun-safety training, and paid a fee of $150.

Several panels of Illinois's state appellate court had ruled that the U.S. Supreme Court's decisions in *District of Columbia v. Heller*[6] and *McDonald v. City of Chicago*,[7] which concluded that those cities' bans on handgun possession in the home violated the Second Amendment, did not apply to the possession of a firearm *outside* the home. But the Illinois Supreme Court disagreed. It was "convinced that the Seventh Circuit's analysis" in the *Moore* case that "the constitutional right of armed self-defense is broader than the right to have a gun in one's home" was correct.[8]

In *Heller*, the U.S. Supreme Court said that "the central component" of the Second Amendment is "individual self-defense." Thus, according to the Illinois Supreme Court, "it would make little sense to restrict that right to the home, as '[c]onfrontations are not limited to the home.'"[9]

By the time of our country's founding, the right to have arms was "understood to be an individual right protecting against both *public* and private violence."[10] The Illinois Supreme Court recognized that the state could regulate gun ownership, but

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this particular law was not "a reasonable regulation but...a comprehensive ban."[11] Therefore, it held that the Illinois statute "violates the right to keep and bear arms, as guaranteed by the second amendment to the United States Constitution"[12] and reversed the defendant's conviction.

Concealed Carry Laws in Other States. In contrast to the Seventh Circuit in the *Moore* case, other federal courts of appeals have ruled for the opposite position on the constitutionality of concealed carry laws, making it likely that the U.S. Supreme Court will eventually decide the issue.

In *Drake v. Filko*, for example, the Third Circuit held that a New Jersey law that requires an applicant to show a "justifiable need" before a concealed carry permit will be issued is not a violation of the Second Amendment, and it declined to declare that the Second Amendment "right to bear arms for the purpose of self-defense extends beyond the home."[13]

In reviewing a Colorado law that banned the issuance of concealed carry permits to out-of-state residents, the Tenth Circuit definitively held that the "carrying of concealed firearms is not protected by the Second Amendment."[14]

The Second Circuit has stated that it will review state regulation of concealed carry only under a lower standard of review—intermediate scrutiny, which is easier for states to meet than "strict scrutiny."[15] Thus, it upheld a New York law that restricts concealed carry permits to those who can demonstrate a "special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession."[16] The court concluded that the ability to carry a gun in public is not within the "core Second Amendment protections" identified by the Supreme Court.[17] New York has a substantial governmental interest in "public safety and crime prevention" that justifies this restriction.[18] This is similar to a Fourth Circuit ruling that upheld a Maryland law that requires a "good and substantial reason" to carry a concealed weapon.[19]

The Second Amendment for Non-Adults. Although he won his first argument, Alberto Aguilar, the 17-year-old defendant in the Illinois case, did not win his second argument. He had also been convicted of violating a second Illinois law that bans anyone under the age of 18 from possessing "any firearm of a size which may be concealed upon the person."[20]

Aguilar argued that this provision was unconstitutional because at the time of the Second Amendment's passage, Americans as young as 15

1. 2013 IL 112116 (Sept. 12, 2013).
2. 720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2008).
3. *Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012).
4. Ibid., at 942.
5. Associated Press, "Chicago Considering Way Around Concealed Carry Law," SaukValley.com, September 7, 2013, http://www.saukvalley.com/2013/09/08/chicago-considering-way-around-concealed-carry-law/aq2xm38/ (accessed September 25, 2013).
6. 554 U.S. 570 (2008).
7. 561 U.S. ___, 130 S.Ct. 3020 (2010).
8. *Illinois v. Aguilar*, at 7.
9. Ibid., at 8 (citing *Moore*, 702 F.3d at 935–936).
10. Ibid., at 8 (citing *Heller*, 554 U.S. at 593–594).
11. Ibid., at 8.
12. Ibid.
13. *Drake v. Filko*, 724 F.3d 426 (3rd Cir. 2013).
14. *Peterson v. Martinez*, 707 F.3d 1197, 1201 (10th Cir. 2013).
15. *Kachalsky v. County of Westchester*, 701 F.3d 81 (2nd Cir. 2012).
16. Ibid., at 86 (citations omitted).
17. Ibid., at 94.
18. Ibid., at 97.
19. *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013).
20. 720 ILCS 5/24-3.1(a)(1) (West 2008).

were required to bear arms "for purposes of militia service." Thus, the protections of the Second Amendment should extend to a 17-year-old. However, the Illinois court rejected that argument.

The court referenced a number of other federal cases that had examined the historical evidence on this issue[21] and concluded that "although many colonies *permitted* or even *required* minors to own and possess firearms for purposes of militia service, nothing like *a right* for minors to own and possess firearms has existed at any time in this nation's history." The court claimed that laws banning juvenile possession of firearms "have been commonplace for almost 150 years." Therefore, the court concluded that it was "obvious and undeniable" that the "possession of handguns by minors is conduct that falls outside the scope of the second amendment's protection."[22]

Not the End. This may not be the end of Second Amendment litigation in Illinois. That will depend on whether Illinois authorities administer the new concealed carry law in a reasonable manner and whether elected officials in places such as Chicago who are hostile to gun rights attempt to evade the intent of the statute and these court holdings. Only time will tell.

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21. See, for example, *National Rifle Association of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, Explosives*, 700 F.3d 185 (5th Cir. 2012) and *U.S. v. Rene E.*, 583 F.3d 8 (1st Cir. 2009).
22. *Illinois v. Aguilar*, at 10–11.