

No.
IN THE
SUPREME COURT OF THE UNITED STATES

ZACHARY SMITH, Petitioner,
-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

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

PETITION FOR WRIT OF CERTIORARI

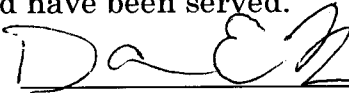
NOTICE AND PROOF OF SERVICE

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The undersigned, a member of the Bar of this Court, in compliance with Rules 29 and 33.2, on April 12, 2018, caused to be mailed the original and ten copies of the Motion for Leave to Proceed *In Forma Pauperis* and Petition for Writ of Certiorari to the Clerk of the above Court and caused to be submitted an electronic copy using the Court's electronic filing system. On that same date, the undersigned served the same documents on opposing counsel by causing to be mailed one copy of the Motion and Petition to both counsels of record, and by causing to be mailed one copy to the petitioner by depositing said documents in the United States mail, postage prepaid and addressed as above. An electronic version was also served by email to opposing counsel. All parties required to be served have been served.



Darren E. Miller
Counsel of record

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MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner requests leave to proceed *in forma pauperis*. The Petitioner has previously been granted leave to proceed *in forma pauperis* in the court below. Counsel was appointed to represent petitioner in the court below pursuant to 725 ILCS 105/10(a).

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

Whether it is unconstitutional for a court to use a void *ab initio* constitutionally infirm prior “conviction” obtained in violation of a defendant’s Second Amendment rights as a predicate offense for a recidivist statute.

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| This Court should grant review in order to clarify that under <i>Burgett v. Texas</i>, 389 U.S. 109, 114-15 (1967), it is impermissible to use a void <i>ab initio</i> prior conviction obtained in violation of a defendant’s Second Amendment rights as a predicate offense for a recidivist statute, and that <i>Custis v. United States</i>, 511 U.S. 485 (1994) does not limit <i>Burgett</i> to only prior convictions obtained in violation of the right to counsel. | |
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The petitioner, Zachary Smith, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The opinion of the Illinois Appellate Court (Appendix A) is reported at *People v. Smith*, 2017 IL App (1st) 151643, and is published. A copy of order denying rehearing (Appendix B) is not reported. The order of the Illinois Supreme Court denying leave to appeal (Appendix C) is reported at 2018 WL 508423 (Table).

JURISDICTION

On September 29, 2017, the Appellate Court of Illinois issued its decision. (App A). A petition for rehearing was timely filed and was denied on October 27, 2017. (App B) The Illinois Supreme Court denied a timely filed petition for leave to appeal on January 18, 2018. (App C) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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 5/24-1.7 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

Procedural History

In *Burgett v. Texas*, 389 U.S. 109, 114-15 (1967), this Court held that a prior uncounseled felony conviction was void and therefore inadmissible in a subsequent prosecution under a recidivist statute. This Court reasoned that to allow such use of a “presumptively void” conviction would mean that a specific federal right (the right to counsel) would be impermissibly “denied anew.” *Id.*, at 115-116. This Court observed that to permit such use of a void conviction would “erode the principle of” *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Id.*, at 115. *Burgett* was recently reaffirmed by this Court in *United States v. Bryant*, 136 S. Ct. 1954, 1962 (2016).

In this case, Zachary Smith was convicted of armed habitual criminal (AHC), an Illinois recidivist statute. 720 ILCS 5/24-1.7 (2013). Under the AHC statute, a defendant is guilty if he possessed a firearm after having been convicted of two prior qualifying convictions. *Id.* In a published decision, the Illinois appellate court found that one of the predicate offenses, aggravated unlawful use of a weapon (aggravated UUW), used as a basis for the AHC charge was constitutionally invalid and violated Smith’s Second Amendment right to bear arms. *People v. Smith*, 2017 IL App (1st) 151643, ¶21. However, relying on *Custis v. United States*, 511 U.S. 485 (1994), the appellate court concluded that the prohibition on using void a conviction as a predicate offense in a recidivist statute is limited to *Wainwright* violations. *Smith*, at ¶ 22. “Where, as here, a prior conviction is challenged on any non-*Wainwright* basis, the *Burgett* line of cases do not support the argument that it is unconstitutional to use the fact of the prior conviction to establish the elements of a subsequent crime.” *Id.* Smith

argued in his petition for rehearing that *Custis* did not limit *Burgett* to *Wainwright* violations. The appellate court denied the petition for rehearing, (Appendix B), and on January 18, 2018, the Illinois Supreme Court denied Smith's petition for leave to appeal. (Appendix C)

Trial

In Cook County, Illinois, Smith was charged by indictment with one count of AHC (Count 1), and three counts of unlawful use of a weapon by a felon (UUW felon). (C. 52-55) The AHC indictment alleged that on October 25, 2013, Smith possessed a .38 caliber revolver and that he had convictions for two qualifying predicate offenses. (C. 52) The State alleged that the predicate offenses were a prior conviction for UUW felon in case number 07CR1257601 and a prior conviction for aggravated UUW in case number 09CR1652401. (C. 52)

At Smith's bench trial, Chicago police officer Reginald Robinson testified that on October 25, 2013, at about 7:30 p.m., he and his assigned partner Calhoun went to 8540 South Parnell in Chicago in response to a domestic battery call. (R. M10-11) When they arrived, Robinson saw Lakeisha Horton outside. (R. M12) She told the police that her boyfriend, Smith, had "jumped on" her. (R. M13) Horton said Smith was inside her apartment, and she took the officers to her third floor apartment. (R. M14-15) When Robinson entered, he saw Smith standing behind the door with a gun in his hand. (R. M17) Smith was arrested and Calhoun confiscated Smith's weapon from the floor. (R. M19-23) At the police station, after waiving his *Miranda* rights, Smith told the police that he had the gun because he thought that Horton's friends and relatives

were going to beat him up out of revenge for hitting Horton. (R. M22) Officer Calhoun generally testified consistently with Robinson's testimony. (R. M32-40)

Certified copies of conviction were entered into evidence for the predicate offenses for the AHC charge, being Cook County case numbers 07CR12576 (UUW felon) and 09CR16524 (aggravated UUW). (R. M47; St. ex. 2-3) The predicate conviction for aggravated UUW was void *ab initio* pursuant to *People v. Aguilar*, 2013 IL 112116, ¶22; *People v. Burns*, 2015 IL 117387, ¶¶ 22, 32. The Illinois Supreme Court held in 2013 that the subsections of the aggravated UUW statute (720 ILCS 5/24-1.6(a)(1)), under which Smith had been convicted are facially unconstitutional and void *ab initio*.

Lakeisha Horton testified that she was mad at Smith because he was with another woman. (R. M50) Because she was mad at Smith, Horton called the police and said he refused to leave. Although she signed a domestic battery complaint, no such incident occurred. (R. M50) She let the police inside her apartment, and when they saw the gun on the garbage can by Smith they rushed him. (R. M50-51) Horton tried to tell the police that the gun was not Smith's, but they did not listen to her. (R. M51) The gun found by the police did not belong to Smith. (R. M52) When the police entered her apartment, the gun was on the floor by the garbage can, and Smith was by the gun. (R. M64) She did sign a domestic battery complaint, but only did so because she was angry. (R. M66-67)

Laquita Handy testified that she arrived at the apartment with Smith, and that Smith did not have a weapon with him when they arrived. (R. M73) She also testified that Smith did not hurt Horton, and Smith was with Handy all day. (R. M75)

The trial court found Smith guilty as charged. (R. M102) The court sentenced Smith to six years of prison for AHC. (R. Y12; C. 156) The court also sentenced Smith to a concurrent two-year sentence for UUW felon as charged in Count 2, and merged the remaining UUW felon counts into Count 2. (R. Y12-13; C. 156)

Appeal

Smith argued on appeal that his AHC conviction must be reversed because it was based on the void and unconstitutional predicate prior conviction for aggravated UUW. *People v. Smith*, 2017 IL App (1st) 151643, ¶ 10. Specifically, Smith argued on appeal that one of the predicate convictions supporting the AHC conviction (the prior aggravated UUW conviction) was void *ab initio* because the Illinois Supreme Court determined that the aggravated UUW statute underlying that conviction was facially unconstitutional and violated the right to keep and bear arms as guaranteed by the Second Amendment to the United States Constitution. *Id.*, at ¶11. Smith further argued on appeal that it is impermissible under *Burgett v. Texas*, 389 U.S. 109 (1967) and its progeny to use a void *ab initio* prior conviction obtained in violation of the Constitution as a predicate offense for a recidivist crime such as AHC. *Smith*, 2017 IL App (1st) 151643, ¶¶13, 19-23, 29.

The Illinois appellate court agreed that in *People v. Aguilar*, 2013 IL 112116, ¶ 22 and *People v. Burns*, 2015 IL 117387, ¶¶ 22, 32, the Illinois Supreme Court “struck down that portion of the aggravated UUW statute as facially unconstitutional, concluding that it violated the right to keep and bear arms guaranteed by the Second Amendment to the United States Constitution” *Smith*, 2017 IL App (1st) 151643, ¶11.

The appellate court also agreed that AHC is a statute designed to enhance punishment and that use of a constitutionally infirm prior conviction such as in this case is “still prohibited under *Burgett*.” *Id.*, at ¶21. However, the appellate court held that this Court’s decision in *Custis v. United States*, 511 U.S. 485, 496 (1994) clarified that *Burgett* excludes from its scope challenges on a “non-*Wainwright* basis.” *Smith*, 2017 IL App (1st) 151643, ¶22.

Smith filed a petition for rehearing and argued that the Illinois appellate court misconstrued *Custis* because *Custis* did not intend to limit *Burgett* to only *Wainwright* violations. The Illinois appellate court denied rehearing, (App. B), and, without comment, the Illinois Supreme Court denied Smith’s petition for leave to appeal. (App C)

REASON FOR GRANTING CERTIORARI

This Court should grant review in order to clarify that under *Burgett v. Texas*, 389 U.S. 109, 114-15 (1967), it is impermissible to use a void *ab initio* prior conviction obtained in violation of a defendant's Second Amendment rights as a predicate offense for a recidivist statute, and that *Custis v. United States*, 511 U.S. 485 (1994) does not limit *Burgett* to only prior convictions obtained in violation of the right to counsel.

In *Burgett*, this Court held that a defendant's void prior conviction in violation of his Sixth Amendment right to counsel could not be used "either to support guilt or enhance punishment for another offense." *Burgett v. Texas*, 389 U.S. 109, 115 (1967). In *Bryant*, this Court recently recognized that *Burgett* prohibits the state from using a constitutionally infirm conviction "in a subsequent proceeding to prove the prior-felony element of a recidivist statute" and called *Burgett's* holding "undisputed." *United States v. Bryant*, 136 S. Ct. 1954, 1962 (2016).

In this case, Zachary Smith was convicted of armed habitual criminal (AHC), an Illinois recidivist statute. 720 ILCS 5/24-1.7 (2013). Under the AHC statute, a defendant is guilty if he possessed a firearm after having been convicted of two prior qualifying convictions. *Id.* One of the predicate convictions supporting the AHC conviction (a prior aggravated UUW felon conviction) was void *ab initio* because the Illinois Supreme Court "struck down that portion of the aggravated UUW statute as facially unconstitutional, concluding that it violated the right to keep and bear arms guaranteed by the second amendment to the United States Constitution" *Smith*, 2017 IL App (1st) 151643, ¶11. See *People v. Aguilar*, 2013 IL 112116, ¶ 22 and *People v. Burns*, 2015 IL 117387, ¶¶ 22, 32. An offense created by a facially unconstitutional statute is not a crime and can be given no legal effect, see *Ex parte Siebold*, 100 U.S. 371, 376-77 (1879). *Burgett* prohibits such use of void convictions, and, therefore,

Illinois may not, consistent with due process, use void convictions under the facially unconstitutional portions of the aggravated UYW statute to prove a subsequent offense.

Here, the Illinois appellate court incorrectly concluded that *Custis v. United States*, 511 U.S. 485, 496 (1994), limited *Burgett* to exclude challenges on a “non-*Wainwright* basis.” *Smith*, 2017 IL App (1st) 151643, ¶22. As is detailed below, the purported constitutional problems with the prior convictions at issue in *Custis* were simply not as serious as the *Wainwright* right to counsel violations in the prior convictions at issue in *Burgett*. *Custis* did not involve the use of a void and unconstitutional prior conviction as predicate for a recidivist offense, as in *Burgett* and the present case.

In *Burgett*, this Court held that a defendant’s void prior conviction obtained in violation of his Sixth Amendment right to counsel could not be used “either to support guilt or enhance punishment for another offense.” *Burgett v. Texas*, 389 U.S. 109, 115 (1967). As Chief Justice Warren noted in his concurring opinion, such a use of a void prior conviction violates due process. *Id.*, at 119. In *Custis v. United States*, 511 U.S. 485, 496 (1994), this Court considered whether it is impermissible to use all constitutionally infirm prior convictions to enhance a penalty. The statute at issue in *Custis* was the Armed Career Criminal Act (ACCA), a federal statute that raises the penalty of possession of a firearm by a felon if a defendant had three prior convictions. *Custis*, 511 U.S. at 487. The issue was “whether a defendant in a federal sentencing proceeding may attack the validity of previous state convictions that are used to enhance his sentence under the ACCA.” *Id.* Specifically, Mr. Custis wanted to attack

the validity of his prior convictions on the basis that he was denied effective assistance of counsel, did not knowingly plead guilty, and was not adequately advised of his rights for a stipulated trial. *Id.*, at 496. *Custis* decided that he could not attack the prior convictions for those reasons. Although *Burgett* prohibited the use of an unconstitutional prior conviction as a basis for establishing that a defendant met the requirements of a recidivist statute where the prior conviction was void because it was obtained in violation of his right to counsel, *Id.*, at 495, *Burgett* and similar cases did not control the outcome in *Custis*. Regarding the claimed constitutional infirmities at issue in *Custis*, the Court held that “[n]one of these alleged constitutional violations rises to the level of a jurisdictional defect resulting from the failure to appoint counsel at all.” *Id.*, at 496. In other words, the purported constitutional problems with the prior convictions at issue in *Custis* were simply not as serious as the *Wainwright* right to counsel violations in the prior convictions at issue in *Burgett*.

Contrary to the purported constitutional problems with the prior convictions at issue in *Custis*, the defect at issue in Mr. Smith’s case is as serious, if not more serious, than *Wainwright* right to counsel violation defects. Here, one of Smith’s prior convictions (used as a predicate for his AHC conviction) is void *ab initio*, as the aggravated UUW statute is facially unconstitutional as it violated the right to bear arms under the Second Amendment of the United States Constitution. See *Smith* at ¶11 (noting that the Illinois Supreme court struck down that portion of the aggravated UUW statute as a facially unconstitutional violation of the Second Amendment in *People v. Aguilar*, 2013 IL 112116, ¶ 22 and *People v. Burns*, 2015 IL 117387, ¶¶ 22, 32). Similarly, convictions obtained in complete violation of the right to counsel are

void. When discussing the seriousness of right to counsel violations, *Custis* asserted that the complete denial of the right to counsel in violation of the Sixth Amendment creates a “jurisdictional bar” to a valid conviction, because the conviction pronounced “is void.” *Custis*, 511 U.S. at 494 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938)). *Custis* also cited to *Burgett*, noting that in *Burgett* the conviction was “void” because the defendant was denied his right to counsel for one of the predicate felonies for the recidivist statute. *Custis*, 511 U.S. at 495. Thus, unlike the purported constitutional violations at issue in *Custis*, the violation at issue here, as is the case in *Burgett* and its progeny, is so serious that the prior conviction is void.

In fact, the constitutional infirmities at issue here are arguably more serious than a *Wainwright* violation. A defendant convicted of a crime in violation of his right to counsel perhaps was guilty as charged, but the process of arriving at that conclusion was impermissible. Here, Smith was never guilty as charged, as he could not have been and can never be properly convicted of the alleged aggravated UUW, as that statute is facially unconstitutional.

At any rate, the constitutional infirmities at issue here are at a minimum as serious as the constitutional infirmities at issue for a *Wainwright* violation. Thus, the Illinois appellate court’s conclusion that the holdings by *Burgett* and its progeny that unconstitutional void prior convictions may not be used to enhance punishment are limited to *Wainwright* violations is incorrect and unjust. Certainly, at times *Custis* used language seemingly limiting *Burgett* and its progeny to *Wainwright* violations. *Custis*, 511 U.S. at 496. But the rationale of *Custis* is simply that the alleged violations at issue there did not rise to same the level of seriousness as *Wainwright* violations.

Id. Again, *Custis* was decided on the fact that “[n]one of these alleged violations rises to the level of a jurisdictional defect resulting from the failure to appoint counsel at all.” *Id.* The unconstitutional aggravated U UW law at issue here fits squarely into this rationale. See *Ex Parte Siebold*, 100 U.S. 371, 376-7 (1897)(holding that “[a]n unconstitutional law is void” and that “if the laws are unconstitutional and void, the Circuit Court acquired no jurisdiction of the causes.”). *Custis* could not possibly have meant to create law where prior unconstitutional convictions with violations as or more serious than *Wainwright* violations can be used to enhance a sentence, but prior unconstitutional convictions due to *Wainwright* violations cannot be so used.

Moreover, *Custis* rested its decision in part on the “[e]ase of administration.” *Custis*, 511 U.S. at 496. *Custis* observed that the claims of unconstitutionality at issue there would require sentencing courts “to rummage through frequently nonexistent or difficult to obtain state court transcripts or records.” *Id.* But claims of unconstitutionality due to the “failure to appoint counsel at all will generally appear from the judgment roll itself, or from an accompanying minute order.” *Id.* Like claims of the failure to appoint counsel, the unconstitutional claim at issue in the present case is a claim which presents an ease of administration. For such claims, the circuit court need only find the specific aggravated U UW provision for the prior conviction, and determine if that provision was deemed unconstitutional on its face. Thus, ease of administration also favors treating void prior convictions obtained in violation of a defendant’s Second Amendment rights similarly to *Wainwright* claims.

In *Bryant*, this Court recently recognized that *Burgett* prohibits the state from using a constitutionally infirm conviction “in a subsequent proceeding to prove the

prior-felony element of a recidivist statute” and called *Burgett’s* holding “undisputed.” *United States v. Bryant*, 136 S. Ct. 1954, 1962 (2016). Here, the use of Smith’s void *ab initio* prior conviction as a predicate offense for AHC was prohibited by *Burgett*, and the appellate court erred by holding to the contrary.

It should be noted that in *Lewis v. United States*, 445 U.S. 55, 65-86 (1980), this Court held that a federal statute prohibiting a felon from possessing a firearm does not violate due process even if the predicate felony was constitutionally infirm. *Lewis* reaffirmed the holding in *Burgett* that such a conviction cannot be used for enhancement purposes, but found that “the firearms prosecution does not open the predicate conviction to a new form of collateral attack.” *Id.*, at 67. The Illinois appellate court correctly observed that this Court’s decision in *Lewis* does not control because there is quite a difference between using prior convictions in “status” offenses such as illegal possession of a gun and enhancement offenses like the AHC statute at issue here where a prior conviction is used to increase a criminal sanction. *Smith*, 2017 IL App (1st) 151643, ¶21. The appellate court correctly stated, “it is difficult to conclude that the invalid conviction is relied on for anything other than to ‘enhance punishment,’ something the *Lewis* Court made clear is still prohibited under *Burgett*.” *Id.* Thus, it is only the scope of *Burgett* and *Custis* that is at issue here, not the applicability of *Lewis*.

Numerous appellate decisions in Illinois have found that it is permissible under *Burgett* to support guilt or enhance punishment for another offense with a void conviction obtained in violation of a defendant’s Second Amendment rights. *People v. Somerville*, 2017 IL App (1st) 132202-UB (unpublished allowing as a predicate for

AHC); *People v. Fields*, 2017 IL App (1st) 110311-B (allowing as a predicate for AHC); *People v. Perkins*, 2016 IL App (1st) 150889 (allowing as a predicate for AHC); *People v. Hernandez*, 2017 IL App (1st) 131871-U (unpublished allowing as a predicate for AHC). Although Illinois has numerous such cases, it does not appear that any other state or federal court of review has held that it is permissible under *Burgett* to support guilt or enhance punishment for another offense with a void conviction obtained in violation of a defendant's Second Amendment rights. Thus, Illinois stands alone in this regard.

Particularly given Illinois' history of unduly restricting the right to bear arms, it makes little sense to limit *Burgett* to *Wainwright* violations. Prior to 2013, Illinois had some of the most restrictive gun control laws in the nation, including its aggravated UUW statute, which criminalized possession of a firearm outside the home. See *Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012) ("Illinois is the *only* state that maintains a flat ban on carrying ready-to-use guns outside the home[.]") (emphasis in original). In *People v. Aguilar*, the Illinois Supreme Court held that the subsection of the aggravated UUW statute banning possession of a firearm outside the home was facially unconstitutional under the Second Amendment and, thus, void ab *initio*. *People v. Aguilar*, 2013 IL 112116, ¶¶12, 22. Despite the clear implications of that ruling — both under the due process clause and the Second Amendment — Illinois continues to use convictions invalidated by *Aguilar* as predicate felonies to convict people of other offenses, and appears to be the only state so acting to deny anew Second Amendment rights.

Post-*Custis*, some courts have held that *Custis* limits *Burgett* to *Wainwright* violations. See *United States v. Aguilar-Diaz*, 626 F.3d 265, 269-70 (6th Cir. 2010); *United States v. Daniels*, 195 F.3d 501, 503 (9th Cir. 1999); *Camp v. State*, 221 S.W.3d 365, 369-70 (Ark. 2006); *State v. Veikoso*, 74 P.3d 575, 582 (Haw. 2003); *State v. Weber*, 90 P.3d 314, 319-20 (Idaho 2004); *State v. Delacruz*, 899 P.2d 1042, 1049 (Kan. 1995); *McGuire v. Commonwealth*, 885 S.W.2d 931, 937 (Ky. 1994); *State v. Johnson*, 38 A.3d 1270, 1278 (Me. 2012); *People v. Carpentier*, 521 N.W.2d 195, 199-200 (Mich. 1994); *State v. Louthan*, 595 N.W.2d 917, 923-26 (Neb. 1999); *State v. Weeks*, 681 A.2d 86, 89-90 (N.H. 1996); *State v. Mund*, 593 N.W.2d 760, 761-62 (N.D. 1999); *State v. Hahn*, 618 N.W.2d 528, 535 (Wisc. 2000); *Vester v. Commonwealth*, 593 S.E.2d 551, 596-97 (Va. Ct. App. 2004); see also *People v. Padilla*, 907 P.2d 601, 606 (Colo. 1995) (applying the *Custis* restriction as a matter of federal constitutional law in the discretionary sentencing context, as opposed to in the context of mandatory sentencing enhancements); *State v. Boskind*, 807 A.2d 358, 360, 362-64 (Vt. 2002) (discussing *Custis* and holding that, when not based on a violation of the right to counsel, collateral challenges to a prior conviction used to enhance a sentence may not be brought during sentencing proceedings, but may be brought in a post-conviction proceeding based on the enhanced sentence). However, none of these cases involved the use of a void *ab initio* prior conviction obtained in violation of a defendant's Second Amendment rights as a predicate offense to enhance a sentence.

Other courts have either explicitly or implicitly rejected a *Wainwright*-only application of *Burgett* scenarios. See *People v. Allen*, 981 P.2d 525, 535-37 (Cal. 1999); *Nash v. State*, 519 S.E.2d 893, 896 (Ga. 1999); *State v. Balsano*, 11 So.3d 475, 479, 482

(La.2009); *State v. Maine*, 255 P.3d 64, 72-73 (Mont. 2011); *Commonwealth v. Lopez*, 690 N.E.2d 809, 814 (Mass. 1998); *Paschall v. State*, 8 P.3d 851, 852 n. 2 (Nev. 2000); *State v. Moeller*, 511 N.W.2d 803, 809-10 (S.D.1994) (permitting collateral attack based on invalid guilty plea); *contra State v. Burkett*, 849 N.W.2d 624 (S.D. 2014); *State v. Jusino*, 137 A.3d 65, 72 (Conn. App. Ct. 2016); *see also United States v. Hoggard*, 61 F.3d 540, 542 (7th Cir. 1995) (holding that “a defendant may not collaterally attack a prior state conviction at sentencing unless the conviction is presumptively void—that is, the lack of constitutionally guaranteed procedures is plainly detectable from the face of the record.”); *People v. Cabassa*, 717 N.Y.S.2d 487 (N.Y. Sup. Ct. 2000) (*Custis* does not limit *Burgett* to *Wainwright* situations and this Court did not intend to “create a hierarchy of constitutional violations when considering the principles underlying *Burgett*”) None of these cases involved the scenario at issue here, either.

The use of the void *ab initio* prior conviction as a predicate for a recidivist statute here clearly violates *Burgett* and due process. “If a law is invalid as applied to the criminal defendant’s conduct, the defendant is entitled to go free.” *Bond v. United States*, 564 U.S. 211, 227 (2011) (Ginsburg, J., concurring). “In short, a law ‘beyond the power of Congress,’ for any reason, is ‘no law at all.’” *Id.* at 227-28, *quoting Nigro v. United States*, 276 U.S. 332, 341 (1928). “Due process, moreover, is a guarantee that a man should be tried and convicted only in accordance with valid laws of the land. If a conviction is not valid under these laws, statutory and constitutional, a man has been denied due process and has a constitutional right to have the conviction set aside, without being deprived of life, liberty, or property as a result.” *North Carolina v. Pearce*, 395 U.S. 711, 739 (1969) (Black, J., concurring). The use of acts/convictions

obtained under an unconstitutional law violate a defendant's right to due process. See *MacDonald v. Moose*, 710 F.3d 154, 167 (4th Cir. 2013) (holding the state's anti-sodomy law was unconstitutional and thus the state could not convict an individual for violating a criminal solicitation statute where the predicate felony was the unconstitutional anti-sodomy law). Here, Smith's due process rights were also violated.

Again, Illinois stands alone in holding that *Burgett* does not include the use of a void *ab initio* prior conviction obtained in violation of a defendant's Second Amendment rights as a predicate offense to enhance a sentence under a recidivist statute. This is clearly impermissible under *Burgett* and violates both Smith's right to due process and his Second Amendment right to bear arms. Because, absent this Court's intervention, Illinois courts of review apparently will continue to violate *Burgett* and allow void convictions obtained in violation of a defendant's Second Amendment rights to be used as predicates for recidivist statutes, certiorari should be granted.

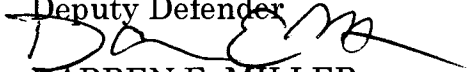
CONCLUSION

For the foregoing reasons, the petitioner, Zachary Smith, respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Appellate Court.

Respectfully submitted,

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APPENDIX

APPENDIX A

2017 IL App (1st) 151643
Appellate Court of Illinois,
First District,
FIRST DIVISION.

The PEOPLE of the State of
Illinois, Plaintiff-Appellee,

v.

Zachary SMITH, Defendant-Appellant.

No. 1-15-1643

|
Filed September 29, 2017

|
Rehearing denied October 27, 2017

Synopsis

Background: Defendant was convicted in the Circuit Court of Cook County. No. 13 CR 22324, Erica L. Reddick, J., of being an armed habitual criminal and unlawful use of a weapon by a felon. Defendant appealed.

Holdings: The Appellate Court, Mikva J., held that:

[1] defendant's prior conviction could count as a predicate conviction even though the statute was later found facially unconstitutional, and

[2] under the one-act, one crime rule, defendant's conviction for unlawful use of a weapon by a felon had to be vacated.

Affirmed in part and vacated in part.

***961** Appeal from the Circuit Court of Cook County. No. 13 CR 22324, Honorable Erica L. Reddick, Judge, Presiding.

Attorneys and Law Firms

Michael J. Pelletier, Patricia Mysza, and Darren E. Miller, of State Appellate Defender's Office, of Chicago, for appellant.

Kimberly M. Foxx, State's Attorney, of Chicago (Alan J. Spellberg, John E. Nowak, and Margaret M. Smith, Assistant State's Attorneys, of counsel), for the People.

Opinion

OPINION

JUSTICE MIKVA delivered the judgment of the court, with opinion.

****127** ¶ 1 Following a bench trial, defendant **Zachary Smith** was convicted of being an armed habitual criminal (AHC) and for unlawful use of a weapon by a felon (UUWF). Mr. Smith was sentenced on the AHC charge to a prison term of six years, followed by three years of mandatory supervised release (MSR), and on the UUWF charge to a concurrent sentence of two years. On appeal, Mr. Smith argues that we must vacate his AHC conviction because one of the predicate convictions for that offense was for aggravated unlawful use of a weapon (AUUW), under a statutory provision later held by the Illinois Supreme Court to be facially unconstitutional. Mr. Smith alternatively asks us to correct his mittimus because—under the ***962** ****128** one-act, one-crime rule—he cannot be convicted of both AHC and UUWF based on the same act of possessing a firearm. For the reasons that follow, we affirm Mr. Smith's AHC conviction and vacate his UUWF conviction.

¶ 2 BACKGROUND

¶ 3 Mr. Smith was charged in this case with one count of AHC—premised on his prior convictions for AUUW (case No. 09 CR 16524) and UUWF (case No. 07 CR 12576)—and three counts of UUWF. At his bench trial, the State introduced certified copies of both prior convictions. The State also presented the testimony of two Chicago police officers, who testified that on the evening of October 25, 2013, they entered an apartment to investigate a reported domestic battery and observed Mr. Smith with a gun in his hand. The officers arrested Mr. Smith and advised him of his *Miranda* rights. According to the officers, Mr. Smith explained to them that he was holding the gun because he thought the officers were members of his ex-girlfriend's family coming to seek revenge against him for having battered her.

¶ 4 Two witnesses testified for the defense. Mr. Smith's ex-girlfriend, Lakeisha Horton, testified that there was a party at her apartment on the afternoon of October 25, 2013. According to Ms. Horton, a fight broke out at the party, and she threatened to call the police. Those attending the party fled, leaving some of their possessions behind. When Mr. Smith later arrived to collect some clothing he had left at the apartment, he brought another woman with him, angering Ms. Horton and causing her to falsely report that he had battered her. Ms. Horton testified that there was a gun on the floor by the garbage can when officers arrived in response to her call, but it did not belong to Mr. Smith. Mr. Smith's girlfriend, Laquita Handy, testified that she was the woman who accompanied Mr. Smith to Ms. Horton's apartment to retrieve his clothing that day and, to her knowledge, he did not have a weapon with him at that time.

¶ 5 The trial court found the testimony of the officers to be more credible than that of the defense witnesses and found Mr. Smith guilty as charged. The court denied Mr. Smith's post-trial motion and sentenced him to six years of imprisonment and three years of MSR on the AHC count, merged the remaining counts into a single count of UUWF, and sentenced him to a concurrent two-year sentence on that count. This appeal followed.

¶ 6 JURISDICTION

[1] ¶ 7 The trial court sentenced Mr. Smith on May 7, 2015, and he filed his notice of appeal the same day. We therefore have jurisdiction pursuant to article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) and Illinois Supreme Court Rules 603 and 606, governing appeals from final judgments of conviction in criminal cases (Ill. S. Ct. Rs. 603, 606 (eff. Feb. 6, 2013)).

¶ 8 ANALYSIS

¶ 9 A. Predicate Conviction

¶ 10 On appeal, Mr. Smith argues that his AHC conviction must be vacated because one of the two predicate convictions the State relied on to support that charge was pursuant to a statutory provision later held to be facially unconstitutional and thus void *ab initio*.

¶ 11 To support a conviction for AHC, the State must prove beyond a reasonable doubt that a defendant possessed a firearm after having been convicted two or more times of certain enumerated offenses, including AUUW and UUWF. 720 ILCS 5/24-1.7(a)(2) (West 2012). One of Mr. Smith's two prior convictions was his 2009 conviction for AUUW, which he says *963 **129 was under the section of the Criminal Code of 1961 that prohibited the carrying of an "uncased, loaded, and immediately accessible" firearm outside the home. 720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2008). In *People v. Aguilar*, 2013 IL 112116, ¶ 22, 377 Ill.Dec. 405, 2 N.E.3d 321—as clarified in *People v. Burns*, 2015 IL 117387, ¶¶ 22, 32, 413 Ill.Dec. 810, 79 N.E.3d 159—our supreme court struck down that portion of the AUUW statute as facially unconstitutional, concluding that it violated the right to keep and bear arms guaranteed by the second amendment to the United States Constitution.

¶ 12 Recently, in *People v. McFadden*, 2016 IL 117424, 406 Ill.Dec. 470, 61 N.E.3d 74, our supreme court considered the effect of its holding in *Aguilar* on a defendant's subsequent conviction for UUWF, which required the State to prove that a defendant who "has been convicted of a felony" knowingly possessed a firearm (720 ILCS 5/24-1.1(a) (West 2008)). The defendant in that case claimed that his predicate felony conviction was under the portion of the AUUW statute held to be unconstitutional in *Aguilar*. *McFadden*, 2016 IL 117424, ¶ 16, 406 Ill.Dec. 470, 61 N.E.3d 74. The *McFadden* court began with the proposition that, "[w]hen a statute is held to be facially unconstitutional, the statute is said to be void *ab initio*, i.e., void from the beginning." (Internal quotation marks omitted.) *Id.* ¶ 17. It noted that a defendant may not be prosecuted under a facially unconstitutional statute and, "as a remedy, must be allowed to apply the court's declaration as a basis to vacate [the] judgment of conviction." *Id.* ¶ 19. But the defendant in *McFadden* did not seek to vacate his prior AUUW conviction. *Id.* ¶ 21. He instead challenged his subsequent UUWF conviction, arguing that the State could not rely on his constitutionally invalid AUUW conviction as the predicate felony for the UUWF conviction. *Id.*

¶ 13 The *McFadden* court did not agree. Noting that its own precedent applying the void *ab initio* doctrine did not resolve the question, it looked to the United States Supreme Court's decision in *Lewis v. United States*, 445

U.S. 55, 100 S.Ct. 915, 63 L.Ed.2d 198 (1980). *McFadden*, 2016 IL 117424, ¶ 22, 406 Ill.Dec. 470, 61 N.E.3d 74. There, the Court was asked to consider whether a prior felony conviction, which the defendant claimed was constitutionally infirm because he was unrepresented by counsel, could nevertheless be used by the government as the predicate felony for a charge that the defendant had violated the federal felon-in-possession-of-a-firearm statute. *Lewis*, 445 U.S. at 65, 100 S.Ct. 915. The *McFadden* court concluded that the plain language of the UUWF statute, like the plain language of the statute at issue in *Lewis*, evidenced the legislature's intent to subject a broad category of individuals to a prohibition on gun possession. *McFadden*, 2016 IL 117424, ¶¶ 23, 28-29, 406 Ill.Dec. 470, 61 N.E.3d 74. In the *McFadden* court's view, neither statute required the government to prove the predicate offense itself, but merely the defendant's status as a convicted felon, a status that “[w]ould cease only when the conviction upon which the status depend[ed] ha[d] been vacated.” *Id.* ¶ 29 (quoting *Lewis*, 445 U.S. at 61 n.5, 100 S.Ct. 915). Under *McFadden*, the burden is thus on a criminal defendant who has been convicted under a facially unconstitutional statute to clear his status as a felon through the judicial process to avoid future convictions predicated in part on that status. *Id.* ¶ 30.

¶ 14 Like the defendant in *McFadden*, Mr. Smith has not sought to vacate his prior AUUW conviction, but contends that it cannot properly serve as a predicate offense for a later conviction. Mr. Smith argues that we should not follow *McFadden* because it is inconsistent with the United States Supreme Court's decisions *964 **130 in *Montgomery v. Louisiana*, 577 U.S. —, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016), and *Ex Parte Siebold*, 100 U.S. 371, 25 L.Ed. 717 (1879). He also argues that the *McFadden* court's reliance on *Lewis* is inapplicable here because the AHC statute requires the State to prove more than just a defendant's status as a convicted felon. In response, the State insists that *McFadden* unequivocally dictates the result in this case.

¶ 15 For the reasons discussed below, we agree with the State—and with the other panels of this court that have considered this issue—that we are bound by precedent to affirm Mr. Smith's AHC conviction. There is no doubt that the holding in this case and others like it extends the reach of *McFadden* and greatly increases the collateral consequences of a constitutionally invalid criminal conviction. We join the other members of this

court who have recognized that this inequitable result calls out for a legislative remedy.

[2] ¶ 16 Whether a conviction may properly serve as a predicate offense is a question of law, which we review *de novo*. *People v. O'Neal*, 2016 IL App (1st) 132284, ¶ 29, 408 Ill.Dec. 598, 66 N.E.3d 390. The specific legal question presented here—whether the rule in *McFadden* that an invalid conviction can serve as a predicate offense for a subsequent conviction should be applied in cases where the subsequent conviction is for AHC, rather than UUWF—is one this court has already considered a number of times. We first held, in *People v. Perkins*, that the rule announced in *McFadden* indeed applies to convictions for AHC. *People v. Perkins*, 2016 IL App (1st) 150889, ¶ 10, 407 Ill.Dec. 283, 63 N.E.3d 207. And in the year since *Perkins* was decided, this court has repeatedly reaffirmed that holding. See, e.g., *People v. McGee*, 2017 IL App (1st) 141013-B, ¶¶ 19-27, 415 Ill.Dec. 407, 82 N.E.3d 611; *People v. Cowart*, 2017 IL App (1st) 113085-B, ¶¶ 43-54; *People v. Fields*, 2017 IL App (1st) 110311-B, ¶¶ 38-49, 412 Ill.Dec. 523, 75 N.E.3d 503; *People v. Faulkner*, 2017 IL App (1st) 132884-B, ¶¶ 15-33, 411 Ill.Dec. 311, 73 N.E.3d 25.

¶ 17 Mr. Smith attacks the holding in these cases on two fronts. First, he insists that the United States Supreme Court's decisions in *Montgomery* and *Siebold* require us to disregard *McFadden*. In *Montgomery*, the Court held that the prohibition on mandatory life sentences without parole for juvenile offenders established in *Miller v. Alabama*, 567 U.S. 460, 465, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), was a new substantive rule that should be given retroactive effect. *Montgomery*, 577 U.S. at —, 136 S.Ct. at 734. The Court reiterated a point it had made over 100 years ago in *Siebold*, “that when a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful.” *Id.* at —, 136 S.Ct. at 729-30. See also *Siebold*, 100 U.S. at 376-77 (noting that a conviction under an unconstitutional law “is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment”).

¶ 18 We do not agree that the holding in *McFadden* is precluded or limited by either *Montgomery* or *Siebold*. As we have noted before, our supreme court was well aware of those cases when it issued its opinion in *McFadden*. See *McGee*, 2017 IL App (1st) 141013-B, ¶ 25, 415 Ill.Dec. 407,

82 N.E.3d 611 (noting that defense counsel in *McFadden* was granted leave to cite *Montgomery*—which in turn cites *Siebold*—as supplemental authority). In *Montgomery*, the United States Supreme Court merely reaffirmed that “states have no power to enforce a conviction or penalty barred by the Constitution.” *People v. Smith*, 2017 IL App (1st) 122370-B, ¶ 29, 411 Ill.Dec. 776, 74 N.E.3d 85 (citing *965 **131 *Montgomery*, 577 U.S. at —, 136 S.Ct. at 729-30). But the State here did not attempt to enforce Mr. Smith's invalid AUUW conviction; rather, it presented evidence of the *existence* of the conviction to establish an element of another crime. We have relied on this distinction to reject substantially similar arguments in other cases. See, e.g., *id.*; *Perkins*, 2016 IL App (1st) 150889, ¶ 9, 407 Ill.Dec. 283, 63 N.E.3d 207. Pursuant to *McFadden*, it is irrelevant that Mr. Smith might very well succeed if he availed himself of the judicial process to vacate his prior AUUW conviction. Mr. Smith failed to take such steps and the conviction thus remained on his record.

¶ 19 Presenting a more difficult question, Mr. Smith also contends that the AHC statute, which requires the State to prove the existence of two specific qualifying convictions, is qualitatively different from both the UUWF statute at issue in *McFadden* and the federal felon-in-possession statute in *Lewis*, which require only proof of a defendant's status as a felon to make the act of possessing a firearm illegal. Mr. Smith contends that the AHC statute is more like the penalty-enhancing recidivist statute at issue in *United States v. Bryant*, 579 U.S. —, —, 136 S.Ct. 1954, 1961, 195 L.Ed.2d 317 (2016). In that case, the Supreme Court held that prior convictions obtained in tribal court—where a defendant is not provided with counsel but where this is permissible under tribal law and thus constitutional—could still be used as predicate convictions for purposes of a state recidivist statute. *Id.* at —, 136 S.Ct. at 1966. At the same time, however, the Court reaffirmed the broader rule, first stated in *Burgett v. Texas*, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967), that it is impermissible for a conviction obtained in violation of the Constitution to be used in a subsequent proceeding “ ‘either to support guilt or enhance punishment for another offense.’ ” *Bryant*, 579 U.S. at —, 136 S.Ct. at 1962 (quoting *Burgett*, 389 U.S. at 115, 88 S.Ct. 258); see also *United States v. Tucker*, 404 U.S. 443, 447-48, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972) (remanding for resentencing where the trial court “gave specific consideration to the [defendant's] previous

convictions” during sentencing but where “two of those convictions were wholly unconstitutional”); *Loper v. Beto*, 405 U.S. 473, 483, 92 S.Ct. 1014, 31 L.Ed.2d 374 (1972) (plurality op.) (concluding that the *Burgett* rule against the use of uncounseled prior convictions to prove guilt was also intended to prohibit their use to impeach a defendant's credibility as a witness).

¶ 20 The premise for both the Supreme Court's decision in *Lewis* and our supreme court's decision in *McFadden* was that the UUWF statute and the federal felon-in-possession statute were different from general recidivist statutes. *McFadden*, 2016 IL 117424, ¶¶ 23, 29, 406 Ill.Dec. 470, 61 N.E.3d 74. Both employed criminal penalties to enforce what was essentially a civil prohibition against gun possession on all individuals with felon status. *Id.* Both courts viewed this status-based disability as one that could “ ‘cease only when the conviction upon which that status depend[ed] ha[d] been vacated.’ ” *Id.* ¶ 29 (quoting *Lewis*, 445 U.S. at 61 n.5, 100 S.Ct. 915). *Lewis* made clear that using a constitutionally invalid prior conviction as the basis for imposing a civil firearms disability in this way was “not inconsistent with *Burgett*, *Tucker*, and *Loper* [and] *** d[id] not ‘support guilt or enhance punishment.’ ” *Lewis*, 445 U.S. at 67, 100 S.Ct. 915 (quoting *Burgett*, 389 U.S. at 115, 88 S.Ct. 258).

¶ 21 We agree with Mr. Smith that the AHC statute is quite different from the statutes in *McFadden* and *Lewis*. A defendant in an AHC case is already “disabled” from having a gun by virtue of a first *966 **132 felony. The second felony required by the statute does not result in the imposition of any new disability; it simply increases—significantly—the criminal sanction used to enforce the disability. Here, Mr. Smith, who was already disqualified from possessing a gun because of his first qualifying felony conviction, now faces a Class X sentence based solely on his prior AUUW conviction, which the State does not dispute is constitutionally invalid under *Aguilar*. Under these circumstances, it is difficult to conclude that the invalid conviction is relied on for anything other than to “enhance punishment,” something the *Lewis* Court made clear is still prohibited under *Burgett*. *Id.*

¶ 22 The problem with Mr. Smith's reliance on *Burgett* and its progeny, however, is that the rule stated in those cases was limited some time ago by the Supreme Court, as it explained in *Custis v. United States*, 511 U.S. 485, 496, 114 S.Ct. 1732, 128 L.Ed.2d 517 (1994). There, the Court

ruled that, under the Armed Career Criminal Act of 1984 (18 U.S.C. § 924(e))—which requires enhanced sentences for those convicted of possessing firearms after having received three prior convictions for violent felonies or drug offenses—the government was entitled to rely on the defendant's prior convictions without considering whether those convictions were constitutionally invalid because the defendant had received ineffective assistance of counsel or because his guilty plea had not been voluntary. *Custis*, 511 U.S. at 496-97, 114 S.Ct. 1732. The Court refused to extend the right to mount a collateral attack on a prior conviction in later proceedings—the right contemplated in cases like *Burgett* and *Bryant*—beyond those cases where the defendant was denied the right to have appointed counsel, as established in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). *Custis*, 511 U.S. at 496-97, 114 S.Ct. 1732. Where, as here, a prior conviction is challenged on any non-*Wainwright* basis, the *Burgett* line of cases do not support the argument that it is unconstitutional to use the fact of the prior conviction to establish the elements of a subsequent crime.

¶ 23 Of course, just because something is constitutional does not mean that it is what our legislature intended. But on that score, we are bound by our supreme court's construction of the relevant statutory language in *McFadden*. There, the court concluded from the legislature's use of the past tense in the phrase “has been convicted” (720 ILCS 5/24-1.1(a) (West 2008)) that “[n]othing on the face of the [UUWF] statute suggests any intent to limit the language to only those persons whose prior felony convictions are not later subject to vacatur.” *McFadden*, 2016 IL 117424, ¶ 27, 406 Ill.Dec. 470, 61 N.E.3d 74. And as *McFadden* made clear, the maxim that a conviction is deemed valid until judicial process had declared it otherwise applies even to convictions under statutory provisions deemed void *ab initio*. *Id.* ¶ 31. As a matter of statutory interpretation, Mr. Smith provides us with no basis by which to distinguish the AHC statute, which also focuses on whether a defendant possessed a weapon “after having been convicted” of the predicate felonies (720 ILCS 5/24-1.7(a) (West 2008)), from the UUWF statute.

[3] ¶ 24 In sum, *McFadden* and *Custis* control the result in this case. Although Mr. Smith's arguments raise important distinctions between the AHC statute at issue in this case and the UUWF statute at issue in *McFadden*, we are not at liberty to reach a different result in this

case based on those distinctions. We are constrained on the one hand by the *McFadden* court's interpretation of the legislative text and, on the other, by limits placed on the *Burgett* line of cases by the United States Supreme Court in *Custis*. See *967 **133 *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 28, 410 Ill.Dec. 289, 69 N.E.3d 834 (“Where the [s]upreme [c]ourt has declared the law on any point, it alone can overrule and modify its previous opinion, and the lower judicial tribunals are bound by such decision and it is the duty of such lower tribunals to follow such decision in similar cases.” (Internal quotation marks and emphasis omitted.)); *People v. Battiste*, 133 Ill. App. 2d 62, 65, 272 N.E.2d 808 (1971) (noting that decisions of the United States Supreme Court likewise “have binding effect on all lower courts whether state or federal” (internal quotation marks omitted)). Under these authorities, it appears permissible to use a conviction held invalid under *Aguilar* as a predicate offense under the AHC statute.

¶ 25 As Mr. Smith acknowledges in his reply brief, his alternative request, that we hold this matter in abeyance pending the United States Supreme Court's disposition of the petition for a writ of *certiorari* filed in *McFadden*, is now moot, as that petition was denied on June 26, 2017. *People v. McFadden*, 2016 IL 117424, 406 Ill.Dec. 470, 61 N.E.3d 74, *cert. denied*, — U.S. —, 137 S.Ct. 2291, — L.Ed.2d — (2017).

¶ 26 Although we agree with our colleagues that evidence of a constitutionally invalid prior conviction to establish a predicate offense for a subsequent conviction is neither unconstitutional nor barred by the relevant statutory text, it now falls to the legislature to decide whether that is right. To be sure, the plight of an armed felon facing a lengthy sentence is likely to garner little sympathy. But the scenario presented by this case and others like it is troubling on a broader level. Conduct other than the possession of firearms was once criminalized and is now recognized as protected (see, e.g., *Loving v. Virginia*, 388 U.S. 1, 7-12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (state laws criminalizing interracial marriage); *Roe v. Wade*, 410 U.S. 113, 164, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (criminal abortion statutes). *Texas v. Johnson*, 491 U.S. 397, 420, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (state prohibitions on desecrating the American flag); *Lawrence v. Texas*, 539 U.S. 558, 577-79, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) (state laws criminalizing same-sex sexual activity)). It strikes us as wholly uncontroversial

that there must be a legislative safeguard to prevent the continued imposition of collateral consequences on individuals based on constitutionally invalid prior convictions.

¶ 27 The solution need not be an elaborate one. For example, the application notes to the federal sentencing guidelines, which assess “criminal history points” based on a defendant’s previous convictions, provide as follows:

“Reversed, Vacated, or Invalidated Convictions.— Sentences resulting from convictions that (A) have been reversed or vacated because of errors of law or because of subsequently discovered evidence exonerating the defendant, or (B) *have been ruled constitutionally invalid in a prior case* are not to be counted.” (Emphasis added.). U.S. Sentencing Guidelines Manual § 4A1.2 cmt. n.6. (U.S. Sentencing Comm’n 2016).

The Seventh Circuit has accordingly held that it is improper for a district court to assign points for a defendant’s prior conviction under the portion of the AUUW statute struck down in *Aguilar*. See, e.g., *United States v. Jenkins*, 772 F.3d 1092, 1098 (7th Cir. 2014).

¶ 28 As other members of this court have recognized, there is a significant injustice in placing the burden on a criminal defendant to clear his record of an unconstitutional conviction in order to avoid collateral consequences of that conviction. As *968 **134 the specially concurring justice in *People v. Spivey* stated:

“We cannot realistically expect the public to read judicial pronouncements and seek their own justice without assistance, or depend on defense attorneys to hunt up their old clients who might be affected by *Aguilar*. And why should criminal defendants—often poor, struggling, jobless, dependent on public funding for their defenses, unsophisticated, and mostly black or brown—bear the burden to file the necessary paperwork for vacating their convictions, when those convictions were caused by a legislature passing an ultimately unconstitutional statute?” *People v. Spivey*, 2017 IL App (1st) 123563, ¶ 24, 415 Ill.Dec. 338, 82 N.E.3d 542 (Hyman, J., specially concurring).

¶ 29 These concerns are greatly amplified where, as here, we are compelled by the legal principles espoused in binding precedent to extend the collateral consequences of an unconstitutionally void statutory provision to

situations involving truly life-altering consequences for criminal defendants. The maximum sentence for UUWF—10 years of imprisonment for a first offense and 14 years for a second—pales in comparison to both the 30-year maximum sentence that a defendant faces on an AHC charge and the 60-year maximum sentence available on an extended-term sentence for that charge. Compare 720 ILCS 5/24-1.1(e) (West 2012) with 720 ILCS 5/24-1.7(b) (West 2012), 730 ILCS 5/5-4.5-25(a) (West 2012), and 730 ILCS 5/5-8-2(a) (West 2012).

¶ 30 Accordingly, we join those of our colleagues who have called for a legislative solution to this troubling situation. See *People v. Somerville*, 2017 IL App (1st) 132202-UB, ¶ 17, 2017 WL 3158811 (“we incorporate the views expressed in both the majority opinion and special concurrence in [*Spivey*], regarding the need for a legislative solution to continuing effects of convictions under the statute found unconstitutional and void *ab initio* in *Aguilar*”); *Spivey*, 2017 IL App (1st) 123563, ¶ 15, 415 Ill.Dec. 338, 82 N.E.3d 542 (majority op.) (“the author agrees with the special concurrence that the ripple effects of *Aguilar* and *McFadden* are best resolved by the legislature”); *id.* ¶ 25 (Hyman, J., specially concurring) (“[t]he legislature should consider whether it is right that these old convictions, based on an unconstitutional statute, may be used to create ‘felon status’ in subsequent prosecutions”); *McGee*, 2017 IL App (1st) 141013-B, ¶ 33, 415 Ill.Dec. 407, 82 N.E.3d 611 (Hyman, P.J., specially concurring) (same).

¶ 31 B. One-Act, One Crime

[4] [5] [6] ¶ 32 Mr. Smith’s convictions for AHC and UUWF are both based on the same physical act: his unlawful possession of a single firearm on October 25, 2013. Mr. Smith contends, and the State agrees, that his conviction for UUWF must therefore be vacated in accordance with the one-act, one-crime rule. Pursuant to that rule, when a defendant is convicted of more than one offense for the same physical act, a “sentence should be imposed on the more serious offense and the less serious offense should be vacated.” *People v. Artis*, 232 Ill. 2d 156, 170, 327 Ill.Dec. 556, 902 N.E.2d 677 (2009). “Pursuant to Supreme Court Rule 615(b), this court may correct the mittimus without remanding the case to the trial court.” *People v. Pryor*, 372 Ill. App. 3d 422, 438, 309 Ill.Dec. 916, 865 N.E.2d 279 (2007) (citing Ill. S. Ct.

R. 615(b)). Accordingly, we vacate Mr. Smith's conviction for UUWF and correct the mittimus to reflect a single conviction for AHC and a corresponding sentence of six years, plus three years of MSR. As there is nothing in the record indicating that the vacated convictions had any effect on the separate sentence Mr. Smith received for AHC, it is unnecessary *969 **135 for us to remand for resentencing. *People v. Shelton*, 252 Ill. App. 3d 193, 209, 191 Ill.Dec. 827, 624 N.E.2d 1205 (1993).

¶ 33 CONCLUSION

¶ 34 For the foregoing reasons, we affirm Mr. Smith's AHC conviction and vacate his UUWF conviction.

¶ 35 Affirmed in part and vacated in part; mittimus corrected.

Justice Simon concurred in the judgment and opinion.

Justice Harris specially concurred, with opinion.

¶ 36 JUSTICE HARRIS, specially concurring.

¶ 37 I concur with my authoring colleague in holding that *McFadden* and *Custis* control the result in this case, and therefore affirm Mr. Smith's AHC conviction and vacate his UUWF conviction. Additionally, I concur in urging a legislative solution to prevent the imposition of collateral consequences based on constitutionally invalid prior convictions.

¶ 38 However, I do not join in paragraphs 27 through 30 of the opinion, nor the statements, suggestions, or quote from the concurring opinion in *People v. Spivey*, 2017 IL App (1st) 123563, 415 Ill.Dec. 338, 82 N.E.3d 542, contained therein. This discussion is *dicta* and not necessary for our determination here.

All Citations

2017 IL App (1st) 151643, 89 N.E.3d 960, 418 Ill.Dec. 126

APPENDIX B

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)
)
 Plaintiff-Appellee,)
)
 v.)
)
 ZACHARY SMITH,)
)
 Defendant-Appellant,)

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OCT 27 2017

No. 1-15-1643
DOCUMENT DEPARTMENT
Office of the Court Appellate Defender
725/531-1107

ORDER

This matter coming to be heard on the Defendant-Appellant's petition for rehearing and the Court being fully advised in the premises;

IT IS HEREBY ORDERED that the petition is denied.

Dated this _____ day of _____, 2017.

ORDER ENTERED

OCT 27 2017

APPELLATE COURT, FIRST JUDICIAL DISTRICT

John B. Jones
Justice

Mary Mikva
Justice

Frederick
Justice

B.

APPENDIX C



SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
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January 18, 2018

In re: People State of Illinois, respondent, v. Zachary Smith, petitioner.
Leave to appeal, Appellate Court, First District.
122894

The Supreme Court today DENIED the Petition for Leave to Appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on 02/22/2018.

Very truly yours,

Carolyn Toft Gosbell

Clerk of the Supreme Court

C.

✓

|
January 18, 2018

2018 WL 508423 (Table)
(This disposition of a Petition for Leave to Appeal
is referenced in the North Eastern Reporter.)
Only the Westlaw citation is currently available.
Supreme Court of Illinois.

PEOPLE State of Illinois, respondent,
v.
Zachary SMITH, petitioner.

No. 122894

Leave to appeal, Appellate Court, First District. 1-15-
1643

Opinion

*1 Petition for Leave to Appeal Denied.

All Citations

Slip Copy, 2018 WL 508423 (Table)

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