2017 IL App (1st) 131871-U
Order filed: September 29, 2017

FIFTH DIVISION

No. 1-13-1871

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 7917
	)	
JUAN HERNANDEZ,	)	Honorable
	)	William G. Lacy,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman concurred in the judgment.
Justice Lampkin concurred, in part, and dissented, in part.

ORDER

¶ 1 *Held*: We affirmed defendant's armed habitual criminal conviction, holding that trial counsel committed no ineffective assistance and that defendant's prior conviction for aggravated unlawful use of a weapon could serve as a predicate offense for the conviction. We vacated defendant's conviction and sentence for unlawful possession of a firearm by a street gang member under the one-act, one-crime rule.

¶ 2 Following a bench trial, defendant Juan Hernandez was found guilty of being an armed habitual criminal (AHC), two counts of unlawful possession of a firearm by a street gang member, two counts of unlawful use of a weapon by a felon (UUWF), and two counts of

aggravated unlawful use of a weapon (AUUW). The court sentenced him to eight years' imprisonment on the AHC offense and seven years' imprisonment for the unlawful possession of a firearm by a street gang member offense, to be served concurrently. The court merged the UUWF and AUUW convictions with the unlawful possession of a firearm by a street gang member conviction.

¶ 3 In 2015, we vacated on direct appeal defendant's AHC conviction because one of its predicate offenses was based on the subsection of the AUUW statute that was found to be unconstitutional in *People v. Aguilar*, 2013 IL 112116. *People v. Hernandez*, 2015 IL App (1st) 131871-U. Also, we affirmed defendant's conviction of unlawful possession of a firearm by a street gang member. *Id.*

¶ 4 Thereafter, our supreme court issued a supervisory order in September 2016, which denied the State's petition for leave to appeal but directed us to vacate our 2015 judgment and reconsider the merits of the appeal in light of *People v. McFadden*, 2016 IL 117424, to determine if a different result is warranted. The parties filed supplemental briefs with respect to *McFadden's* impact on this case. We now vacate our previous judgment and enter this order in its stead.

¶ 5 On appeal, defendant contends: (1) trial counsel was ineffective by failing to move to suppress evidence based on challenging the police officers' justification to stop the car defendant was driving; (2) his AHC conviction should be vacated because one of the predicate offenses, his 2005 AUUW conviction, was under a subsection of the statute that has been declared unconstitutional in *Aguilar*; (3) his merged UUWF and AUUW convictions should be vacated as void *ab initio* pursuant to *Aguilar*; (4) the State failed to prove his guilt of unlawful possession of a firearm by a street gang member where it presented no evidence to show the Spanish Cobras

met the statutory definition of a street gang by engaging in a course or pattern of criminal activity; (5) the offense of unlawful possession of a firearm by a street gang member violates the constitutional prohibition against cruel and unusual punishment; and (6) his convictions of AHC and unlawful possession of a firearm by a street gang member violate the one-act, one-crime rule.

¶ 6 For the reasons that follow, we affirm defendant's AHC conviction and vacate his conviction and sentence for unlawful possession of a firearm by a street gang member.

¶ 7 I. BACKGROUND

¶ 8 This cause arose from defendant's arrest on the evening of May 1, 2011, after Chicago police detective Jason Bala and his partner stopped the car defendant was driving and recovered a firearm. Defendant was charged with the offenses of AHC, UUWF, AUUW, and possession of a firearm by a street gang member.

¶ 9 At the June 2012 bench trial, Detective Bala testified that he had been with the police department for 10 years and had been assigned for 4 years as a gang officer with the department's organized crime bureau. His training included instruction on the different types of street gangs, the number of gangs and approximate number of membership in the city, and gang hierarchy, tattoos, symbols and colors. He had experience and contact with gang members on a daily basis, learned who they were, and made arrests involving gang members. Detective Bala and Officer Ralph Magallom were working together on the date of the incident. They were in plain clothes and an unmarked vehicle.

¶ 10 At about 11 p.m., they were driving east on Deming Place when they came up behind defendant, who was sitting in the driver's seat of a four-door 1991 Lincoln Town Car that was stopped in front of 4446 West Deming Place. The Lincoln was standing in the middle of that

narrow, one-way residential street, obstructing the path of traffic. Defendant was alone in the car. Detective Bala ran the Lincoln's license plate to check whether it was stolen. While the officers waited for a response from the Law Enforcement Agencies Data System (LEADS), defendant drove east on Deming Place, turned north onto Kostner Avenue, and then turned east onto Schubert Avenue. The officers followed defendant, and after LEADS responded that the Lincoln was not stolen, Officer Magallom, who was driving, activated his vehicle's lights and siren. Defendant pulled over near 4316 West Schubert Avenue.

¶ 11 ¶ 10 Detective Bala exited his vehicle and walked toward the passenger side of defendant's car while Detective Bala illuminated the area with his flashlight. Street lights also illuminated the scene. When Bala was 10 feet away from defendant's car, he saw defendant place a handgun underneath the bench backseat of the car with his right hand. Bala yelled "gun, gun, gun" to alert Officer Magallom, who was approaching the driver's side of defendant's car. Bala ordered defendant out of the car, and Magallom placed him in custody. Bala recovered the gun, with five live rounds, from underneath the backseat of the car. Defendant did not have a driver's license or any identification on him. While the officers waited 5 or 10 minutes for transport, a woman whom defendant claimed was the mother of his child arrived. Defendant gave her some speakers and an amplifier from the car. Officer Magallom drove defendant to the police station, and Detective Bala drove defendant's car, which still had the keys in the ignition, to the police station impound. Upon further investigation, the officers issued defendant a citation for driving while his license was suspended.

¶ 12 After defendant was given his *Miranda* warnings, he told the officers he was carrying the gun for protection because he had been shot at earlier that day, around 3:30 a.m., near 3800 West Fullerton Avenue. Defendant also said he was affiliated with the Spanish Cobras street gang for

the last seven years in the vicinity of Haddon and California Avenues. He said he was an enforcer for that gang and was on his way to meet a different faction of the Spanish Cobras when he was arrested. He said the Spanish Cobras and Latin Eagles street gangs were at war because "Pancake" and other members of the Spanish Cobras were "flipping" to the Latin Eagles. Defendant worked under "Fifty," who had about 11 soldiers working under him. During processing, Detective Bala noticed that defendant had symbols of the Spanish Cobras street gang tattooed on his chest and arms. The police took photographs of defendant's tattoos.

¶ 13 The parties stipulated that defendant did not possess a Firearm Owner's Identification (FOID) card. The State also introduced into evidence the self-authenticating documents of the registration and title transfer of defendant's 1991 Lincoln Town Car. Furthermore, the State submitted certified documents of defendant's prior convictions, and the parties stipulated that defendant was convicted on January 21, 2009, of UUWF in circuit court case number 07-CR-23880, and on January 22, 2005, of AUUW in circuit court case number 04-CR-27349.

¶ 14 Defendant testified that he was a member of the Spanish Cobras. Prior to the date of the incident at issue here, he helped Naomi Rivera purchase and sign title to the Lincoln Town Car. At the time of the incident, he pulled the Lincoln over in front of his cousin's house when he saw the police lights and heard the siren. He gave the officers his identification upon request and exited the Lincoln when the officers asked. The officers did not search him, but they placed him on the front fender of the Lincoln and took the car keys from his pocket. An officer opened the trunk and tore "the inside out." An officer also used the keys to unlock the passenger-side door and pulled a gun from the car. Defendant asserted that he never possessed the gun and had been driving the Lincoln only for about 40 minutes prior to being pulled over. His friend, Jose Lopez, had been driving the Lincoln before defendant. Defendant testified, however, that when he was

driving the Lincoln around 3:30 a.m. on the date of the incident, his girlfriend was shot in the leg through the car door, which bore several bullet holes from that shooting.

¶ 15 The trial court found defendant guilty of AHC, two counts of unlawful possession of a firearm by a street gang member, two counts of UUWF, and two counts of AUUW. The trial court also found that the testimony of Detective Bala was credible and was corroborated, in many respects, by defendant's testimony, which was somewhat incredible. The trial court denied defendant's posttrial motions. At the sentencing hearing, the court merged the UUWF and AUUW counts into the offense of unlawful possession of a firearm by a street gang member and sentenced defendant to seven years' imprisonment for that offense, to run concurrent to eight years' imprisonment for the offense of AHC. Defendant appealed.

¶ 16 II. ANALYSIS

¶ 17 On appeal, defendant contends: (1) trial counsel was ineffective by failing to move to suppress evidence based on challenging the police's justification to stop the car defendant was driving; (2) his AHC conviction should be vacated because one of the predicate offenses, his 2005 AUUW conviction, was under a subsection of the statute that has been declared unconstitutional by the Illinois Supreme Court; (3) his merged UUWF and AUUW convictions should be vacated as void *ab initio*; (4) the State failed to prove his guilt of unlawful possession of a firearm by a street gang member where it presented no evidence to show the Spanish Cobras met the statutory definition of a street gang by engaging in a course or pattern of criminal activity; (5) the offense of unlawful possession of a firearm by a street gang member violates the constitutional prohibition against cruel and unusual punishment; and (6) his convictions of AHC and unlawful possession of a firearm by a street gang member violate the one-act one-crime rule.

¶ 18 A. Ineffective Assistance of Counsel

¶ 19 Defendant argues he received ineffective assistance of counsel because trial counsel failed to file a motion to suppress evidence challenging the legality of the traffic stop that resulted in the discovery of the gun in the car, defendant's arrest, and his statement to the police after his arrest. According to defendant, the traffic stop was illegal because there was no evidence he committed any parking or standing infraction that would have justified the stop and the officers could not have had any reasonable suspicion that he had committed a crime. Defendant argues that even if he had been double-parked, that infraction would not have justified the traffic stop because parking infractions have been decriminalized in the City of Chicago. Specifically, defendant cites section 9-64-230 of the Municipal Code of Chicago (2011) for the propositions that a vehicular standing or parking violation of the traffic code shall be a civil offense punishable by fine and no criminal penalty or civil sanction other than that prescribed in the municipal code shall be imposed. Although defendant acknowledges that it is a violation of the Illinois Vehicle Code to "stop, stand or park a vehicle *** [o]n the roadway side of any vehicle stopped or parked at the edge or curb of a street" (625 ILCS 5/11-1303(a)(1)(a) (West 2010)), he argues the police could not have discerned during the limited time frame whether his car was temporarily halted to receive or discharge passengers and, thus, the officers could not have developed a reasonable suspicion that his car was unlawfully stopped or standing in the street.

¶ 20 Defendant also argues his posttrial counsel was ineffective for failing to demonstrate to the trial court that trial counsel's misunderstanding of the law resulted in his decision not to file a suppressive motion. Specifically, trial counsel testified at the hearing on defendant's posttrial motion alleging ineffective assistance of counsel that counsel did not believe defendant had standing to file a motion to suppress because defendant asserted that he never possessed the gun.

¶ 21 In determining whether a defendant was denied effective assistance of counsel, we apply the familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. To demonstrate performance deficiency, a defendant must establish that counsel's performance fell below an objective standard of reasonableness. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). In evaluating sufficient prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. If either prong of the *Strickland* test cannot be shown, then the defendant has not established ineffective assistance of counsel. *Id.* at 697.

¶ 22 We conclude that defendant's claim of ineffectiveness of trial counsel fails because counsel was not deficient where any motion to suppress would have been futile because the traffic stop was proper. See *People v. Glisson*, 359 Ill. App. 3d 962, 974 (2005) (an attorney's performance will not be deemed ineffective for failing to file a futile motion); accord *People v. Stewart*, 365 Ill. App. 3d 744, 750 (2006). Accordingly, defendant cannot meet his burden of establishing prejudice because he fails to show a reasonable probability that the outcome of the proceeding would have been different if trial counsel filed the motion to suppress.

¶ 23 The fourth amendment to the United States Constitution guarantees the right of the people to be secure against unreasonable searches and seizures. U.S. Const., amend. IV. "Reasonableness under the fourth amendment generally requires a warrant supported by

probable cause" (*People v. Johnson*, 237 Ill. 2d 81, 89 (2010)), but the Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968), recognized an exception to the warrant requirement. Pursuant to *Terry*, "an officer may, within the parameters of the fourth amendment, conduct a brief, investigatory stop of a citizen when the officer has a reasonable, articulable suspicion of criminal activity, and such suspicion amounts to more than a mere 'hunch.' " *People v. Gherna*, 203 Ill. 2d 165, 177 (2003) (citing *Terry*, 392 U.S. at 27). The Illinois legislature has codified the *Terry* standards in section 107-14 of the Code of Criminal Procedure of 1963 (Criminal Code). 725 ILCS 5/107-14 (West 2010) (a peace officer, after identifying himself, may stop any person in a public place for a reasonable period of time when the officer reasonably infers from the circumstances that the person is committing, is about to commit, or has committed an offense). Defendant has the burden of demonstrating an illegal search or seizure. *People v. Buss*, 187 Ill. 2d 144, 204 (1999).

¶ 24 Not every encounter between the police and a private citizen results in a seizure. *People v. Luedemann*, 222 Ill. 2d 530, 544 (2006). "Courts have divided police-citizen encounters into three tiers: (1) arrests, which must be supported by probable cause; (2) brief investigative detentions, or '*Terry* stops,' which must be supported by a reasonable, articulable suspicion of criminal activity; and (3) [consensual] encounters that involve no coercion or detention and, thus, do not implicate fourth amendment interests." *Id.*

¶ 25 Here, the officers' stop of defendant was justified under *Terry*. Section 11-1301 of the Illinois Vehicle Code provides, in pertinent part:

> "(a) Outside a business or residence district, no person shall stop, park or leave standing any vehicle, whether attended or unattended, upon the roadway when it is practicable to stop, park or leave such vehicle off the roadway, but in every event an unobstructed width of the highway opposite a standing vehicle shall be left for the free

> passage of other vehicles and a clear view of such stopped vehicle shall be available from a distance of 200 feet in each direction upon such highway." 625 ILCS 5/11-1301(a) (West 2010).

¶ 26 The fourth amendment does not prohibit a warrantless arrest for minor traffic violations that are punishable only by a fine. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). Pursuant to the authority codified in both the Criminal Code and the Illinois Vehicle Code, "police officers have additional authority to place a defendant under custodial arrest for committing a traffic infraction that is punishable only by a fine." *People v. Taylor*, 388 Ill. App. 3d 169, 178 (2009) (citing 725 ILCS 5/107-2(1)(c) (West 2010)), (a police officer may arrest someone when "[h]e has reasonable grounds to believe that the person is committing or has committed an offense") and 625 ILCS 5/16-102(a) (West 2010), ("The State Police shall patrol the public highways and make arrests for violation of the provisions of this Act.")).

¶ 27 Contrary to defendant's argument on appeal, the record establishes that the police did not stop defendant for merely violating a municipal parking ordinance. Detective Bala testified that defendant was in his car, which was stopped in the middle of a narrow, residential one-way street with cars parked on both sides of the street so that no other cars could pass around defendant's car. It was late at night, so the officers requested a LEADS report before stopping the vehicle. However, before they could obtain the LEADS report, defendant drove away, so the officers followed him a short distance and then curbed his vehicle immediately after they obtained the LEADS report. The officers had a legitimate reason for the delayed stop because they were checking with LEADS to determine if the car had been reported as stolen for officer safety reasons. Moreover, the plain language of section 11-1301 does not have any minimum time requirement for standing in the roadway before a violation occurs. See *Glisson*, 359 Ill. App. 3d

at 973-74 (finding a legal basis to *Terry* stop the defendant for standing on the public highway in violation of section 11-1301 where the police officer saw the defendant's car at midnight stopped in the roadway near anhydrous ammonia storage tanks, and as the officer approached the car a man closed the trunk and entered the passenger side of the car, which then drove away). In addition, no evidence indicated that defendant was stopped in the roadway to discharge a passenger.

¶ 28 Viewing the circumstances in their entirety, we conclude that the officers' stop of defendant's car for violating the Illinois Vehicle Code was valid and that a motion to suppress would have been properly denied. Thus, defendant suffered no prejudice as a result of trial counsel's failure to file a motion to suppress, even assuming counsel's performance was objectively unreasonable. Accordingly, defendant's claim of ineffectiveness of trial counsel fails.

¶ 29 Similarly, defendant was not prejudiced by his posttrial counsel's failure to demonstrate to the trial court that trial counsel's misunderstanding of the law resulted in his decision not to file a suppression motion, where such a motion would have been denied. Accordingly, defendant's claim of ineffectiveness of posttrial counsel fails.

¶ 30 B. Armed Habitual Criminal Conviction

¶ 31 To sustain a conviction for AHC, the State was required to prove that defendant possessed a firearm after having been convicted of at least two qualifying predicate offenses. See 720 ILCS 5/24-1.7(a) (West 2010). At the trial, the State submitted certified documents of defendant's prior convictions, and the parties stipulated that he was convicted of the statutory qualifying predicate offenses of UUWF on January 21, 2009, and AUUW on January 22, 2005.

¶ 32 Defendant argues the State failed to prove him guilty of being an AHC beyond a reasonable doubt because his 2005 AUUW conviction is void and cannot stand as a predicate offense to prove an essential element of the AHC offense.

¶ 33 Defendant's 2005 AUUW conviction was based on his carrying an uncased, loaded and immediately accessible firearm while not on his land or in his abode. 720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2004). After his 2012 AHC conviction, our supreme court in *Aguilar*, 2013 IL 112116, ¶ 21, found that the same subsection of the AUUW statute, at issue in the present case, was facially unconstitutional because it amounted to a wholesale statutory ban on the exercise of a personal right to keep and bear arms beyond the home. Defendant argues that, pursuant to *Aguilar*, his 2005 AUUW conviction is void *ab initio* and, thus, cannot stand as an essential element of his AHC conviction so that his AHC conviction must be vacated.

¶ 34 *McFadden* is dispositive. In *McFadden*, the defendant was convicted of UUWF based on his possession of a firearm after having been convicted of AUUW. *McFadden*, 2016 IL 117424, ¶ 1. On appeal, the defendant argued that his UUWF conviction must be vacated because it was predicated on his prior AUUW conviction, which was entered under the section of the statute that was held facially unconstitutional in *Aguilar* and, thus, the State failed to prove all the elements of the UUWF offense. *Id.* ¶ 8.

¶ 35 Our supreme court examined the language of the UUWF statute, which prohibits a person's knowing possession of a firearm after having been convicted of a felony. *Id.* ¶ 27 (citing 720 ILCS 5/24-1.1(a) (West 2008)). The court explained that the UUWF statute only requires the State to prove the defendant's felon status, and does not require the State to prove the predicate offense at trial. *Id.* The court noted that the proscription under section 24-1.1(a) of the UUWF statute is expressed in the past tense, applying to any person who "has been

convicted" of a felony (*id*. (citing 720 ILCS 5/24-1.1(a) (West 2008)), and that "[n]othing on the face of the statute suggests any intent to limit the language to only those persons whose prior felony convictions are not later subject to vacatur." *Id*.

¶ 36 The court further found that "the language of section 24-1.1(a) is 'consistent with the common-sense notion that a disability based upon one's status as a convicted felon should cease only when the conviction upon which that status depends has been vacated.' " *Id*. ¶ 29 (citing *Lewis v. United States*, 445 U.S. 55, 61 n. 5 (1980)). Additionally, the purpose of the UUWF statute is to "protect the public from persons who are potentially irresponsible and dangerous." *Id*. Thus, it is immaterial whether the predicate conviction ultimately turns out invalid. *Id*. The UUWF statute is not concerned with enforcing the predicate conviction, but rather is concerned with the role of that conviction as a disqualifying condition for the purpose of obtaining firearms. *Id*. Therefore, the court found that the UUWF statute is a "status offense," and that the legislature intended that the defendant clear his felon status through the judicial process by having his prior conviction vacated or expunged prior to obtaining firearms. *Id*.

¶ 37 The court further stated:

> "It is axiomatic that no judgment, including a judgment of conviction, is deemed vacated until a court with reviewing authority has so declared. As with any conviction, a conviction is treated as valid until the judicial process has declared otherwise by direct appeal or collateral attack. Although *Aguilar* may provide a basis for vacating defendant's prior 2002 AUUW conviction, *Aguilar* did not automatically overturn that judgment of conviction. Thus, at the time defendant committed the [UUWF] offense, defendant had a judgment of conviction that had not been vacated and that made it unlawful for him to possess firearms." *Id*. ¶ 31.

¶ 38 The court found that, although the defendant could seek to vacate his prior AUUW conviction as being void *ab initio* under *Aguilar*, that remedy would not alter the requirement under the UUWF statute that he clear his felon status prior to obtaining a firearm. *Id*. ¶ 37. Accordingly, the court concluded that the defendant's prior AUUW conviction properly served as proof of the predicate felony conviction for UUWF. *Id*.

¶ 39 We recently applied the *McFadden* analysis to an AHC conviction in *People v. Perkins,* 2016 IL App (1st) 150889. In *Perkins*, the defendant was convicted of AHC and filed a post-conviction petition alleging the State failed to prove him guilty beyond a reasonable doubt because his AHC conviction was predicated on the AUUW statute found facially unconstitutional under *Aguilar* and void *ab initio*. *Id*. ¶ 2. The trial court agreed, and granted the post-conviction petition. *Id*. The State appealed. *Id*. ¶ 3.

¶ 40 While the case was on appeal, our supreme court decided *McFadden*. The appellate court gave the parties the opportunity to brief *McFadden*'s impact. *Id*. ¶ 5. The defendant argued that *McFadden*'s reasoning was limited to the offense of UUWF, which requires the State to prove only his felon status and does not require proof of a specific felony conviction. *Id*. ¶ 6. The defendant argued that because the offense of AHC requires the State to prove that he was convicted of specific enumerated offenses, the AHC offense "imposes a conduct-based disability by allowing for harsher punishment based on a defendant's commission of specific acts." *Id*. The defendant argued that because the conduct of which he was previously convicted (possession of a firearm) was constitutionally protected, it cannot serve as the predicate for his AHC conviction. *Id*.

¶ 41 The appellate court disagreed:

> "We find this to be a distinction without a difference. In order to sustain its burden to prove that a defendant is an armed habitual criminal, the State need only prove the fact of the prior convictions of enumerated offenses [citations], just as the State need only prove the fact of a prior felony conviction to support a UUWF conviction. Nothing in the armed habitual criminal statute requires a court to examine a defendant's underlying conduct in commission of the enumerated offenses in order to find that the State has sustained its burden of proof. And because here, as in *McFadden*, [the defendant's] prior convictions had not been vacated prior to his armed habitual criminal conviction, they could properly serve as predicates for that conviction." *Id*. ¶ 7.

¶ 42 The appellate court next addressed the defendant's argument that *McFadden* need not be followed because the United States Supreme Court decision in *Montgomery v. Louisiana*, 577 U.S. _, 136 S. Ct. 718 (2016), mandated that his AHC conviction be vacated. *Perkins*, 2016 IL App (1st) 150889, ¶ 8. In *Montgomery*, the Supreme Court held that the prohibition against mandatory life sentences without parole for juvenile offenders was a substantive rule of constitutional law entitled to retroactive effect on collateral review. *Montgomery*, 577 U.S. at _, 136 S. Ct. at 734. The defendant argued that *Aguilar* was entitled to the same retroactive effect and that the State's reliance on his unconstitutional prior AUUW convictions violates *Montgomery*'s central premise: " 'There is no grandfather clause that permits States to enforce punishments the Constitution forbids. To conclude otherwise would undercut the Constitution's substantive guarantees.' " *Perkins*, 2016 IL App (1st) 150889, ¶ 8 (quoting *Montgomery*, 577 U.S. at _, 136 S. Ct. at 731)).

¶ 43 In analyzing the defendant's argument, the appellate court noted that the defendant was not seeking to vacate his prior unconstitutional AUUW conviction, but instead was challenging

his status as a convicted felon at the time of his trial for AHC and, as such, that *Montgomery* posed no constitutional impediment to the affirmance of his AHC conviction. *Id*. ¶ 9. The appellate court concluded that because the defendant's prior AUUW conviction had not been vacated at the time he possessed a firearm, it could serve as the predicate for his AHC conviction. *Id*. ¶ 10. See also *People v. McGee*, 2017 IL App (1st) 141013-B; *People v. Cowart*, 2017 IL App (1st) 113085-B; *People v. Fields*, 2017 IL App (1st) 110311-B; and *People v. Faulkner*, 2017 IL App (1st) 132884 (all of these cases, like *Perkins*, addressed the same arguments made by defendant here, and held that a defendant's prior AUUW conviction, which had not been vacated, could serve as a predicate offense for an AHC conviction).

¶ 44 In the present case, defendant's 2005 AUUW conviction was not vacated prior to his AHC conviction. Pursuant to *McFadden*, *Perkins*, *McGee*, *Cowart*, *Fields*, and *Faulkner*, we hold that defendant's prior AUUW conviction could serve as the predicate for his AHC conviction and, therefore, the defendant was proven guilty beyond a reasonable doubt.

¶ 45 Defendant argues that his UUWF and AUUW convictions should be vacated. We do not address defendant's arguments regarding his UUWF and AUUW findings of guilt because no sentences were imposed on those offenses. The record shows that the trial court merged those UUWF and AUUW offenses into, and imposed the sentence only on, the conviction of unlawful possession of a firearm by a street gang member. In the absence of a sentence, there is no final judgment and, therefore, defendant's challenge on appeal concerning the UUWF and AUUW offenses cannot be entertained by this court. *People v. Caballero*, 102 Ill. 2d 23, 51 (1984).

¶ 46 Finally, the State concedes that our affirmance of defendant's conviction of AHC requires that his conviction and sentence for unlawful possession of a firearm by a street gang

member be vacated under the one-act, one-crime rule. Accordingly, we vacate defendant's conviction and sentence for unlawful possession of a firearm by a street gang member.

¶ 47 III. CONCLUSION

¶ 48 For the foregoing reasons, we affirm defendant's conviction of being an armed habitual criminal and concurrent eight-year prison term. We vacate his conviction and sentence for unlawful possession of a firearm by a street gang member.

¶ 49 As a result of our disposition of this case, we need not address the other arguments on appeal.

¶ 50 Affirmed, in part, and vacated, in part.

¶ 51 JUSTICE LAMPKIN concurring, in part, and dissenting, in part.

¶ 52 Although I concur with the majority's analysis of defendant's claims of ineffective assistance of counsel, I respectfully dissent from the majority's decision to affirm defendant's AHC conviction and vacate his conviction of unlawful possession of a firearm by a street gang member. For the reasons that follow, I would vacate defendant's AHC conviction and affirm his conviction of unlawful possession of a firearm by a street gang member. I would also find that the State proved beyond a reasonable doubt his guilt of unlawful possession of a firearm by a street gang member, and that offense does not violate the constitutional prohibition against cruel and unusual punishment.

¶ 53 A. Armed Habitual Criminal Conviction

¶ 54 I would find that the State failed to prove defendant guilty of being an AHC beyond a reasonable doubt because his 2005 AUUW conviction is void and cannot stand as a predicate offense to prove an essential element of the AHC offense.[1]

¶ 55 Our supreme court addressed a similar issue in *McFadden*, 2016 IL 117424, where the defendant was convicted of three counts of armed robbery and two counts of UUWF based on robbing three different victims at gunpoint within a 24-hour period in 2008. For purposes of the UUWF charges, the defendant had stipulated at trial that he had been convicted in 2002 of AUUW. *Id.* ¶ 8. On appeal, this court held, *inter alia*, that his conviction of two counts of UUWF violated the one-act, one-crime doctrine. *People v. McFadden*, 2014 IL App (1st) 102939. This court also held that his 2002 AUUW conviction, which was based on the same statutory subsection subsequently found to be unconstitutional in *Aguilar*, could not be used to prove the fact of his felon status in 2008 to support a conviction of UUWF. *Id.*

¶ 56 Our supreme court, however, reversed this court's ruling in part and held that the defendant's 2002 AUUW conviction could stand as the predicate offense for his UUWF conviction. *McFadden*, 2016 IL 117424. *McFadden* reaffirmed the principle that the void *ab initio* doctrine renders a facially unconstitutional statute unenforceable and renders a conviction under that facially unconstitutional statute subject to vacatur. *Id.* ¶ 20. However, the defendant's status as a felon was not affected by *Aguilar* because his 2002 AUUW conviction was treated as valid until a court with reviewing authority declared that it was vacated. *Id.* ¶ 31. Thus, the 2002 AUUW conviction, which was treated as a valid felony conviction, made it unlawful for the defendant to possess firearms in 2008 when he committed the three armed robberies. *Id.* Because

[1] Defendant does not challenge the use of his 2009 UUWF conviction as one of the two qualifying predicate offenses to prove the AHC offense, and this court is bound to follow *McFadden*'s holding that a void AUUW conviction can be used to prove a defendant's felon status under the statute defining the UUWF offense.

the defendant had not cleared his felon status before obtaining a firearm in 2008, his 2002 AUUW conviction properly served as proof of the predicate felony conviction for UUWF. *Id.* ¶¶ 21, 37.

¶ 57 In reaching that conclusion, *McFadden* reviewed the plain language of the UUWF statute, which makes it unlawful for a person to knowingly possess any firearm "if the person has been convicted of a felony" under the laws of Illinois or any other jurisdiction. 720 ILCS 5/24-1.1(a) (West 2008). *McFadden* found that the broad statutory language required the State to prove only the defendant's felon status and not the predicate offense at trial. *McFadden*, 2016 IL 117424, ¶ 27 ("Nothing on the face of the statute suggests any intent to limit the language to only those persons whose prior felony convictions are not later subject to vacatur."). *McFadden* also noted that the purpose of the UUWF statute was to protect the public from potentially irresponsible and dangerous people and thus it was "immaterial whether the predicate conviction 'ultimately might turn out to be invalid for any reason.' " *Id.* ¶ 29 (quoting *Lewis*, 445 U.S. at 62). The UUWF statute was not concerned with prosecuting or enforcing the prior conviction but, rather, was concerned with the role of that conviction as a disqualifying condition for the purpose of obtaining firearms. *McFadden*, 2016 IL 117424, ¶ 29. "Accordingly, *** [the offense of UUWF] is a status offense, and the General Assembly intended that a defendant must clear his felon status before obtaining a firearm." *Id.* Moreover, requiring a defendant to clear his felony record before possessing a firearm served the policy and purpose of the UUWF statute. *Id.* ¶ 30 (a defendant may not resort to self help by first obtaining a firearm and later try to assert the invalidity of the prior conviction as a defense to a prosecution for UUWF).

¶ 58 *McFadden* noted the Supreme Court addressed a similar question in *Lewis*, 445 U.S. 55, where the defendant possessed a firearm at the time of his arrest on probable cause in 1977 after

receiving a felony conviction in 1961. The defendant argued that he could not be convicted under a federal statute for unlawfully possessing a gun due to his status as a convicted felon because his 1961 felony conviction was obtained without counsel or a valid waiver of counsel, as required by *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Lewis* held that the government could use the defendant's constitutionally infirm 1961 felony conviction as the predicate felony. *Lewis*, 445 U.S. at 65.

¶ 59 Specifically, *Lewis* reviewed the plain language of the federal statute, which provided, in pertinent part, that "[a]ny person who *** has been convicted by a court of the United States or of a State *** of a felony, *** and who *** possesses *** any firearm shall be fined *** or imprisoned for not more than two years, or both." 18 U.S.C.A. App. 1 § 1202(a)(1) (repealed by Pub. L. 99-308, § 104(b) and amended and recodified at 18 U.S.C.A. § 924(e) (eff. May 19, 1986)). *Lewis* found that the sweeping and unambiguous statutory language directed its proscription at any person who "has been convicted" in this country of a felony; no modifier was present and nothing suggested any restriction on the scope of the term "convicted." *Lewis*, 445 U.S. at 60. Although other provisions of the statute contained numerous exceptions for certain people like a prison inmate entrusted with a firearm due to certain duties or a person who received a pardon and was expressly authorized to possess a firearm, section 1202(a)(1) made no exception for a person whose outstanding felony conviction ultimately might turn out to be invalid for any reason. *Id.* at 62. *Lewis* noted that the absence of any restrictive language in section 1202(a)(1) stood in contrast to other federal statutes that explicitly permitted a defendant to challenge by way of defense the validity or constitutionality of the predicate offense. *Id.* (citing the Dangerous Special Offender Sentencing Act, 18 U.S.C. § 3575(e), which provided for enhanced sentences where the defendant had committed a prior felony as part of a pattern of

criminal conduct, and the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 851(c)(2), which provided proceedings to challenge the constitutionality of a prior conviction).

¶ 60 Although *Lewis* found that the language of section 1202(a)(1) was unambiguous, *Lewis* added that nothing in the legislative history of section 1202(a)(1) suggested that Congress was willing to allow a defendant to question the validity of his prior conviction as a defense to a charge under section 1202(a)(1). *Lewis*, 445 U.S. at 62. The legislation "was a sweeping prophylaxis, in simple terms, against the misuse of firearms" and was enacted in response to the rise in the 1960s of political assassinations, riots, and other violent crimes involving firearms. *Id.* at 63. *Lewis* noted that the minimal legislative history available showed the senator who was the sponsor and floor manager of the legislation stated that a person could possess a gun until his first felony conviction and then he was denied the right to possess a firearm in the future unless he was pardoned and expressly authorized to possess a firearm. *Id.* Also, the structure of simultaneously enacted and similar legislation, which proscribed shipping or transport of a firearm in interstate or foreign commerce by a person under indictment for or convicted of a felony even if he was subsequently acquitted of the felony charge, indicated that the scope of the disability under section 1202(a) for the much more significant fact of a felony conviction was not limited to a "validly convicted felon." *Id.* at 64. Finally, *Lewis* noted that the convicted felon's access to statutory remedies to remove the disability or state court proceedings to challenge the prior conviction suggested Congress intended the defendant to clear his felon status before obtaining a firearm. *Id.*

¶ 61 Here, defendant argues *McFadden* and *Lewis* support the proposition that the mere fact of a prior conviction, even if that prior conviction is invalid, can be used as a predicate offense for

regulatory types of statutes like the UUWF statute, which essentially establishes a civil firearm disability, because the focus of regulatory statutes is on the mere fact of the conviction to prevent dangerous people from possessing firearms, and, thus, the reliability of the predicate conviction is immaterial. Defendant asserts, however, that invalid prior convictions cannot stand as a predicate offense for statutes with a punitive purpose (*i.e.*, to support guilt or impose harsher punishments on certain types of repeat offenders who have committed specific serious crimes) like the AHC statute because a punitive statute focuses on the reliability of the prior conviction, and, thus, an invalid prior conviction cannot be deemed immaterial.

¶ 62 Defendant's argument presents a matter of statutory interpretation. The construction of a statute is a question of law, which is reviewed *de novo. In re Estate of Dierkes,* 191 Ill. 2d 326, 330 (2000). The primary objective of statutory construction is to ascertain and give effect to the legislature's intent, presuming the legislature did not intend to create absurd, inconvenient or unjust results. *Michigan Avenue National Bank v. County of Cook,* 191 Ill. 2d 493, 503-04 (2000); *People v. Williams,* 2016 IL 118375, ¶ 15. The best indication of legislative intent is the statutory language, which must be given its plain and ordinary meaning. *Illinois Graphics Co. v. Nickum,* 159 Ill. 2d 469, 479 (1994). Where the language is clear and unambiguous, this court will apply the statute without resort to further aids of statutory construction. *Davis v. Toshiba Machine Co., America,* 186 Ill. 2d 181, 184–85 (1999). "However, where the meaning of a statute is unclear from the statutory language itself, a court may look beyond the language employed and consider the purpose of the law, the evils that law was designed to remedy [citation], as well as legislative history to discern legislative intent [citation]." *In re B.C.*, 176 Ill 2d 536, 542-43 (1997). When construing criminal statutes, the rule of lenity requires that any ambiguity must be resolved in that manner which favors the accused. *People v. Jones,* 223 Ill. 2d

569, 581 (2006). However, this rule must not be stretched so far as to defeat the legislature's intent. *Id.*

¶ 63 The language of section 24-1.7(a) of the AHC statute—the controlling statute under which defendant was convicted in the present case—provides that 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" certain offenses, including UUWF and AUUW. 720 ILCS 5/24-1.7(a) (West 2010). Unlike the sweeping statutory language at issue in *McFadden* and *Lewis*, which was directed at any person who has been convicted of a felony, section 24-1.7(a) restricts the scope of the statute to a person who has at least two felony convictions. Furthermore, whereas any type of felony could stand as the predicate offense in *McFadden* and *Lewis*, a conviction of AHC is restricted to particular felonies, *i.e.*, a forcible felony, UUWF, AUUW, aggravated discharge of a firearm, vehicular hijacking, aggravated vehicular hijacking, aggravated battery of a child, intimidation, aggravated intimidation, gunrunning, home invasion, aggravated battery with a firearm, and any violation of the Illinois Controlled Substances Act or the Cannabis Control Act that is punishable as a Class 3 felony or higher. 720 ILCS 5/24-1.7(a) (1)-(3) (West 2010).

¶ 64 In *McFadden*, our supreme court construed language in the UUWF statute wherein our legislature used the present perfect verb tense to describe the offender as a person who "*has been convicted* of a felony." (Emphasis added.) 720 ILCS 5/24-1.1(a) (West 2008). However, in the AHC statute at issue here, our legislature used the progressive form of the present perfect participle—*having been convicted*—to qualify the offender. This variation is not without significance.

¶ 65 The present perfect tense, which was used in the UUWF statute, is generally used to express a finished action that happened at an unspecified time before now or a condition or state that started in the past and continues in the present. See John C. Hodges & Mary E. Whitten, *Harbrace College Handbook* 88 (9th ed. 1982) (the present perfect tense indicates sometime before now, e.g. "I **have seen** the movie." or sometime up to now, e.g., "He **has used** his savings wisely."); Robert A. Farrell, *Why Grammar Matters: Conjugating Verbs in Modern Legal Opinions*, 40 Loy. U. Chi. L.J. 1, 19 (2008) ("The present perfect tense refers to action already completed or continuing in the present, e.g., 'John has written the letter' or 'John has lived here for many years.' ") (*citing* Andrea A. Lunsford, *The St. Martin's Handbook* 625-31 (5th ed. 2003)). S*ee also* Merriam-Webster's Collegiate Dictionary 862 (10th ed. 1998) (defining "perfect" as "of, relating to, or constituting a verb form that expresses an action or state completed at the time of speaking or at a time spoken of").

¶ 66 "The English language also has progressive verb forms, which are verb phrases consisting of a form of *be* plus an *–ing* verb (the present participle). These phrases denote an action in progress." Hodges & Whitten, *supra*, at 80. See also Farrell, *supra*, at 19 ("The progressive form of the present tense represents continuing action, e.g., "John *is running*."). In the AHC statute, the present perfect progressive participle *having been convicted* expresses an action that started in the past and continued until recently or is continuing at the present time. See https://www.grammarly.com (last visited Sept. 13, 2017); www.ef.edu (last visited Sept 13, 2017). S*ee also* Merriam-Webster's Collegiate Dictionary 932 (10th ed. 1998) (defining "progressive" as "of, relating to, or constituting a verb form that expresses action or state in progress at the time of speaking or a time spoken of").Thus, the legislature's use of the present perfect tense in the UUWF statute indicates the finished action of the defendant's conviction,

which may continue up to the present, whereas the use of the present perfect progressive in the AHC statute indicates the continuous nature of the defendant's conviction.

¶ 67 The Supreme Court has stated that although it "does not review congressional enactments as a panel of grammarians[, it does not] regard ordinary principles of English prose as irrelevant to a construction of those enactments" (*Flora v. United States*, 362 U.S. 145, 150 (1960)), and "Congress' use of verb tense is considered significant in construing statutes" (*United States v. Wilson*, 503 U.S. 329, 333 (1992)). Here, the legislature did not mirror the *has been convicted* language of the UUWF statute when the legislature enacted the AHC statute; instead the legislature chose language—*having been convicted*—that refers to the continuous nature of the past action and could suggest the legislature intended to limit the language to only those persons whose prior felony convictions were not later subject to vacatur. Accordingly, I would find that section 24-1.7(a) is ambiguous because it is capable of being understood by reasonably well-informed persons in two or more different ways. See *People v. Williams*, 2016 IL 118375, ¶ 30. This section could be read either to permit outstanding qualifying types of felony convictions to stand as a predicate conviction to prove the offense of AHC, or that predicate conviction must be both outstanding and constitutionally valid. Because the statute is ambiguous on this issue, the court must resort to other construction aids.

¶ 68 The legislative history of the AHC statute shows that the new criminal offense of being an armed habitual criminal, which is a Class X felony with a sentencing range of 6 to 30 years' imprisonment, was enacted in 2005. Pub. Act 94-398 § 5 (eff. Aug. 2, 2005) (adding 720 ILCS 5/24-1.7). The minimal relevant legislative debate about the passage of the AHC statute shows that the sponsor of the legislation, Representative Brosnahan, stated that the bill was introduced to make the Illinois penalties for illegal possession of a firearm commensurate with the usually

much more severe federal penalties. 94th Ill. Gen. Assem., House Proceedings, April 11, 2005, at 21. Thus, unlike *McFadden*'s assessment that the purpose of the UUWF statute—"to protect the public from persons who are potentially irresponsible and dangerous"—rendered it "immaterial whether the predicate conviction 'ultimately might turn out to be invalid for any reason' " (*McFadden*, 2016 IL 117424, ¶ 29, quoting *Lewis*, 445 U.S. at 62), here, some legislative history of the AHC statute reflects an intent to impose more severe penalties on recidivist defendants commensurate with the more severe sentences found in federal law. Under these circumstances, it could not be considered immaterial if the predicate conviction ultimately is found to be constitutionally invalid and void *ab initio*. See *Burgett v. Texas*, 389 U.S. 109, 115 (1967) (a prior felony conviction invalid under *Gideon* was void and could not be used against the defendant to either support his guilt or enhance his punishment under a State's recidivist statute); *United States v.Tucker*, 404 U.S. 443 (1972) (a prior conviction invalid under *Gideon* could not be considered by a court in sentencing a defendant after a subsequent conviction); *United States v. Bryant*, 579 U.S. __ , 136 S. Ct. 1954, 1962, 195 L. Ed. 2d 317 (2016) (emphasizing the continued validity of *Burgett* and *Tucker*).

¶ 69 Because section 24-1.7(a) is ambiguous, it is appropriate to invoke the rule of lenity, which requires courts construing criminal statutes to resolve any ambiguity "in that manner which favors the accused." *Jones*, 223 Ill. 2d at 581. Applying the rule here, I would hold that section 24-1.7(a) requires that the predicate felonies must be both outstanding and constitutionally valid. I would not find that the legislature clearly intended to convict a person of being an armed habitual criminal when that person's predicate AUUW felony conviction was obtained in violation of the right to keep and bear arms and is in derogation of the principles of *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742

(2010), *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), and *Aguilar*, 2013 IL 112116, ¶¶ 19-20.

¶ 70 The State argues, and the majority agrees, that this court should follow the unbroken line of decisions in *McGee*, 2017 IL App (1st) 141013-B, ¶¶ 17-27, *Cowart*, 2017 IL App (1st) 113085-B, ¶¶ 43-54, *Fields*, 2017 IL App (1st) 110311-B, ¶¶ 38-47; *Faulkner*, 2017 IL App (1st) 132884, ¶¶ 15-33, and *Perkins*, 2016 IL App (1st) 150889, ¶¶ 6-10, where this court relied on *McFadden* to affirm the defendants' AHC convictions despite the fact that their predicate felony AUUW convictions were based on the unconstitutional subsection of the AUUW statute. Those cases, however, simply applied *McFadden*'s analysis of the UUWF statute to the AHC statute without construing the language or discussing the differences between the two statutes. Accordingly, I do not find the analysis in those cases persuasive and would not follow them.

¶ 71 I would hold that defendant's 2005 AUUW conviction, which was based on a statutory subsection found to be unconstitutional and is void *ab initio*, cannot stand as a predicate offense to support his AHC conviction. Therefore, I would vacate his AHC conviction and concurrent eight-year prison term. Accordingly, I also address defendant's arguments challenging his conviction of unlawful possession of a firearm by a street gang member.

¶ 72 B. Unlawful Possession of a Firearm by a Street Gang Member

¶ 73 Defendant argues the State failed to prove his guilt of unlawful possession of a firearm by a street gang member because the State failed to present evidence that the Spanish Cobras committed two or more gang-related offenses in Illinois since 1993 within five years of one another, and that at least one of those offenses was a felony. Defendant argues that although Detective Bala characterized the Spanish Cobras as a gang, he did not give sufficient evidence

about its activities to permit a rational trier of fact to conclude that it was a street gang as defined by statute.

¶ 74 When a defendant attacks his conviction on reasonable doubt grounds, the relevant question is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Collins,* 106 Ill. 2d 237, 261 (1985). The reviewing court must allow all reasonable inferences from the record in favor of the prosecution. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). The trier of fact bears the responsibility to assess the credibility of the witnesses, weigh the evidence presented, resolve conflicts in the evidence, and draw reasonable inferences from the evidence. *People v. Williams,* 193, Ill. 2d 306, 338 (2000). This court affords the trier of fact great deference (*People v. DePaolo,* 317 Ill. App. 3d 301, 306 (2000)), and will not set aside a conviction unless the evidence is so improbable or insufficient that there remains a reasonable doubt as to the defendant's guilt (*People v. Campbell*, 146 Ill. 2d 363, 374 (1992)).

¶ 75 To sustain a conviction of unlawful possession of a firearm by a street gang member, the State was required to prove, *inter alia*, that defendant was a member of a street gang as defined by the Illinois Streetgang Terrorism Omnibus Prevention Act (Act). See 720 ILCS 5/24-1.8 (West 2010). The Act defines a *streetgang* as "any combination, alliance, network, conspiracy, understanding, or other similar conjoining, in law or in fact, of 3 or more persons with an established hierarchy that, through its membership or through the agency of any member engages in a course or pattern of criminal activity." 740 ILCS 147/10 (West 2010). The Act defines a *course or pattern of criminal activity* to mean "2 or more gang-related criminal offenses committed in whole or in part within this State when: (1) at least one such offense was committed after the [January 1, 1993] effective date of this Act; (2) both offenses were

committed within 5 years of each other; and (3) at least one offense involved the solicitation to commit, conspiracy to commit, attempt to commit, or commission of any offense defined as a felony or forcible felony under the Criminal Code of 1961. 'Course or pattern of criminal activity' also means one or more acts of criminal defacement of property under section 21-1.3 of the Criminal Code of 1961, if the defacement includes a sign or other symbol intended to identify the streetgang." *Id.*

¶ 76 A *streetgang member* or *gang member* "means any person who actually and in fact belongs to a gang, and any person who knowingly acts in the capacity of an agent for or accessory to, or is legally accountable for, or voluntarily associates himself with a course or pattern of gang-related criminal activity, whether in a preparatory, executory, or cover-up phase of any activity, or who knowingly performs, aids, or abets any such activity." *Id.* Furthermore, *gang-related* means:

> "[A]ny criminal activity, enterprise, pursuit, or undertaking directed by, ordered by, authorized by, consented to, agreed to, requested by, acquiesced in, or ratified by any gang leader, officer, or governing or policy-making person or authority, or by any agent, representative, or deputy of any such officer, person, or authority:
>
> (1) with the intent to increase the gang's size, membership prestige, dominance, or control in any geographical area; or
>
> (2) with the intent to provide the gang with any advantage in, or any control or dominance over any criminal market sector, including but not limited to, the manufacture, delivery, or sale of controlled substances or cannabis; arson or arson-for-hire; traffic in stolen property or stolen credit cards; traffic in

prostitution, obscenity, or pornography; or that involves robbery, burglary, or theft; or

(3) with the intent to exact revenge or retribution for the gang or any member of the gang; or

(4) with the intent to obstruct justice, or intimidate or eliminate any witness against the gang or any member of the gang; or

(5) with the intent to otherwise directly or indirectly cause any benefit, aggrandizement, gain, profit or other advantage whatsoever to or for the gang, its reputation, influence, or membership." *Id*.

¶ 77 "Statutory language must be given its plain and ordinary meaning, and courts are not free to construe a statute in a manner that alters the plain meaning of the language adopted by the legislature." *Murray v. Chicago Youth Center*, 224 Ill. 2d 213, 235 (2007). The legislature expressly stated that it was not the intent of the Act "to interfere with the constitutionally protected rights of freedom of expression and association." 740 ILCS 147/5 (West 2010). The State may rely on circumstantial evidence, as long as it provides proof beyond a reasonable doubt of each element of the crime charged. *People v. Laubscher*, 183 Ill. 2d 330, 335-36 (1998). "However, there must be *some* evidence giving rise to a reasonable inference of defendant's guilt; the State may not leave to conjecture or assumption essential elements of the crime." (Emphasis in original.) *Id*. Furthermore, a witness, whether expert or lay, may provide an opinion on an ultimate issue in a case. *Richardson v. Chapman*, 175 Ill. 2d 98, 107 (1997); *People v. Jamesson*, 329 Ill. App. 3d 446, 460 (2002).

¶ 78 In *Jamesson*, 329 Ill. App. 3d at 450, the court found that the State met its burden to prove the defendant guilty of the misdemeanor offense of unlawful contact with a street gang

member where the police officer, who was qualified at the trial to testify as a gang evidence expert, testified that he arrested the defendant in an area designated as the territory of the Latin Counts street gang after seeing the defendant loitering with two other individuals the officer knew to be members of the Latin Counts. Moreover, the officer testified that the Latin Counts were a violent street gang that had been involved in numerous violent incidents involving narcotics, assaults, batteries, and aggravated batteries for a couple of years. *Id*. The court found the officer's testimony, which did not specify any incidents or dates of gang-related criminal offenses, sufficient to allow the trial court to conclude that the Latin Counts had engaged in a pattern or course of criminal activity under the definition set forth in the Act. *Id*. at 461.

¶ 79 Here, defendant admitted that he was a member of the Spanish Cobras, and Detective Bala testified about his training and experience as a gang officer for the past four years. Detective Bala had contact with gang members on a daily basis, knew the identity of gang members, was familiar with gang tattoos and their meaning, made arrests involving gang members, recognized defendant's tattoos as symbols of the Spanish Cobras, and identified the Spanish Cobras as a street gang. Furthermore, Detective Bala's testimony concerning defendant's statement to the police about being an enforcer and working under "Fifty," who had at least 11 soldiers working under him, established the hierarchy of the Spanish Cobra's alliance or network. Moreover, the State's evidence showed that defendant did not possess a FOID card and was in a vehicle on the street holding a loaded firearm that he attempted to conceal from the police, which was a felony offense. In addition, defendant's statement to the police established that the Spanish Cobras were a street gang that partook in violent conduct. Defendant told the police that the Spanish Cobras were at "war" with their rivals, the Latin Eagles, because members of the Spanish Cobras were "flipping" to the Latin Eagles. Defendant also admitted

that he had been fired at earlier that morning during a drive-by shooting, his girlfriend had been injured, and his car door sustained bullet holes. In addition, defendant admitted that at the time of his arrest he was carrying the gun for protection while he was en route to a meeting with another faction of the Spanish Cobras concerning the "war" with the Latin Eagles.

¶ 80 Defendant's statements to the police and trial testimony established that he engaged in criminal activity on behalf of the Spanish Cobras by possessing the gun without a FOID card and was acting as the Spanish Cobra's enforcer during its violent war with the Latin Eagles, which war was intended to increase the Spanish Cobras' size, prestige, dominance, or control of a geographical area. Moreover, this criminal activity occurred within the requisite 5-year time frame pursuant to the statutory definition of *a course or pattern of criminal activity*.

¶ 81 After reviewing the record in the light most favorable to the prosecution, I would conclude that a rational trier of fact could have determined beyond a reasonable doubt that defendant was guilty of the offense of unlawful possession of a firearm by a street gang member. The testimony of Detective Bala and defendant and reasonable inferences from the evidence support the trial court's finding that the Spanish Cobras were a street gang engaged in a pattern or course of criminal activity. Defendant's own words characterized the Spanish Cobras as a violent street gang that partook in violent conduct, and the trial court was free to accept Detective Bala's lay opinion that the Spanish Cobras were a street gang. See *Jamesson*, 329 Ill. App. 3d at 460 ("Although [the police officer] did not testify as to specific dates or specific incidents, the trial court was free to accept or reject [the officer's] opinions that the Latin Counts were a street gang that engaged in a course or pattern of criminal activity."). Accordingly, we affirm defendant's conviction of unlawful possession of a firearm by a street gang member.

¶ 82 C. Constitutionality of the Statute

¶ 83 Defendant argues the unlawful possession of a firearm by a street gang member statute is unconstitutional because it impermissibly criminalizes defendant's mere status as a gang member, in violation of the eighth amendment prohibition of the infliction of cruel and unusual punishments. U.S. Const., amend. VIII.

¶ 84 Statutes are presumed to be constitutional, and the party challenging the constitutionality of a statute bears the burden of rebutting this presumption and clearly establishing a constitutional violation. *People v. Funches*, 212 Ill. 2d 334, 339-40 (2004). "If reasonably possible, courts must construe a statute so as to affirm the statute's constitutionality and validity." *Id*. Defendant's constitutional challenge involves a facial attack of the statute, which is the most difficult challenge to mount, in that the challenger must establish that no set of circumstances exists under which the statute would be valid. *People v. Greco*, 204 Ill. 2d 400, 407 (2003).

¶ 85 One cannot constitutionally be punished because of one's status alone; criminal penalties require an *actus reus*. Compare *Robinson v. California*, 370 U.S. 660, 662-63 (1962) (a statute that made it a misdemeanor punishable by imprisonment for any person to be addicted to the use of narcotics was unconstitutional because it criminalized, not an act but rather, the person's status or condition of narcotic addiction, for which the offender could be prosecuted at any time before he reformed even though he never used or possessed any narcotics within the State and had not been guilty of any antisocial behavior there), with *Powell v. Texas*, 392 U.S. 514, 541-44 (1968) (a statute that criminalized public drunkenness was constitutional because it did not punish the mere status of chronic alcoholism but instead imposed a criminal sanction for public behavior and thus required the State to prove the defendant actually committed some proscribed act). See also, *People v. Clay*, 361 Ill. App. 3d 310, 327-28 (2005) (rejecting eighth amendment

challenge to insanity statute and finding that it did not punish the status of the mentally ill); *People v. Luckey*, 90 Ill. App. 2d 325, 331-32 (1967) (rejecting eighth amendment challenge to mandatory life sentence for sale of narcotics and finding it punished an act, not a status).

¶ 86 Defendant argues the unlawful possession of a firearm by a gang member statute is unconstitutional under the eighth amendment because he is exposed to an increased penalty solely based on his status as a gang member. Specifically, defendant argues that his conviction under the challenged statute is a Class 2 felony with a sentencing range of 3 to 10 years' imprisonment whereas the same conduct by a non-gang member under the AUUW statute carries a substantially lesser penalty as a Class 4 felony with a sentencing range of 1 to 3 years' imprisonment. Compare 720 ILCS 5/24-1.8 (West 2010), with 720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2010). Based on this increased penalty under the challenged statute, defendant concludes that it is his status as a gang member, not his conduct of unlawfully possessing a firearm without a valid FOID card, that is criminalized in violation of the eighth amendment.

¶ 87 I would reject defendant's eighth amendment challenge to the unlawful possession of a firearm by a street gang member statute. In order to sustain the conviction under this statute, the State had to prove that defendant: (1) possessed a firearm while on any street, road, alley, gangway, sidewalk, or any other lands, except when inside his own abode or fixed place of business; (2) did not have a valid FOID card; and (3) was a member of a street gang. 720 ILCS 5/24-1.8(a)(1) (West 2010). The plain language of the statute establishes that it does not merely criminalize a person's status as a street gang member. Rather, the statute punishes the act of unlawful possession of a firearm and, thus, contains the requisite *actus reus* and thereby passes constitutional scrutiny.

¶ 88 Defendant cites *Chicago v. Youkhana*, 277 Ill. App. 3d 101 (1995), where the appellate court held that a gang loitering ordinance was unconstitutional because it was unconstitutionally overbroad, was unconstitutionally vague, and unconstitutionally criminalized the status of being a gang member. However, defendant's reliance on *Youkhana* to support his eighth amendment challenge here is misplaced. After the State appealed the appellate court's ruling, both the Illinois and United States Supreme Courts affirmed without addressing the eighth amendment challenge to the ordinance's constitutionality and the defendant's contention that the ordinance created a status offense. *City of Chicago v. Morales*, 177 Ill. 2d 440 (1997); *aff'd*, 527 U.S. 41(1999). Both the Illinois and United States Supreme Courts found that the gang loitering ordinance was unconstitutionally vague because the ordinance's prohibition of loitering drew no distinction between innocent conduct and conduct calculated to cause harm. *Morales*, 177 Ill. 2d at 451-52; *aff'd* 527 U.S. at 55-60. Furthermore, the unlawful possession of a firearm by a street gang member statute contains a well-defined and culpable prohibited act—illegal gun possession—and thus has no parallel to the gang loitering ordinance cases, which lacked any illegal act in the elements of the offense.

¶ 89 D. One-Act One-Crime Rule

¶ 90 Defendant argues his convictions of AHC and unlawful possession of a firearm by a street gang member violate the one-act one-crime rule. Our supreme court has held that a defendant's conduct cannot result in multiple convictions if the convictions are based on precisely the same physical act and any of the offenses are included offenses. *People v. King*, 66 Ill. 2d 551, 566 (1977). Because I would vacate defendant's conviction of AHC, there could be no violation of the one-act one-crime rule.

¶ 91 For the foregoing reasons, I would vacate defendant's conviction of being an armed habitual criminal and concurrent eight-year prison term. I would affirm his conviction of unlawful possession of a firearm by a street gang member and seven-year prison term.