FOURTH DIVISION
December 14, 2017

No. 1-14-1331

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. 10 CR 00001
	)	
MARVIN RUSSELL,	)	Honorable
	)	Timothy Joseph Joyce,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Burke and Justice McBride concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction and sentence affirmed. Trial court did not penalize defendant at sentencing for demanding trial. Armed habitual criminal statute does not violate substantive due process and is not facially unconstitutional.

¶ 2 Three-year-old Jaquan Reed was accidentally shot and killed by a nine-year-old boy who found defendant Marvin Russell's gun under a pillow in his aunt's house, where Russell was staying as a guest. Russell was charged with armed habitual criminal (AHC) and unlawful use of a weapon by a felon (UUWF) in connection with this incident. After a Rule 402 conference, the trial judge offered him a ten-year sentence in exchange for a plea of guilty to one count of AHC. Russell rejected the offer. He was convicted after a bench trial and sentenced to twelve years.

¶ 3 Russell asks us reduce his sentence to ten years, contending that the trial judge punished him for rejecting the plea offer and demanding trial. He also contends that the AHC statute is facially unconstitutional, because it criminalizes innocent conduct and thus violates substantive due process. For the reasons that follow, we affirm.

¶ 4 In November 2013, the trial judge conducted a Rule 402 conference. Russell's case had been pending for more than four years at that time. On the record, the judge expressed his sharp disagreement with the State's position that the maximum sentence of thirty years was warranted. Initially, the judge was inclined to offer Russell a twelve-year sentence on a guilty plea; but after further negotiation by defense counsel, he agreed to an eleven-year sentence—which, as he noted on the record, would have to be served at eighty-five-percent time. As he would later explain in more detail, the judge reasoned as follows: Russell's largely nonviolent criminal record, apparent remorse, and cooperation with the police would have warranted a sentence at or near the six-year minimum; but those considerations had to be balanced against the tragedy of Jaquan's death.

¶ 5 Defense counsel noted in open court that there had been some confusion at the Rule 402 conference concerning Russell's background: The parties had represented that Russell had three prior felony convictions, when he had only two. The judge indicated that, if defense counsel was correct in this regard, he would consider reducing the offer to ten years, but he was not sure. The case was continued for Russell to consider the offer.

¶ 6 After the confusion regarding Russell's background was resolved—as we explain in more detail later, he had only two adult felonies, both drug possession cases, but also a misdemeanor domestic battery conviction—the judge reduced the offer to ten years. The State objected and requested a sentencing hearing. The court granted that request but said that, barring anything unexpected, it anticipated sticking to its offer of ten years.

¶ 7 That offer remained pending for over two months, while the State prepared its case in aggravation. Then, in late January 2014, when the case was on call for an expected plea, Russell told defense counsel that he was confused about "the 85 percent rule." The judge explained to Russell that he was not eligible for day-for-day credit and detailed how the truth-in-sentencing provisions would affect his time in custody. Russell acknowledged that he understood.

¶ 8 The judge laid out the terms of Russell's choice for him. He could plead guilty, in which case the State would present witnesses in aggravation. But unless the hearing revealed a "drastic change in circumstances" or something that the judge was "completely misled about," the offer of "ten upon a plea of guilty" would stand. Or Russell could go to trial. If convicted, he would be sentenced within the range of six to thirty years, but "[w]hat I would give you at that time, I don't know. I haven't heard the evidence." In making his decision, the judge cautioned, Russell should bear in mind that ten years is only "what I would give in light of the fact that you're of a mind to accept responsibility."

¶ 9 The case was passed for Russell to confer with defense counsel. When it was recalled, Russell said that he wanted to represent himself.

¶ 10 Upon hearing Russell's intentions, the judge pointedly expressed "chagrin" that he had "accommodated the parties" and "permitted [the case] to linger" for so long. He lamented, "all this is time that could have been spent getting the matter ready for trial * * * had the Defense not communicated to the Court that this was going to be resolved by a plea of guilty." The judge reiterated that Russell had a right to go to trial or to plead guilty, as he saw fit; and a right to have appointed counsel, to retain private counsel, or to represent himself, as he saw fit. "But I do want you to know," the judge cautioned, "that if you don't take the Court's offer today, you're not going to see it after today." The court continued to note that the parties and witnesses spent time

and effort preparing for trial, and it told defendant that if "you come back [on the day of trial] and you say well, now that you've got my feet to the fire, I'm changing my mind and I'll take the ten," that "[t]he ten is not going to be there." The judge implored Russell to "[t]hink about what your end-game is before you make this decision," emphasizing again that "you're not going to see ten on a plea of guilty after today."

¶ 11 Russell apologized for any appearance that he was wasting the court's time. He explained that he had been "waiting to go to trial" for four years and "never even intended to even do the 402 conference." He only agreed to consider a possible plea because defense counsel had assured him he would get a "reasonable" sentence "at 50 percent" that way.

¶ 12 Defense counsel disputed this claim, and further noted that he had "worked very hard," "getting almost on my knees begging" the judge to reduce his initial offer of twelve years, which the judge ultimately did. The prosecutor also remarked on how vigorously defense counsel had negotiated on Russell's behalf.

¶ 13 The judge expressed some "frustration" at this impasse, and at the prospect that Russell was "passing up an opportunity that's not coming [*sic*] to come back this way after today." The judge told Russell he could either accept the plea offer without further delay, or go to trial on a date certain of March 4, 2014—roughly six weeks away—with no possibility of a continuance, whether Russell kept his public defender, retained private counsel, or represented himself.

¶ 14 After the case was passed, Russell said that he wanted his public defender to represent him at a bench trial. The judge withdrew the plea offer and set the case for trial.

¶ 15 The evidence showed that on May 19, 2009, Russell was staying at the home of Kenyada Joseph and her sister LaToya Gaston. Gaston's nine-year-old nephew, Maurice Newman, lived

with them. Zenekia Buckhanan, a friend of Gaston, was also staying there as a guest, along with her two sons, the infant Darius and three-year-old Jaquan Reed.

¶ 16 Joseph testified that she saw Russell take a gun out of a kitchen cabinet and say, "I found what I was looking for." She did not see Russell return the gun to the cabinet.

¶ 17 Later that day, Jaquan and Maurice were playing in Gaston's bedroom. Gaston was in the room, along with Buckhanan and Darius. At some point, Jaquan and Maurice went next door, to Joseph's bedroom, where Joseph was talking on the phone and Russell was watching television.

¶ 18 Jaquan and Maurice were playing on the bed when a single gunshot was fired. Joseph turned around and saw Jaquan lying on the bed, motionless. Russell got up to check on Jaquan. He carried Jaquan to Buckhanan, said "Sorry," and left the apartment.

¶ 19 Jaquan died of a single gunshot wound to the chest. One nine millimeter shell casing was found on Joseph's bed, but no gun was recovered.

¶ 20 Russell was arrested and interrogated more than six months later. He did not testify, but his handwritten custodial statement was admitted into evidence. In that statement, he admitted that he had a gun in his possession on the night of the shooting. He had purchased the gun on the street, for protection, a few days earlier. At first, he left the gun in a kitchen cabinet, but after spending much of the day drinking, he put it under a pillow on Joseph's bed and forgot about it.

¶ 21 Jaquan and Maurice came into the room while Russell was watching television. He left to use the bathroom, and then went to Gaston's room to talk to the others. After he heard a gunshot, he went to Joseph's room and found Jaquan on the bed. He carried Jaquan to Buckhanan and said he was sorry, retrieved his gun from Joseph's room, left the apartment, and threw the gun on top of a garage in an alley. Russell stated that the gun he removed from Joseph's room and discarded in the alley was the same gun that he had taken out of the kitchen cabinet earlier that day.

¶ 22 The parties stipulated that Russell had two prior convictions in 2003 for manufacture and delivery of a controlled substance.

¶ 23 The trial judge convicted Russell of one count each of AHC and UUWF, and merged the lesser UUWF count into the more serious AHC conviction.

¶ 24 At sentencing, the State argued in aggravation that Russell's irresponsible acts caused the death of a child and extreme emotional distress to the child's family. The defense argued in mitigation that Jaquan's death was an accident and that Russell never meant to harm anyone.

¶ 25 Defense counsel also reminded the judge that he had an opportunity to review Russell's background for the Rule 402 conference, and had decided that an appropriate sentence would be ten years. Since then, Russell may have "decided to exercise his right to [a] bench trial," but that sentence, counsel argued, was still appropriate.

¶ 26 Russell spoke very briefly, sending his condolences to Jaquan's family.

¶ 27 Jaquan's death, the judge remarked, was not so much an "accident" as a "tragedy." True, Russell never meant any harm, but "the reason this is a crime is because bad things happen with guns," and here, "a three-year-old child lost his life because of the manner in which this gun was possessed." The State did not charge Russell with being "the proximate cause" of Jaquan's death in "the legal sense," but all the same, the judge concluded, "you just can't get away from the fact that this child died" when deciding upon an appropriate sentence.

¶ 28 The judge further remarked that while "it may not be perfectly proper argument to argue what the Court's offer of sentence in a 402 conference [was]," he did not "begrudge" counsel's argument on that point, since the judge himself had "actually concerted considerable efforts in trying to talk Mr. Russell into taking that" offer. "That being said," the judge continued, Russell "didn't plead guilty. He went to trial, did not accept responsibility for this in a legal sense."

¶ 29 The judge then reviewed Russell's criminal history, which included four adjudications as a juvenile for various drug possession offenses; two adult felonies, also for possession offenses, that resulted in "penitentiary" time; and a misdemeanor domestic battery conviction, for which Russell was sentenced to 180 days in jail. That history was "not * * * particularly horrid," since the offenses were largely nonviolent, and it would have warranted a sentence between six and eight years—if not for Jaquan's death.

¶ 30 Weighing these competing considerations, the judge sentenced Russell to twelve years.

¶ 31 Russell filed a motion to reconsider sentence, alleging that his "sentence improperly penalized [him] for exercising his right to trial." The trial court denied the motion.

¶ 32 Russell first contends that the trial court penalized him for exercising his right to a trial. He now asks us to give him the benefit of the trial court's plea offer by reducing his sentence to ten years. See Ill. S. Ct. R. 615(b)(4) (reviewing court may "reduce the punishment imposed by the trial court"). We decline to do so.

¶ 33 Although a trial court's sentencing decision is entitled to great deference and will not be disturbed absent an abuse of discretion, a court may not "penalize" or "punish" a defendant for rejecting a plea offer and demanding trial. *People v. Ward*, 113 Ill. 2d 516, 526 (1986); *People v. Moriarty*, 25 Ill. 2d 565, 567 (1962). A reviewing court will vacate or reduce a sentence only if it is "clearly evident" that it includes such a penalty. *Ward*, 113 Ill. 2d at 526; *Moriarty*, 25 Ill. 2d at 567; *People v. Young*, 20 Ill. App. 3d 891, 894 (1st Dist. 1974) (claim that defendant was penalized for demanding trial must be "clearly established by the evidence"). We base our review on the record as a whole, not on "a few words or statements of the trial court." *Ward*, 113 Ill. 3d at 526-27; *People v. Latto*, 304 Ill. App. 3d 791, 805 (1st Dist. 1999).

¶ 34 To be clear at the outset: A trial court *does* have discretion to impose a longer sentence after trial than it would have imposed in exchange for a guilty plea. *People v. Morgan*, 59 Ill. 2d 276, 281 (1974) (disparity "does not, standing alone, taint the sentence"). Not every disparity between a rejected plea offer and the sentence imposed after a trial reflects a penalty. Sometimes an upward departure is justified by new information—about the seriousness of the crime, the defendant's character and prospects for rehabilitation, or any aggravating circumstances that may have been present—that was unknown at the time of the offer but came to light in subsequent proceedings. *People v. Peterson*, 311 Ill. App. 3d 38, 53 (1st Dist. 1999); see also *Alabama v. Smith*, 490 U.S. 794, 801 (1989) (same justifications permit increased sentence when defendant withdraws guilty plea and is convicted at trial). These justifications do not apply here, since the judge did not base Russell's sentence on any information that was first revealed during the trial or post-trial proceedings. But it does not automatically follow that the judge had no basis for imposing a longer sentence than he had offered in exchange for a guilty plea.

¶ 35 When a defendant has pleaded guilty, that fact alone will usually "justify leniency"; but "after trial, the factors that may have indicated leniency as consideration for the guilty plea are no longer present." *Smith*, 490 U.S. at 801; *Peterson*, 311 Ill. App. 3d at 53; see also *Ward*, 113 Ill. 2d at 526 (it "may be proper * * * to grant concessions" to defendant who pleaded guilty). A disparity between a rejected plea offer and the sentence imposed after trial "may simply reflect an inducement given to a defendant to plea bargain in exchange for a sentence less than that which is ordinarily warranted," rather than a "penalty" for demanding trial. *People v. Parsons*, 284 Ill. App. 3d 1049, 1064 (1st Dist. 1996). Thus, even when the trial did not reveal anything pertinent to sentencing that was not known at the time of the plea offer, such a disparity may still

be proper. And indeed, we would generally *expect* there to be at least *some* disparity, for that is just what "leniency"—which makes plea bargaining possible—means.

¶ 36 But how do we know whether any such disparity reflects a proper offer of leniency or an improper penalty for demanding trial? For all we have said so far, "leniency" and "penalty" may well seem like competing descriptions of one and the same thing. There are two ways a penalty might make itself known in the record.

¶ 37 First, a judge's comments may evince an improper punitive motive by revealing hostility toward the defendant's demand for trial. We trust that such cases are rare, but they do arise from time to time. Perhaps the clearest example is the one cited by defendant, *Moriarty*, 25 Ill. 2d at 566-67, where the defendant rejected the court's offer of one year to life on a guilty plea; after losing at trial, he was sentenced to ten years to life. *Id.* at 566-67. At sentencing, the judge told him, in no uncertain terms, that "you should have * * * save[d] the State the trouble of calling a jury"; and that now "you're going to pay the penalty" for not doing so, as that decision "will cost you nine years additional" prison time. *Id.* at 567.

¶ 38 Those remarks left no doubt that the defendant's sentence was meant, at least in part, to be vindictive, to punish him for rejecting the plea offer and standing trial. *Cf. Smith*, 490 U.S. at 799-800 (where defendant withdraws plea and stands trial, higher sentence is proper unless it was a product of "actual vindictiveness on the part of the sentencing authority"). Similarly, in *Young*, 20 Ill. App. 3d at 894-95, after the defendant rejected a plea offer and was convicted at trial, the judge said that a "primary reason for increasing" his sentence was that he "shot the dice and they just came up craps." While not as blunt as the comment in *Moriarty*, where the judge actually called the increased sentence a "penalty," that comment nonetheless displayed the same hostility toward the defendant's assertion of his right to a trial.

¶ 39 Second, we can sometimes infer a punitive or vindictive intent from a disparity that is too gross to admit of any other credible explanation. For example, in *People v. Dennis*, 28 Ill. App. 3d 74 (1st Dist. 1975), the court had offered the defendant a sentence of two to six years after a plea conference at which it was "apprised of the State's 'provables' and of petitioner's criminal record." *Id.* at 76-78. After rejecting the plea and going to trial, the defendant received a sentence of forty to eighty years. *Id.* at 78. Because such a disparity could not be explained by leniency alone, and because the record disclosed no other basis for such a disparity, we concluded that the defendant's "extremely harsh sentence" could only be a "punishment" for demanding trial. *Id.* Notably, in reducing his sentence to six to eighteen years, we did not give him the full benefit of the rejected plea offer, as that offer included consideration to which he was no longer entitled. See *id.*

¶ 40 Here, the record does not clearly establish that Russell was penalized for demanding trial. First, the increase in Russell's sentence—from ten to twelve years—was by no means unreasonable. Nor is there any direct evidence, in trial judge's remarks, of an improper punitive motive. Russell contends otherwise, highlighting several remarks by the judge, including these:

- "The sentence I recommend upon a plea of guilty was the sentence I recommend upon that being accepted. * * * [I]f you don't take the court's offer today, you're not going to see it after today."

- "So if I spend time manipulating my trial calendar to make this happen, the State expends effort, expense, time out of its daily requirements, time out of witnesses' daily requirements, police officers' time and expense taking them away from home, family, their other responsibilities at work, and you come back and you say well, now that you've got my feet to the fire, I'm changing my mind and I'll take the ten. The ten is not going to be there."

- "And if I indicated that I was going to give you ten on a plea of guilty, and if I'm telling you that you're not going to see ten on a plea of guilty after today, start doing some thinking."

- "You might want to think of what you're trying to accomplish by not doing this [i.e, taking the offer of ten years on a guilty plea]".

- "[T]he Court indicated on a plea of guilty, sentence of ten years would be appropriate. Court actually concerted considerable effort in trying to talk Mr. Russell in[to] taking that * * * . That being said, Mr. Russell didn't plead guilty. He went to trial, did not accept responsibility for this in a legal sense."

¶ 41 Putting the second remark aside for the moment, the trial judge said little more than this: The ten-year offer was contingent upon Russell's guilty plea, and he should not expect the same leniency if he rejected it. Before trial, the judge repeatedly urged Russell to accept the offer; after trial, the judge noted that defendant would not receive the consideration that would have been due to him if he had "accept[ed] responsibility" by pleading guilty. These remarks do not strike us as vindictive or punitive. They indicate two things: first, that the lenient plea to incentivize a guilty plea would not be given when the incentive was not accepted; and second, that the mitigating factor of accepting responsibility, via a guilty plea, would not be credited to defendant when he did not, in fact, accept responsibility via a plea. The judge may have been assertive in urging Russell to accept the offer—and to accept it promptly—but that does not show that he ultimately punished Russell for rejecting it.

¶ 42 Returning to the second remark, Russell argues that the judge's references to the time and effort that would be expended by various parties in preparing for trial are evidence that the judge intended to punish him if he rejected the plea offer. We begin with our supreme court's reminder not to pluck a single word or passage from a court's comments but to focus on the record as a whole. See *Ward*, 113 Ill. 3d at 526-27. In a broader context, Russell's case was "not * * * particularly complicated," the judge noted, but it had been pending for over four years. The plea offer had been pending for over two months. The defense had indicated that the case would be resolved by a guilty plea, and it was on call for that purpose, when Russell suddenly said that he

wanted to proceed *pro se*—which would all but ensure that the case would not be resolved that day by the anticipated plea. The judge expressed "frustration" and "chagrin" that the case would need to be continued again, despite its age and long-pending plea offer. In this context, the judge told Russell to decide, without further delay, whether he would accept the offer. If Russell did not accept it that day—and trial preparation began in earnest—the judge would not be inclined to show the same leniency if he decided later on that he wanted to plead guilty: If Russell "change[d] his mind" about the plea offer when his "feet [were] to the fire," the pending offer of ten years "would not * * * be there" any more.

¶ 43 The judge, in other words, was setting an immediate deadline on the pending offer. That is not the same as expressing an intention to punish Russell with an undeserved sentence if he rejected that offer. Thus, we do not believe that the judge was issuing a "veiled warning," as Russell describes it, that he would receive a vindictive sentence if he went to trial.

¶ 44 Lastly, we find it telling that Russell's sentence had a clear precedent in the trial judge's reasoning: It was the same sentence that the judge was initially inclined to offer on a guilty plea, before defense counsel bargained the offer down, first to eleven years, and then to ten. Viewed from the trial judge's perspective, Russell's sentence might very well reflect leniency despite his rejection of the plea offer. It was not the full measure of leniency that defense counsel vigorously sought, but Russell had no right to that. In any event, it appears that the judge determined Russell's sentence *after trial* by returning to his own initial assessment of what would be a reasonable sentence to impose *on a guilty plea*. We are hard-pressed to call that a penalty for demanding trial. We therefore affirm Russell's sentence.

¶ 45 Russell next argues that the AHC statute violates substantive due process and is facially unconstitutional. He argues that the AHC statute criminalizes potentially innocent conduct,

because someone with two previous, AHC-qualifying convictions could still be issued a Firearm Owner's Identification (FOID) Card under limited circumstances, yet that person would still be subject to liability under the AHC statute if convicted of a third offense involving a gun, because having a valid FOID card is not a defense to the AHC statute. In that scenario, says defendant, someone who legitimately possesses the gun (by virtue of the FOID card) could be convicted as an armed habitual criminal despite his "innocent" conduct of legally possessing a firearm.

¶ 46 This court has rejected that precise argument twice. See *People v. Johnson*, 2015 IL App (1st) 133663, ¶ 27 (potential application to "innocent conduct" alleged here does not render AHC statute facially unconstitutional); *People v. Fulton*, 2016 IL App (1st) 141765, ¶ 31 (same). Though we agree with the holdings of those cases and much of their reasoning, we do take issue with a small portion of their analyses and thus explain our own reasoning below.

¶ 47 The constitutional guarantee of substantive due process limits the legislature's otherwise broad discretion to criminalize conduct. *People v. Madrigal*, 241 Ill. 2d 463, 466 (2011); see U.S. Const. amend. XIV; Ill. Const. 1970, art. I, § 2. Unless a fundamental constitutional right is implicated, Illinois courts use the rational-basis test to determine whether a statute violates substantive due process. *Madrigal*, 241 Ill. 2d at 468. Defendant does not claim that a fundamental constitutional right is implicated, and he argues for this rational-basis standard accordingly.

¶ 48 A statute fails the rational-basis test if it does not bear a reasonable relationship to a legitimate public interest, or, in other words, if it is not a reasonable method of preventing the guilty conduct it was meant to target. *Id.* Under this rubric, our supreme court has held various statutes facially unconstitutional because they swept too broadly, punishing "innocent conduct" along with the guilty conduct they legitimately targeted. See *id.* at 467-68; *People v. Carpenter*,

228 Ill. 2d 250, 267 (2008); *People v. Wright*, 194 Ill. 2d 1, 28 (2000); *People v. Zaremba*, 158 Ill. 2d 36, 42 (1994); *People v. Wick*, 107 Ill. 2d 62, 66 (1985).

¶ 49 In *Madrigal*, 241 Ill. 2d at 470, for instance, the court struck down a subsection of the identity theft law that made it illegal to use someone else's personal identification information or document to gain access to any records of that person's activities or transactions, or any communications made or received by that person, without that person's express prior permission. See 720 ILCS 5/16G-15(a) (West 2008). Because this subsection did not require a "culpable mental state"—*i.e.*, "criminal intent, criminal knowledge, or a criminal purpose"—it applied to the conduct specified in the statute regardless of the defendant's purpose in undertaking those actions. *Madrigal*, 241 Ill. 2d at 470-71, 473. As a result, it "potentially punishe[d] a significant amount of wholly innocent conduct not related to the statute's purpose" of preventing identity theft, including "doing a computer search through Google *** or though a social networking site" by entering someone's name; "using the internet to look up how their neighbor did in the Chicago Marathon;" "call[ing] an employer of a friend to see if the friend is working or on vacation;" or "call[ing] a hotel to see if [one's] husband has registered, checked in yet, or made a reservation." *Id*. at 471-72.

¶ 50 Other statutes struck down in the *Madrigal-Wick* line of cases exemplify the same pattern of overreach: the statute at issue lacked the mental-state elements necessary to limit its application to genuinely criminal—as opposed to everyday, innocuous—instances of the prohibited conduct. In *Carpenter*, 228 Ill. 2d at 269, the statute criminalized false or secret compartments in vehicles, whether used to conceal contraband or legal items. The court noted that, due to the lack of a mental state of criminal purpose, the law prohibited the transportation of lawfully-obtained items such as "cash, jewelry, a risqué magazine, a confidential file, or a BB

gun." *Id*. at 270. In *Zaremba*, 158 Ill. 2d at 42-43, the statute criminalized exercising control over property in the custody of a law enforcement agency that one knows to be stolen property; but because the statute required no criminal purpose in doing so, the law equally outlawed an evidence technician merely doing his or her job. See also *Wright*, 194 Ill. 2d at 28 (statute criminalized failure to maintain sales records, making no distinction between doing so as part of criminal scheme to sell stolen vehicles and parts, or as result of mere incompetence or inability to do so without criminal purpose); *Wick*, 107 Ill. 2d at 66 (aggravated arson statute applied to fires set for perfectly lawful purpose, as long as firefighter or police officer was injured, and thus reached too broadly).

¶ 51 The State argues that, because this is a facial challenge, defendant must demonstrate that no set of circumstances exists under which the AHC statute could be valid; defendant must show that the statute is incapable of constitutional application in any context. That principle of law is true in most facial challenges, but not in a facial challenge on substantive due process grounds alleging substantial overbreadth, like the ones we have discussed above.

¶ 52 In those decisions, the challenged statutes were not invalid because they were incapable of legitimate application. They most certainly *were* capable of valid application in many instances. The identity theft statute in *Madrigal* certainly covered the conduct of people actually engaging in identity theft. The law criminalizing secret compartments in *Carpenter* unquestionably covered criminals who used secret compartments to hide contraband. The stolen-goods statute in *Zaremba* clearly covered the conduct of people who were actually fencing stolen goods. The problem with those statutes was not that they failed to cover legitimately criminal activity. It was that they *also* criminalized "innocent" conduct—"innocent" in the sense that it was conduct entirely unrelated to the intended purpose of those laws. A person looking up an old

classmate on Facebook without intending any criminal harm; a person searching a name on Google to find out her time in the Chicago Marathon, not to steal her identity; an individual placing her wallet in a secret compartment in a car; an evidence technician inventorying stolen goods as part of her routine job duties—all of those people could be prosecuted for felonies under laws that were never intended, in the court's view, to outlaw their conduct.

¶ 53 In fact, it is precisely *because* a statute can be legitimately applied in many circumstances that, before striking it down facially on substantive due process grounds, the criminal statute must *substantially* overshoot its legitimate target. *Madrigal*, 241 Ill. 2d at 478 ("[c]riminal statutes * * that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid *even if they also have legitimate application*") (emphasis added) (quoting *City of Houston, Texas v. Hill*, 482 U.S. 451, 459 (1987)). In relying on *Hill*, a first-amendment case, our supreme court underscored that, in this respect too, facial substantive-due-process challenges function like overbreadth challenges, which require "that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615.

¶ 54 In *Madrigal*, 241 Ill. 2d at 471, 473, 476-77, for example, the court repeatedly found that the identity theft law punished a "wide array" or "significant amount" of conduct that had nothing to do with identity theft, like the Google or Facebook user who had no intention of stealing someone's identity. The stolen-goods statute in *Zaremba*, 158 Ill. 2d at 42-43, substantially overreached in that it would have criminalized the job duties of police evidence technician throughout Illinois in routinely taking custody of property they knew to be stolen. 158 Ill. 2d at 42-43. The secret-compartment prohibition in *Carpenter*, 228 Ill. 2d at 269-70, would

have created felons out of a large swath of well-meaning people throughout our state who just wanted to hide their valuables in their cars from potential thieves.

¶ 55 So the question is not whether the AHC statute is capable of some valid, constitutional application. It unquestionably is; defendant does not argue otherwise. To the extent the courts in in *Johnson*, 2015 IL App (1st) 133663, ¶¶ 25, 27 and *Fulton*, 2016 IL App (1st) 141765, ¶ 20, wrote that the existence of some valid application of the statute defeats this kind of a facial challenge, we respectfully disagree with those statements in those opinions. We otherwise agree with their reasoning and holdings in full.

¶ 56 Rather, the relevant question is whether the AHC statute also criminalizes a *substantial* amount of "innocent" behavior—whether it *substantially* overshoots its admittedly legitimate purpose. Thus, we begin with the purpose of the AHC statute. That law "was enacted to protect the public from the threat of violence that arises when repeat offenders possess firearms." *Johnson*, 2015 IL App (1st) 133663, ¶ 27; see also *Fulton*, 2016 IL App (1st) 141765, ¶ 23. Generally speaking, the statute hews quite closely to that purpose. Defendant does not say otherwise, as a general proposition. Instead, defendant points to one specific instance in which, he says, he could be prosecuted as an armed habitual criminal despite having received a FOID card in the interim between his second and third offense.

¶ 57 Defendant is correct, theoretically. An individual could obtain a FOID card despite having two AHC-qualifying convictions. Section 10 of the FOID Card Act (430 ILCS 65/1 *et seq* (West 2016)) provides that an applicant who has been rendered ineligible for a FOID card because of prior felony convictions may petition the circuit court for relief from that disability. *Id.* § 65/10(a), (c). The court may order the Department of State Police to issue a FOID card upon finding that:

> (1) the applicant has not been convicted of a forcible felony within twenty years of the application, or at least twenty years have passed since the applicant was last incarcerated for a forcible felony; (2) the applicant would not be likely to act in a manner dangerous to public safety; (3) granting relief would not be contrary to the public interest; and (4) "granting relief would not be contrary to federal law." *Id.* § 65/10(c)(1)-(4).

¶ 58 Thus, defendant concludes, it is possible for someone to receive a FOID card but still be subject to prosecution as an armed habitual criminal while *legally* possessing a firearm, because the AHC statute makes no provision for someone who possesses the weapon legally via a FOID card.

¶ 59 While we might depart from *Johnson* in some respects, as noted above, we fully agree with *Johnson*'s conclusion that the hypothetical presented here by defendant (the same one presented in *Johnson*) involves "one very unlikely set of circumstances." *Johnson*, 2015 IL App (1st) 133663, ¶ 27. As we just noted above in our block quote, the hypothetical applicant for a FOID card, who already has two felony convictions, must demonstrate that he or she has been free of felony convictions or imprisonment for at least twenty years, that granting the FOID license will not be contrary to public safety or the public interest, and that federal law does not prohibit the issuance of the FOID card. 430 ILCS 65/10(c)(1)-(4) (West 2016). That single, narrow example does not strike us presenting an instance where the AHC statute has *substantially* overreached to protect "innocent," law-abiding conduct, such as in the cases we have discussed above.

¶ 60 We could stop there, finding no substantial overreach. But we would go a step beyond *Johnson* to note that, as things currently stand, not only is the hypothetical given by defendant "very unlikely"—it could not happen, because current federal law would prohibit anyone with

two prior felonies from obtaining a handgun; thus, granting a FOID card to such a person would be "contrary to federal law" under the FOID law. 430 ILCS 65/10(c)(4) (West 2016).

¶ 61 The current federal felon-in-possession statute makes it a crime for "any person * * * who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year" to possess "any firearm or ammunition[.]" 18 U.S.C. § 922(g)(1). Thus, anyone who has two AHC-qualifying convictions would necessarily violate federal law by possessing a firearm. See 720 ILCS 5/24-1.7(a)(4). Unless that federal firearms disability is removed, the applicant is not eligible for a FOID card, because federal law prohibits it. 430 ILCS 65/10(c)(4) (West 2016).

¶ 62 And for all practical purposes, there is currently no way for an applicant to remove a federal firearms disability imposed by section 922(g)(1). Theoretically, an individual may apply to the Attorney General "for relief from the disabilities imposed by Federal laws with respect to the * * * possession of firearms." 18 U.S.C. § 925(c). Applications made under section 925(c) are to be reviewed, in the first instance, by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), pursuant to a grant of delegated authority. *United States v. Bean*, 537 U.S. 71, 74 (2002); *Tyler v. Hillsdale County Sheriffs Dep't.*, 837 F.3d 678, 682 (6th Cir. 2016). If an application is denied, the statute provides for judicial review in federal district court. 18 U.S.C. § 925(c).

¶ 63 The remedial procedure contemplated by section 925(c) "has been rendered inoperative, however, for Congress has repeatedly barred the Attorney General from using appropriated funds 'to investigate or act upon [relief] applications.' " *Logan v. United States*, 552 U.S. 23, 28 n.1 (2007) (quoting *Bean*, 537 U.S. at 74-75) (brackets in original); see also *Tyler*, 837 F.3d at 682 ("Section 925(c), however, is currently a nullity."). In 1992, Congress defunded the relief-from-

disabilities program, noting that reviewing relief applications was a "very difficult and subjective task which could have devastating consequences for innocent civilians if the wrong decision is made." S. Rep. No. 102-353, at 19 (1992). Congress has reaffirmed this prohibition every year since 1992; it remains in force, in the current federal budget's appropriations provisions for ATF. See Consolidated Appropriations Act, 2017, P.L. 115-31, 131 Stat. 135, 198 (May 5, 2017) ("*Provided*, That none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under section 925(c) of title 18, United States Code[.]").

¶ 64 The long and short of it is that currently, ATF is prohibited from reviewing relief applications, and the Supreme Court has held that this prohibition on initial agency review stripped the federal courts of jurisdiction to review claims arising under section 925(c). *Bean*, 537 U.S. at 78. So as things stand today, there is no way an applicant for a FOID card can remove the federal firearms disability that necessarily arises from his or her AHC-qualifying convictions. Which means that the hypothetical applicant that defendant places before this court—this "very unlikely" applicant (*Johnson*, 2015 IL App (1st) 133663, ¶ 27)—in fact is a hypothetical applicant that could not, as a matter of law, exist under current law. See *Johnson*, 2015 IL App (1st) 133663, ¶ 29 (noting that current federal law would prohibit State from issuing FOID card to convicted felon).

¶ 65 Clearly, then, defendant cannot demonstrate that the AHC statute *substantially* overreaches its intended purpose, if it overreaches at all.

¶ 66 That could change, of course, and one day an applicant with AHC-qualifying convictions might get relief from the federal disability, prevail in his bid to obtain a FOID card, and later be charged under the AHC statute. Nothing would stop such a person from raising an as-applied

challenge to the AHC law, or maybe even a facial challenge under new circumstances. At this time, however, there is no basis for sustaining a facial challenge to the AHC statute based on substantive due process. We reject defendant's constitutional challenge.

¶ 67 We affirm the judgment of the circuit court.

¶ 68 Affirmed.