

No. 1-14-0896

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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|--------------------------------------|---|------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County. |
| |) | |
| v. |) | No. 11 CR 9879 |
| |) | |
| NIKOLAS GACHO, |) | Honorable |
| |) | William G. Lacy, |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Pierce and Justice Simon concurred in the judgment.

O R D E R

¶ 1 *Held:* (1) Exclusive jurisdiction provision of the Juvenile Court Act of 1987 (705 ILCS 405/5-120 (West 2010)) is not unconstitutional; (2) mandatory firearm sentencing enhancement and truth-in-sentencing law are not unconstitutional as applied to defendant's sentence; and (3) resentencing unwarranted where new sentencing provisions contained in Public Act 99-69 (eff. Jan. 1, 2016) (adding 730 ILCS 5/5-4.5-105) do not apply retroactively to defendant's case.

¶ 2 Following a bench trial, defendant Nikolas Gacho was convicted of attempted first-degree murder and sentenced to 35 years' imprisonment, which included a mandatory 25-year

firearm sentencing enhancement. Defendant, 17 years old at the time of the offense, was tried and sentenced as an adult because he was automatically excluded from the jurisdiction of the juvenile court pursuant to section 5-120 of the Juvenile Court Act of 1987 (Act) (705 ILCS 405/5-120 (West 2010)). On appeal, defendant contends that: (1) the exclusive jurisdiction provision of the Act (*id.*) is unconstitutional; (2) the mandatory firearm sentencing enhancement (720 ILCS 5/8-4(c)(1)(D) (West 2010)) and truth-in-sentencing law (730 ILCS 5/3-6-3(a)(2)(ii) (West 2010)) are unconstitutional as applied to his sentence; and (3) his case should be remanded for resentencing under new provisions contained in Public Act 99-69 (eff. Jan. 1, 2016) (adding 730 ILCS 5/5-4.5-105), which took effect during the pendency of his appeal. We affirm.

¶ 3 At trial, the evidence established that on June 8, 2010, defendant and Mario Palomino had an argument over the phone about defendant's girlfriend, Jessica Drowns. Later in the evening, after Palomino left a party with Drowns to walk her home, defendant appeared and pulled out a firearm. Palomino began to run away, but defendant fired his weapon three times and hit Palomino once in the middle of his upper back, causing him to fall down. As a result of the gunshot, Palomino became paralyzed from the chest down and suffers from other conditions caused by the gunshot. Defendant presented evidence of previous altercations with Palomino and people associated with him. Defendant testified that when he saw Palomino and Drowns together on the night in question, Palomino made a motion to his waistband and told defendant "I got you now." Thinking Palomino was reaching for a firearm, defendant pulled out his firearm and shot at Palomino three times.

¶ 4 The trial court rejected defendant's assertion of self-defense and found him guilty of attempted first-degree murder. The court subsequently sentenced defendant to 35 years' imprisonment, 10 years for attempted first-degree murder and another 25 years for personally

discharging the firearm that proximately caused great bodily harm to Palomino. Defendant did not file a postsentencing motion. This appeal followed.

¶ 5 Defendant first challenges the constitutionality of the exclusive jurisdiction provision of the Act (705 ILCS 405/5-120 (West 2010)), arguing that the provision violates the eighth amendment of the United States constitution (U.S. Const., amend. VIII). In support of this argument, defendant primarily relies on the United States Supreme Court's decisions in *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010) and *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012).

¶ 6 Because *Roper*, *Graham* and *Miller* are relevant throughout defendant's appeal, we briefly discuss each. In *Roper*, 543 U.S. at 578, the Supreme Court held that sentencing juveniles to death violated the eighth amendment. In *Graham*, 560 U.S. at 74, the Supreme Court held that sentencing juveniles convicted of non-homicide offenses to natural life imprisonment without parole violated the eighth amendment. In *Miller*, 567 U.S. at ___, 132 S. Ct. at 2475, the Supreme Court held that sentencing schemes that mandate sentences of natural life imprisonment without parole for juveniles convicted of homicides violated the eighth amendment. *Miller* additionally noted that "*Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id.* at ___, 2475.

¶ 7 Initially, the State argues that defendant is raising an as-applied challenge to the constitutional validity of the exclusive jurisdiction provision without raising the challenge first in the trial court during an evidentiary hearing. Citing to *In re Parentage of John M.*, 212 Ill. 2d 253, 268, (2004), the State asserts the claim may not be raised for the first time on appeal. After reviewing defendant's claim, we find that he is contending the statute should have no force and

effect upon any person regardless of the specific circumstances. Therefore, this is an argument that the statute should be deemed facially invalid, which may be raised at any time. See *People v. Thompson*, 2015 IL 118151, ¶ 32.

¶ 8 At the time of defendant's offense, the exclusive jurisdiction provision of the Act provided:

"Proceedings may be instituted under the provisions of this Article concerning any minor who prior to the minor's 17th birthday has violated or attempted to violate, regardless of where the act occurred, any federal or State law or municipal or county ordinance, and any minor who prior to his or her 18th birthday has violated or attempted to violate, regardless of where the act occurred, any federal, State, county or municipal law or ordinance classified as a misdemeanor offense." 705 ILCS 405/5-120 (West 2010).¹

Because defendant was 17 years old at the time he was charged with attempted first-degree murder, a felony, the provision automatically excluded him from the jurisdiction of the Act and required that he be tried and sentenced in adult criminal court. *Id.*

¶ 9 Defendant's constitutional challenge stems from the automatic exclusion of 17-year-olds charged with felonies from juvenile court because juvenile offenders, in light of the Supreme Court's decisions in *Roper*, *Graham* and *Miller*, are "categorically less culpable than adults." He asserts that, while prosecuting and sentencing juvenile offenders in adult criminal court is

¹ We note that in January 2014, the age of defendants under the jurisdiction of the Act was raised from 17 to 18 years of age. Pub. Act 98-61 (eff. Jan. 1, 2014) (amending 705 ILCS 405/5-120 (West 2012)). Consequently, today "[e]xcept as provided in Sections 5-125, 5-130, 5-805, and 5-810 of this Article, no minor who was under 18 years of age at the time of the alleged offense may be prosecuted under the criminal laws of this State." 705 ILCS 405/5-120 (West 2016).

permissible, it cannot be the rule, only the exception. Because it is the rule in Illinois, not the exception, defendant argues the exclusive jurisdiction provision is unconstitutional.

¶ 10 When addressing a challenge to the constitutionality of a statute, we presume that the statute is constitutional. *People v. Greco*, 204 Ill. 2d 400, 406 (2003). The party challenging the constitutionality of the statute bears the burden of demonstrating its invalidity. *Id.* If reasonably possible, we must construe the statute so as to uphold its validity and constitutionality. *Id.* Whether a statute is constitutional raises a question of law, which we review *de novo*. *People v. Dabbs*, 239 Ill. 2d 277, 291 (2010).

¶ 11 The exclusive jurisdiction provision of the Act (705 ILCS 405/5-120 (West 2010)) is similar to the automatic transfer provision of the Act (705 ILCS 405/5-130 (West 2010)). At the time of defendant's offense, the automatic transfer provision required that a defendant at least 15 years old and charged with one of five enumerated serious felonies be automatically transferred to adult criminal court. *Id.*

¶ 12 In *People v. Patterson*, 2014 IL 115102, ¶¶ 100-111, our supreme court reviewed the constitutionality of the automatic transfer provision and concluded that the provision did not violate the eighth amendment because whether to prosecute a defendant in juvenile or adult criminal court is a matter of procedure. The court explained the purpose of the provision was "to protect the public from the most common violent crimes, not to punish a defendant." *Id.* ¶ 105. The provision demonstrated the legislature's decision that adult criminal court was the proper venue for the prosecution of a juvenile charged with one of the enumerated offenses. *Id.* Consequently, because the automatic transfer provision was merely procedural and did not actually impose punishment, it did not violate the eighth amendment. *Id.* ¶¶ 104, 106. Although our supreme court recognized the persuasiveness of *Roper*, *Graham* and *Miller* and their

discussion concerning the unique qualities and characteristics juvenile offenders have as compared to their adult counterparts, the court maintained that, because the automatic transfer provision did not impose actual punishment, an eighth amendment challenge could not succeed. *Id.* ¶¶ 106, 111.

¶ 13 We see no meaningful distinction between the automatic transfer provision deemed constitutional in *Patterson* and the exclusive jurisdiction provision, whose constitutionality is at issue in the instant appeal. Both sections are procedural in nature, as they provide a mechanism for determining where a juvenile defendant's case should be adjudicated. The sections merely differ regarding which juveniles are affected and under what circumstances the provisions apply. Because the exclusive jurisdiction provision is merely procedural, it does not impose actual punishment on a defendant transferred to adult criminal court pursuant to it. See *id.* ¶¶ 104-106. As the automatic transfer provision has been deemed constitutional in *Patterson*, the same result is warranted here with respect to the exclusive jurisdiction provision.

¶ 14 Furthermore, in *People v. Harmon*, 2013 IL App (2d) 120439, ¶¶ 50-56, which predates *Patterson*, this court examined the exclusive jurisdiction provision and found it did not violate the eighth amendment. After the court examined *Roper*, *Graham* and *Miller*, it noted that those cases found that a trial court must have the chance to consider mitigating circumstances before sentencing a juvenile defendant to the most severe penalties of death and natural life imprisonment without parole. *Id.* ¶ 54. The *Harmon* court concluded that the issues in *Roper*, *Graham* and *Miller* were not the same as whether the exclusive jurisdiction provision violated the eighth amendment. *Id.* The court discussed Illinois appellate decisions rejecting the same constitutional challenge in the context of the automatic transfer provision and finding the provision did "not impose a punishment but rather specifies the forum in which the defendant's

guilt may be adjudicated, so it is not subject to the eighth amendment." *Id.* ¶ 55 (citing *People v. Pacheco*, 2013 IL App (4th) 110409, ¶ 55; *People v. Salas*, 2011 IL App (1st) 091880, ¶ 66)). *Harmon* found the reasoning in *Pacheco* and *Salas*, that the automatic transfer provision did not violate the eighth amendment, applied equally with respect to the exclusive jurisdiction provision. *Id.* Therefore, the exclusive jurisdiction provision similarly did not violate the eighth amendment. *Id.* ¶ 56. We agree with the analysis in *Harmon*.

¶ 15 Accordingly, in light of *Patterson* and its holding that the automatic transfer provision did not violate the eighth amendment, the similarity between the exclusive jurisdiction provision and automatic transfer provision, and the *Harmon* holding that the exclusive jurisdiction provision did not violate the eighth amendment, we find the exclusive jurisdiction provision applicable at the time of defendant's offense did not violate the eighth amendment.

¶ 16 Defendant next challenges the constitutionality of the application of the 25-year mandatory firearm enhancement to his sentence in conjunction with the truth-in-sentencing law, arguing together they violate the eighth amendment of the United States Constitution (U.S. Const., amend. VIII) and the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11).

¶ 17 Because the trial court determined that defendant personally discharged a firearm that caused great bodily harm, the court was required to add on to his sentence a minimum of 25 years' imprisonment with the discretion to add up to a term of natural life imprisonment. 720 ILCS 5/8-4(c)(1)(D) (West 2010). The court added 25 years to defendant's attempted first-degree murder sentence of 10 years' imprisonment as the enhancement, for an aggregate sentence of 35 years' imprisonment. Moreover, due to the truth-in-sentencing law, defendant is required to serve at least 85% of his 35-year sentence. 730 ILCS 5/3-6-3(a)(2)(ii) (West 2010). Based on the

confluence of the mandatory firearm enhancement and truth-in-sentencing law, defendant argues the trial court was prevented from properly considering his youth and attendant circumstances in determining the appropriate sentence for his crime. Therefore, in light of *Roper*, *Graham* and *Miller*, he contends this sentencing scheme is unconstitutional.

¶ 18 Initially, the State again argues that defendant is raising an as-applied challenge to the constitutional validity of these laws without raising the challenge first in the trial court or during an evidentiary hearing. Citing to *In re Parentage of John M.*, 212 Ill. 2d at 268, the State asserts the claim may not be raised for the first time on appeal. Generally, an as-applied constitutional challenge is forfeited when raised for the first time on appeal. *Thompson*, 2015 IL 118151, ¶ 39. However, "[w]hen considered as a whole, *Thompson* implies that courts must overlook forfeiture and review juveniles' as-applied eighth amendment challenges under *Miller*, notwithstanding the general rule prohibiting as-applied challenges raised for the first time on appeal." *People v. Nieto*, 2016 IL App (1st) 121604, ¶ 35. We find the same rationale applies to an as-applied proportionate penalties challenge, as well. Therefore, we may address defendant's as-applied constitutional challenges.

¶ 19 We will address defendant's eighth amendment challenge first. The eighth amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII. The amendment applies to the states through the fourteenth amendment. *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008). At issue is the eighth amendment's cruel and unusual punishments clause, which the United States Supreme Court has interpreted as forbidding "inherently barbaric punishments" as well as punishments that are disproportionate to the offense. *Graham*, 560 U.S. at 59.

¶ 20 In *Patterson*, 2014 IL 115102, ¶¶ 107-10, our supreme court rejected the defendant's argument that "at a minimum, the combination of the [automatic] transfer statute and the applicable sentencing provisions is unconstitutional as applied to non-homicide offenders because they" do not deserve the most serious form of punishment as homicide offenders deserve. The court observed that the rationales in *Roper*, *Graham* and *Miller* have been limited to only cases where the "most severe of all criminal penalties" have been imposed, such as death or natural life imprisonment without parole. *Id.* ¶ 110. It concluded that a 36-year sentence for a juvenile defendant convicted of three counts of aggravated criminal sexual assault did not fall into the category of sentences discussed in *Roper*, *Graham* and *Miller*. *Id.*

¶ 21 Here, too, defendant did not receive the "most severe of all criminal penalties," *i.e.*, he did not receive natural life imprisonment without parole. Rather, he received 35 years' imprisonment for attempted first-degree murder while discharging a firearm that caused great bodily harm, which was 4 years more than the minimum. See 720 ILCS 5/8-4(c)(1)(D) (West 2010); 730 ILCS 5/5-4.5-25(a) (West 2010). Therefore, we find that the application of the 25-year mandatory firearm enhancement to defendant's sentence in conjunction with the truth-in-sentencing law did not violate the eighth amendment.

¶ 22 We next address defendant's proportionate penalties challenge. The proportionate penalties clause of the Illinois Constitution provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. A challenge under this clause "contends that the penalty in question was not determined according to the seriousness of the offense." *People v. Sharpe*, 216 Ill. 2d 481, 487 (2005). As relevant here, a successful challenge shows that the penalty imposed is " 'cruel, degrading, or so wholly disproportionate to the offense committed as

to shock the moral sense of the community.' " *Id.* (quoting *People v. Moss*, 206 Ill. 2d 503, 522 (2003)). The Illinois Supreme Court has stated the "the Illinois proportionate penalties clause is co-extensive with the eighth amendment's cruel and unusual punishment clause." *Patterson*, 2014 IL 115102, ¶ 106. Therefore, for the same reasons defendant's eighth amendment challenge failed, his proportionate penalties clause challenge must also fail. *Patterson*, 2014 IL 115102, ¶ 106; also see *People v. Banks*, 2015 IL App (1st) 130985, ¶ 24.

¶ 23 We next address an issue raised in supplemental briefing. After the parties filed briefs in this matter, defendant filed a supplemental brief contending that his case must be remanded for resentencing under new sentencing provisions contained in Public Act 99-69 (eff. Jan. 1, 2016) (adding 730 ILCS 5/5-4.5-105), which became effective during the pendency of his appeal. The State has filed a supplemental response brief, and defendant has filed a supplemental reply brief.

¶ 24 Section 5-4.5-105(a) of the Unified Code of Corrections (Code) (730 ILCS 5/5-4.5-105(a) (West 2016)), which became effective on January 1, 2016, provides:

"On or after the effective date of this amendatory Act of the 99th General Assembly, when a person commits an offense and the person is under 18 years of age at the time of the commission of the offense, the court, at the sentencing hearing conducted under Section 5-4-1, shall consider the following additional factors in mitigation in determining the appropriate sentence."

The mitigating factors include the defendant's "age, impetuosity, and level of maturity at the time of the offense," whether he "was subjected to outside pressure, including peer pressure, familial pressure, or negative influences," and his "family, home environment, educational and social background, including any history of parental neglect, physical abuse, or other childhood trauma." *Id.* Sections 5-4.5-105(b) and (c) provide the court discretion to refrain from imposing

firearm enhancements to a defendant who was less than 18 years old when he committed the offense except for certain homicide offenses. 730 ILCS 5/5-4.5-105(b), (c) (West 2016).

¶ 25 Under this sentencing scheme, the trial court would have been required to consider additional mitigating factors prior to sentencing defendant for attempted first-degree murder. See 730 ILCS 5/5-4.5-105(a) (West 2016). Additionally, the court would not have been required to enhance his sentence with an additional minimum of 25 years' imprisonment for personally discharging a firearm that caused great bodily harm. See 730 ILCS 5/5-4.5-105(b), (c) (West 2016).

¶ 26 The parties dispute section 5-4.5-105's effect on defendant's sentence. Defendant argues the section is retroactive because of the legislative intent and procedural nature of the section. Thus, he asserts the section applies to his case and entitles him to a new sentencing hearing under the provisions of the section. The State responds that the plain language of the section demonstrates a legislative intent to apply it prospectively only, thus not entitling defendant to a new sentencing hearing.

¶ 27 As a matter of statutory construction, we review the question of whether a statutory amendment is prospective or retroactive *de novo*. *Allegis Realty Investors v. Novak*, 223 Ill. 2d 318 330 (2006); also see *People v. Hunter*, 2016 IL App (1st) 141904, ¶ 35. In answering this question, we utilize the United States Supreme Court's approach set forth in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). *People ex rel. Madigan v. J.T. Einoder, Inc.*, 2015 IL 117193, ¶ 29. The first step under *Landgraf* is to determine whether the legislature "has indicated the temporal reach of the amended statute," and if so, we must apply this legislative intent unless the constitution prohibits the amendment's temporal reach. *Id.* "The best indicator of such intent is the language of the statute, which is to be given its plain and ordinary meaning." *People v.*

Goossens, 2015 IL 118347, ¶ 9. If there is no express provision from the legislature, the second step under *Landgraf* is "to determine whether applying the statute would have a retroactive impact, 'keeping in mind the general principle that prospectivity is the appropriate default rule.' " *J.T. Einoder, Inc.*, 2015 IL 117193, ¶ 29 (quoting *Allegis Realty Investors v. Novak*, 223 Ill. 2d 318, 330-31 (2006)).

¶ 28 In *Hunter*, 2016 IL App (1st) 141904, ¶¶ 36-44, we used the *Landgraf* approach to determine whether section 5-4.5-105 applied retroactively or prospectively. We first examined the section's language, which provides the statute applies "only at sentencing hearings held '[o]n or after the effective date' of Public Act 99-69, *i.e.*, January 1, 2016." *Id.* ¶ 43 (quoting 730 ILCS 5/5-4.5-105(a) (West 2016)). We found this language plainly demonstrated that a trial court must apply the section's requirements at a sentencing hearing on or after January 1, 2016, the amendment's effective date. *Id.* Therefore, the section's plain language showed a legislative intent to apply it prospectively. *Id.*

¶ 29 The *Hunter* court also found the legislature's use of the language "on or after" further buttressed its finding that the temporal reach of the section was prospective only, as similar language often had been used by our legislature to express prospective law. *Id.* ¶ 44 (citing cases). We agree with the *Hunter* decision and find the legislature intended to apply section 5-4.5-105 prospectively only. Because the legislature has indicated the temporal reach of section 5-4.5-105, we need not move beyond the first step of the *Landgraf* approach. See *J.T. Einoder, Inc.*, 2015 IL 117193, ¶ 29.

¶ 30 Nevertheless, defendant argues that the amendment's retroactive effect is supported by the lack of a savings clause limiting the amendment's application based on when the offense occurred, section 4 of the Statute on Statutes (5 ILCS 70/4 (West 2016)) applies and the

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amendment represents a "significant policy shift" regarding sentencing of juvenile defendants. We note each argument has been considered and rejected by this court in *Hunter*, 2016 IL App (1st) 141904, ¶¶ 45-48.

¶ 31 Accordingly, because section 5-4.5-105 applies prospectively only, defendant is not entitled to a new sentencing hearing.

¶ 32 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 33 Affirmed.