2017 IL App (1st) 141117

SECOND DIVISION
March 28, 2017

No. 1-14-1117

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. PHAROAH MORRIS, Defendant-Appellant,	)	Appeal from the Circuit Court of Cook County. 10 CR 17983 Honorable Stanley J. Sacks, Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court, with opinion.
Justice Neville concurred in the judgment and opinion.
Presiding Justice Hyman specially concurred, with opinion.

OPINION

¶ 1 Defendant, Pharoah Defendant, who was 16-years-old at the time of the offense, was convicted of first-degree murder, attempt murder, and aggravated battery with a firearm following a jury trial. He was sentenced to an aggregate sentence of 100 years in prison. Defendant appeals, arguing that (1) he received a *de facto* life sentence without meaningful consideration of mitigating circumstances; (2) the applicable sentencing statutes which mandate firearm enhancements are facially unconstitutional under the Federal and Illinois Constitutions, and under the Illinois Constitution as applied to him; (3) section 5-130(1) of the Illinois Juvenile Court Act (Act) (705 ILCS 405-5-130(1) (West 2016)), which automatically transfers 16-year-olds charged with murder and attempted murder to adult court therefore subjecting them to mandatory adult sentencing, violates the Federal and Illinois Constitutions and due process; and

(4) he is entitled to a new sentencing hearing under the newly enacted section 5-4.5-105 of the Illinois Code of Corrections (Code) (730 ILCS 5/5-4.5-105(a), (b) (West 2016)), which requires trial courts to consider certain factors before sentencing and gives trial courts discretion to impose firearm enhancements for individuals under 18. For the reasons that follow, we remand for resentencing.

¶ 2 BACKGROUND

¶ 3 On September 8, 2010, Pharaoh Morris fatally shot DeAntonio Goss and attempted to kill Corey Thompson. Defendant was charged with first-degree murder, attempt murder, and aggravated battery with a firearm.

¶ 4 Prior to trial, the State filed two motions to admit proof of other crimes. According to the first motion, Marvin Floyd was shot in the back on August 21, 2010, while riding his bicycle near a gas station. Defendant was identified as the offender. Subsequent testing of the .45 caliber bullet recovered from Floyd's body and the .45 caliber bullet recovered from DeAntonio Goss's body revealed that both bullets were fired from the same gun. The motion sought admission of this evidence to show identity and absence of mistake.

¶ 5 The second motion stated that while at the Cook County Jail, defendant discussed his pending murder case with his cellmate, Ricky Whitehead. Defendant approached Whitehead with a list of the witnesses in his pending case, each name listed with their respective address and date of birth, and asked Whitehead if he could "take care of them." Understanding this to mean defendant wanted them killed, Whitehead gave the list to Sheriff Investigator McCoy. The investigator assigned an officer to act as a hitman and introduced both he and defendant over a taped phone call. Defendant asked that the undercover officer come to the jail. Once at the jail, the officer recorded his conversations with defendant, who gave him a list of names and asked

that he "get rid of them." The State sought to admit this evidence of the solicitation to show defendant's consciousness of guilt.

¶ 6 The trial court held that the evidence of the shooting of Floyd and the evidence of the ballistics match admissible as proof of identity. The court also held admissible the solicitation of murder evidence to prove consciousness of guilt.

¶ 7 At trial, Marvin Floyd testified that on the date he was shot, August 23, 2010, he had known defendant for about three years. Floyd testified that on the afternoon of August 23, 2010, he was riding his bike to the gas station near his home when he saw defendant at the gas station. He testified that he saw a gun under defendant's pants, tried to flee on his bike, but was shot in the back. He stated he was taken to the hospital where he stayed for two months and underwent two surgeries.

¶ 8 Corey Thompson testified that on September 8, 2010, after attending class at Bowen High School, he was walking home with his friends, among them DeAntonio Goss. At some point Thompson and Goss reached the street corner of 86th and Saginaw and saw that defendant and his friend, Lacy Sheppard, were also there. Defendant began speaking to Thompson and Goss and said, "This is what y'all want, this is what y'all going to get," and pulled out a gun and pointed it at Thompson. Thompson testified that he began running back towards school while noticing Goss running in a different direction. Thompson stated that as he was running he heard gunshots and then suddenly felt something hit him in his buttocks. Thompson stated he felt pain and fell down, but then got up to keep running before beginning to feel drowsy, weak, and unable to run anymore. He testified he lay down in the middle of the street, heard Goss say, "CJ, where are you, where are you, are you okay?" and then observed Defendant head towards Goss's voice. Thompson testified he then heard a few more gunshots before passing out. Thompson

was taken to the hospital where he stayed for three weeks and underwent two surgeries.

¶ 9 Ricky Whitehead testified that he was defendant's cellmate at the Cook County Department of Corrections. He stated that while there, defendant gave him a list of the names of witnesses in defendant's pending trial and asked if he could "take care of them." Whitehead testified he understood this to mean defendant wanted them killed, and subsequently gave the list to Sheriff McCoy.

¶ 10 Eric Bucio testified that he is an instructor at the Cook County jail complex. He stated that on August 9, 2012, he was assigned to investigate defendant. He testified that he recovered a list of witness names from defendant's personal items.

¶ 11 Hilary McElligott, assistant medical examiner at Cook County testified that she examined Goss's body. The bullet that caused his death entered the back of his right arm, exited on the other side of the arm and entered his body again on the right side of his chest.

¶ 12 Patrick Brennan, a supervisor with the Illinois State police Forensic Science Center testified that the bullet recovered from Floyd's body, the bullet recovered from Goss and a cartridge case that was found at the scene of the shooting were fired from the same firearm.

¶ 13 The State rested. Defendant did not present any evidence.

¶ 14 After hearing all of the evidence, the jury found defendant guilty of the first degree murder of Deantonio Goss, the attempt murder of Corey Thompson and the aggravated battery of a firearm of Thompson.

¶ 15 At the sentencing hearing, defense argued in mitigation that defendant was a juvenile, he had a troubled background, a history of mental illness, drug and alcohol abuse, and that he had rehabilitative potential. Defense counsel explained that defendant's father had been incarcerated for much of defendant's life. Defense counsel explained that at the age of 12, defendant began

seeing a psychiatrist to address his anger management and was ultimately diagnosed with bipolar disorder for which he received medication. Moreover, counsel pointed out that defendant attempted suicide at the age of 15, 17, and 18. Finally, defense counsel elicited the fact that defendant began drinking alcohol at the age of 11 followed shortly thereafter with marijuana use, and that by the age of 13 he was drinking 20 glasses of hard alcohol and smoking five "blunts" of marijuana every day. Defense counsel asked the trial court for the minimum sentence in consideration of these mitigating factors contained in defendant's PSI report.

¶ 16 In allocution, defendant told the court that he did not shoot Corey Thompson, stating that Lacy Sheppard did. The record then shows the trial court made the following statements. "I've read the PSI dated March 31st, I've considered the fact that defendant did not have the best upbringing, it doesn't justify murder, however. I'll consider it for what it was worth." The court went on to say, "The other factors in aggravation and mitigation, I've considered all of them. What's mitigating about Pharaoh Defendant? Not much. At the time of the murder, 16 years old, that's about all that's mitigating." In regards to rehabilitation, the court stated:

> "Is there room for rehabilitation for Pharaoh Morris? That's up to him. If he's rehabilitated he'll be inside, however. Pharaoh Morris has shown by his conduct two weeks before the incident, the murder of DeAntonio Goss, on the day of the incident ***, which was September 8, 2010, and even thereafter in the jail, I want these people tooken [sic]care of *** I like to read the cases, I find little words in each one of them. I think I found ones that apply to Pharaoh Morris. Pharaoh Morris has a malignant heart***.
> It applies to Pharaoh Morris, it was written for him. A young guy out on the streets of the City of Chicago with a gun, shooting it up, hitting one guy two weeks before, two guys on the date of the murder, including the murder victim obviously and then I want these

people tooken [sic] care of. Everybody in the world knows what that means, tooken [sic] care of.

There's some times, Pharaoh, you commit a crime you pretty much forfeit your right to be ever out on the street again, this is one of them. Everything I give you in a few seconds, Mr. Morris, you earned every single day, every single minute, every single second. Maybe you can live a useful life in prison, however, not back on the streets of the City of Chicago."

¶ 17 The trial court sentenced defendant to consecutive terms of 55 years for the first-degree murder and 45 years for the attempted first-degree murder for a total of 100 years in prison.

¶ 18 ANALYSIS

¶ 19 Defendant argues that his sentence of 100 years' imprisonment is a *de facto* life sentence and is the result of an unconstitutional sentencing scheme in violation of *Miller v. Alabama*, 136 S. Ct. 2455 (2012), as the trial court was precluded from considering his youthful characteristics. He also contends that (1) the applicable sentencing statutes, which mandate consecutive prison terms (730 ILCS 5/5–8–4(d)(1) (West 2010)) and 25-year and 20-year firearm enhancements (730 ILCS 5/5–8–1(a)(1)(d)(iii) (West 20010); 730 ILCS 5/8–4(c)(1)(C) (West 2010)) violate the Eighth Amendment (U.S. Const. amend. XIV) and the Proportionate Penalties Clause (IL Const. art. I, § 11), both facially and as applied to him. He argues that the automatic transfer provision which automatically transfers 15-and-16-year olds charged with first-degree murder and aggravated battery with a firearm to adult court (705 ILCS 405/5–130(a)(1) (West 2010)), thereby subjecting them to mandatory adult sentencing statutes, violates the Eighth Amendment, the Proportionate Penalties Clause, and due process. Finally, he argues that he is entitled to a new sentencing hearing under the newly enacted section 5-4.5-105 of the Code (730 ILCS 5/5-

4.5-105(a), (b) (West 2016)), which requires the trial court to consider certain factors before sentencing and gives trial courts discretion to impose firearm enhancements for individuals under 18.

¶ 20 Defendant, who was 16-years-old at the time he committed the offenses in this case, was sentenced to 100 years' imprisonment in aggregate for his convictions of first degree murder, attempt murder and aggravated battery with a firearm. The statutory minimum for the first-degree murder was 45 years: 20 years for the murder and 25 years for the firearm enhancement. The statutory minimum for the attempted first-degree murder was 26 years: 6 years for the underlying Class X felony and 20 years for the firearm enhancement. In total, the minimum prison term the trial court was required to impose was 71 years. The maximum it could impose was natural life: 20 to 60 years for first-degree murder plus 25 years to natural life for the firearm enhancement, and 6 to 30 years for the underlying Class X felony plus 20 years for the firearm enhancement. Defendant will have to serve one hundred percent of the 55-year sentence and at least eighty-five percent of the 45-year sentence, meaning he will serve at least 93 years and four months.

¶ 21 The Supreme Court held in *Miller* that the Eighth Amendment to the United States Constitution "forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders." 132 S. Ct. at 2469. The Court emphasized that in fashioning an appropriate sentence, recognition of youth is the most important. *Miller*, 132 S. Ct. at 2465-66. Therefore, criminal procedure laws that fail to adequately account for the offender's usefulness are flawed. *Id.* at 2466. The Court explained that children, through both common sense and with the aid of social sciences, are constitutionally different from adults for purposes of sentencing. *Id.* at 2464. Juveniles have diminished culpability and a greater prospect for reform,

and therefore "they are less deserving of the most severe punishments, which, according to *Graham*, includes life without parole. *Id.* The Court went on to say:

> "First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. Second, children are more vulnerable to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity." (Internal quotations marks omitted.) *Id.*

¶ 22 The Court further emphasized the distinctive attributes of youth by emphasizing two main rationales behind sentencing, retribution and rehabilitation. *Id.* at 2465. First, the Court stated that such youthful attributes diminish the justifications of imposing the harshest sentences on juveniles, even when they commit terrible crimes, because the retribution rationale is rooted in the offender's blameworthiness which is not as strong with children as with adults. *Id.* Second, by sentencing a juvenile to life without parole, the court is making a determination that the offender is simply unable to change and will forever be a menace to society. *Id.* But life without parole "forswears altogether the rehabilitative ideal," and reflects "an irrevocable judgment about an offender's value and place in society," which is at odds with a child's capacity for change. *Id.* Only the worst of youth, those that are deemed "permanently incorrigible," should be considered for life without parole. *Id.* at 2469. Mandatory punishment, the Court said, precludes consideration of youth's "hallmark features-among them, immaturity, impetuosity, and failure to appreciate risks and consequences." *Id.* at 2468. "It prevents taking into account the family and home environment that surrounds him-and from which he cannot

usually extricate himself-no matter how brutal or dysfunctional." *Id.*

¶ 23 The Court elaborated on *Miller* in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). The Court reiterated *Miller*'s central holding that life sentences without parole for juvenile offenders pose too great a risk of disproportionate punishment. *Id.* at 733. *Miller* requires the trial judge to account for how children are different before irrevocably sentencing them to life in prison and the Court stressed that such an occasion will be uncommon. *Id.* *Montgomery* pointed out, however, that even if a court considers a child's age before sentencing him to life without parole, it still violates the Eighth Amendment if the crime committed reflects the child's "unfortunate yet transient immaturity. *Id.* at 734. Therefore, *Montgomery* held that *Miller* established a substantive rule: all juveniles must have an opportunity to prove they fall within a class of defendants that, because of their status as youths and their attendant circumstances, makes a sentence of life without parole unconstitutional. *Id.* It follows that those sentenced to a life without parole must be afforded an opportunity to show they are capable of change. *Id.* at 736.

¶ 24 Subsequently, while this appeal was pending, our supreme court issued its most recent opinion addressing the *Miller* holding in *People v. Reyes*, 2016 IL 119271. In *Reyes*, the court extended the holding of *Miller* to apply to sentencing schemes that mandate an aggregate term-of-years which result in a *de facto* life sentence for juvenile offenders. *Id.* ¶ 9. The court found:

> "A mandatory term-of-years sentence that cannot be served in one lifetime has the same practical effect on a juvenile defendant's life as would an actual mandatory sentence of life without parole—in either situation, the juvenile will die in prison. *Miller* makes clear that a juvenile may not be sentenced to a mandatory, unsurvivable prison term without first considering in mitigation his youth, immaturity, and potential for rehabilitation." *Id.*

The court held that "sentencing a juvenile offender to a mandatory term of years that is the

functional equivalent of life without the possibility of parole constitutes cruel and unusual punishment in violation of the eighth amendment." *Id*. In order for a court to impose a lengthy sentence, judicial discretion must be applied. *Id*.

¶ 25 Since *Montgomery* and *Reyes*, this court has extended relief to juvenile defendants where the record affirmatively showed that the trial court failed to consider such factors before imposing a *discretionary* sentence of natural life without the possibility of parole in *People v. Nieto*, 2016 IL App (1st) 121604, and *People v. Ortiz*, 2016 IL App (1st) 133294.

¶ 26 In *Nieto*, 2016 IL App (1st) 121604, this court determined that under *Montgomery*, *Miller*'s prohibition against mandatory life sentences without parole for juveniles also applies to discretionary life sentences without parole. Nieto was convicted of first-degree murder and aggravated battery with a firearm. *Id.* ¶ 4. Though the defendant's statutory minimum sentence was 51 years, the trial court chose to sentence defendant to 78 years, 75.3 of which he would be required to serve. *Id.* ¶¶ 12-13. The *Nieto* court recognized that *Montgomery* did not distinguish between mandatory life sentences without parole from discretionary *de facto* life sentences, and took this to mean that the trial court must consider a juvenile's special characteristics even when exercising discretion. *Id.* ¶¶ 46, 49. "After *Montgomery*, *Miller* requires that a juvenile be given an opportunity to demonstrate that he belongs to the large population of juveniles not subject to natural life in prison without parole, even where his life sentence resulted from the trial court's exercise of discretion." *Id.* ¶ 47.

¶ 27 We concluded that because the defendant would not be released from prison until he is 94 years old, he effectively received a natural life sentence without parole. *Id.* ¶ 42. Although the trial court did consider the defendant's young age when imposing sentence, we nonetheless vacated the defendant's sentence because the trial court did not consider the corresponding

characteristics of the defendant's youth. *Id.* ¶ 56.

¶ 28 In *People v. Ortiz*, 2016 IL App (1st) 133294, the defendant committed first-degree murder at age 15 and was sentenced to 60 years' imprisonment, and would be required to serve one hundred percent of his sentence. *Id.* ¶ 24. The record showed that at the sentencing hearing, the trial court recognized defendant had a "difficult upbringing" and that his parents "allowed" him to quit school and associate himself freely with the Latin King gang. However, the trial court placed more emphasis on defendant's lack of remorse, continued violence while incarcerated, and knowledge of wrongdoing, and told defendant that he must be held accountable and pay the price by being incarcerated.

¶ 29 We determined that since the defendant would not be eligible for release until the age of 75 years, he effectively received a life sentence without parole and adopted *Nieto*'s analysis to hold that "for a juvenile's mandatory or discretionary sentence of life in prison without parole to be constitutionally valid, the sentencing judge must take into consideration his youth and attendant characteristics to determine whether the defendant is the rarest of juvenile offenders whose crimes reflect permanent incorrigibility," or whether his crimes reflect "unfortunate yet transient immaturity." (Internal quotations marks omitted) *Id.* ¶ 19, 23. In vacating the defendant's sentence, we noted that while the trial court did consider defendant's young age and his personal history, it did not consider the corresponding characteristics of his youth as outlined in *Miller* and *Montgomery* or their effect on his conduct. *Id.* ¶ 25.

¶ 30 We also found support for our holding from the legislature's recent enactment of section 5-4.5-105 of the Juvenile Court Act of 1987, effective January 1, 2016, which provides that for all defendants who commit crimes under the age of 18 on or after that date, the court must consider various attendant-youth characteristics before sentencing. 730 ILCS 5/5-4.5-105(a)(1)-

(a)(3) (West Supp. 2015); *Id.* ¶ 23. These characteristics to be considered include impetuosity, level of maturity, the ability to consider risks and consequences, whether they were subjected to outside pressures, their home environment, and any history of parental neglect, physical abuse, or other childhood trauma. *Id.*

¶ 31 Here, the juvenile defendant's statutorily mandated minimum sentence was 71-years for his crimes. The trial court instead sentenced defendant to 55 years in prison for first degree murder and 45 years in prison for the attempted murder, both to be served consecutively for an aggregate of 100 years imprisonment. Defendant is required to serve 93.25 years of this sentence, meaning the earliest he is eligible for release will be at the age of 109 years. Using the rationale in *Nieto* and *Ortiz,* we find that defendant has received the functional equivalent of an effective life sentence without parole. This *de facto* life sentence is improper because the trial court did not meaningfully consider defendant's youth and attendant characteristics as well as their effect on him, as outlined in *Miller* and *Montgomery*, before sentencing him.

¶ 32 The record reveals that defendant had a troubled background, a history of mental illness, and a history of drug and alcohol abuse. Defendant's PSI report showed defendant's father was incarcerated in Wisconsin, that at the age of 12 defendant began seeing a psychiatrist to address anger management for which he was diagnosed with bipolar disorder and received medication, and that defendant attempted suicide at the age of 15, 17, and 18. The PSI report also indicated that at the age of 11 defendant began drinking alcohol, and shortly thereafter began using marijuana. By the age of 13 defendant was drinking multiple glasses of hard alcohol a day and smoking multiple "blunts" of marijuana.

¶ 33 Looking at the record in its entirety, we are not convinced that the trial court adequately considered defendant's youth and attendant circumstances before sentencing him to an effective

life sentence which, following *Miller*, is reserved only after the rare finding of permanent incorrigibility. The trial court only considered defendant's youth and upbringing: "What's mitigating about Pharoah Morris? Not much. At the time of the murder, 16 years old, that's about all that's mitigating." And while the trial court acknowledged that it read defendant's PSI, stating, "I've read the PSI dated March 31st, I've considered the fact that Defendant did not have the best upbringing," it does not appear that it meaningfully considered those special characteristics contained within the report.

¶ 34 The trial court weighed heavily on defendant's prior conduct. We do not doubt the trial court when it said, "I've been doing this, December was 25 years. I can't recall a case as horrible as this one. Shoot one guy, weeks later shoot two guys, kill one and try and get the witnesses killed so you get a chance to go home." However, the trial court did not weigh heavily defendant's opportunity for rehabilitation: "Is there room for rehabilitation for Pharoah Morris? That's up to him. If he's rehabilitated he'll be inside, however." It went on to say, "There's some times, Pharoah, you commit a crime you pretty much forfeit your right to be ever out on the street again, this is one of them ***. Maybe you can live a useful life in prison, however, not back on the streets of the City of Chicago." It is not apparent from the record that the trial court carefully considered defendant's youthful characteristics against those aggravating factors before coming to the ultimate conclusion that defendant "is the rarest of juvenile offenders whose crimes reflect permanent incorrigibility," rather than a reflection of his "unfortunate yet transient immaturity." *Montgomery*, 136 S. Ct. at 734-35.

¶ 35 By sentencing defendant to 100 years in prison, the trial court made the ultimate decision that defendant, at the age of 16, was permanently incapable of change. The trial court stated, "Pharoah Morris has a malignant heart. I like that phrase, a malignant heart. It applies to

Pharoah Morris, it was written for him." Nor, pursuant to *Montgomery*, can we side with the court's rationale that defendant's sentence will "deter[] others from hopefully doing the same." Deterrence is diminished in juvenile sentencing because juveniles' recklessness, immaturity and impetuosity make them less likely to consider possible punishment. *Montgomery*, 136 S. Ct. at 726. Accordingly, we vacate defendant's sentence and remand for resentencing.

¶ 36 While defendant's case was pending on direct appeal, the state legislature passed 730 ILCS 5/5-4.5-105 (West 2015) (eff. Jan 1, 2016), that could affect the disposition of defendant's case. The parties were granted leave to file supplemental briefs on the issue of the applicability of the newly enacted section 5-4.5-105 here.

¶ 37 In his supplemental brief, defendant contends that his case must be remanded for resentencing under new sentencing provisions contained in Public Act 99–69, section 10 (eff. Jan. 1, 2016) (adding 730 ILCS 5/5-4.5-105) and Public Act 99–258, section 5 (eff. Jan. 1, 2016) (amending 705 ILCS 405/5-130, 5-805 (West 2014)).

¶ 38 Section 5-4.5-105 provides

> "(a) 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:
>
> (1) the person's age, impetuosity, and level of maturity at the time of the offense, including the ability to consider risks and consequences of behavior, and the presence of cognitive or developmental disability, or both, if any;
>
> (2) whether the person was subjected to outside pressure, including peer

pressure, familial pressure, or negative influences;

(3) the person's family, home environment, educational and social background, including any history of parental neglect, physical abuse, or other childhood trauma;

(4) the person's potential for rehabilitation or evidence of rehabilitation, or both;

(5) the circumstances of the offense;

(6) the person's degree of participation and specific role in the offense, including the level of planning by the defendant before the offense;

(7) whether the person was able to meaningfully participate in his or her defense;

(8) the person's prior juvenile or criminal history; and

(9) any other information the court finds relevant and reliable, including an expression of remorse, if appropriate. However, if the person, on advice of counsel chooses not to make a statement, the court shall not consider a lack of an expression of remorse as an aggravating factor." 730 ILCS 5/5-4.5-105 (West 2016).

Additionally, sections 5-4.5-105(b) and 5-4.5-105(c) provide that, except in cases where the offender has been convicted of certain homicide offenses, the trial court "may, in its discretion, decline to impose any otherwise applicable sentencing enhancement based upon firearm possession." *Id*.

¶ 39 The State argues that section 4.5-105 does not apply retroactively because the plain language of section 4.5-105 clearly indicates the legislature intended prospective application

only. We agree.

¶ 40 Statutory construction is a question of law that we review *de novo*. *People v. Matthew A.*, 2015 IL 118605, ¶21. The main objective of statutory construction is to ascertain and give effect to the legislature's intent. *In re A.A.*, 2015 IL 118605, ¶21. When the intent is evident from the clear and unambiguous language of the statute, courts will enforce it and need not read into it any further. *Id.*

¶ 41 In determining whether a statute may be applied retroactively, courts look to whether the legislature clearly prescribed the temporal reach of the statute. *Hayashi v. Illinois Dept. of Financial & Professional Regulation*, 2014 IL 116023, ¶23. If the legislature does so, courts must give such intent effect, absent a constitutional prohibition. *Id.* If the legislature did not expressly indicate the temporal reach, then the court must determine "whether the new statute would have retroactive effect, that is, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994). If retrospective application would result in a retroactive impact or inequitable consequences, courts must presume that the legislature did not intend such an application. *Id.* However, because of Section 4 of the Statutes on Statutes, if no temporal reach is indicated, "it is virtually inconceivable that an Illinois court will ever go beyond step one of the *Landgraf* approach." *Caveney v. Bower*, 207 Ill. 2d 82, 94 (2003).

¶ 42 Consistent with recent decisions in this district, the language of section 5-4.5-105 does not indicate that the legislature intended for trial judges to follow the amended provisions at any sentencing hearing occurring on or after the effective date of the statute. *See People v. Hunter*, 2016 IL App (1st) 141904, ¶44, appeal allowed, No. 121306 (Nov. 23, 2016) (consolidated

appeal with *People v. Wilson*, 2016 IL App (1st) 141500, appeal allowed, No. 121345 (Nov. 23, 2016)) (the language "on or after" demonstrates the legislature's intent to apply section 5-4.5-105 prospectively); *People v. Wilson*, 2016 IL App (1st) 141500, 15-16 (temporal reach of section 5-4.5-105 demonstrates by clear and unambiguous language that " 'on or after the effective date,' when an individual 'commits an offense' and was under the age of 18 at the time it was committed, the sentencing court must consider the additional mitigating factors listed and could decline to impose any otherwise applicable firearm sentencing enhancement").

¶ 43 We agree with the reasoning in *Hunter* and *Wilson* and find that section 5-4.5-105 applies prospectively to sentencing hearings for offenses committed "[on] or after the effective date" of January 1, 2016. Accordingly, because the statute applies prospectively only, and because the defendant committed the offense in September 2010, well before the effective date of section 5-4.5-105, he is not entitled to a sentencing hearing under the new provision.

¶ 44 Because we have vacated defendant's sentence in this case, we need not consider his argument that the 20-year and 25-year firearm enhancements violate the federal and Illinois constitutions, and the proportionate penalties clause of the Illinois constitution as applied to defendant because they did not permit the trial court to consider his young age at the time of the offense.

¶ 45 Finally, defendant argues that the version of section 5-130(1)(a) of the Act, which was in effect at the time he committed the offenses, which automatically transfers 15-and-16-year-olds charged with murder and attempt murder to adult court violates the eight amendment, the proportionate penalties clause of the Illinois constitution and federal and state due process rights.

¶ 46 Defendant recognizes that our supreme court upheld the constitutionality of the Illinois automatic transfer provision under the eighth amendment and due process clauses of the federal

constitutional and the proportionate penalties clause of the Illinois Constitution in *People v. Patterson*, 2014 IL 115102. He argues however, that *Patterson* was incorrectly decided on the question of whether automatic transfer to adult court is punishment within the meaning of federal and state constitutional prohibitions on cruel and unusual punishment.

¶ 47 We find no reason to depart from the holding in *Patterson*. "As an intermediate appellate court, we are bound to honor our supreme court's conclusion on this issue unless and until that conclusion is revisited by our supreme court or overruled by the United States Supreme Court." *People v. Fountain*, 2012 IL App (3d) 090558, ¶ 23.

¶ 48 CONCLUSION

¶ 49 We hold that defendant was given a de facto life sentence without meaningful consideration of his youth and attendant characteristics, as well as their effect on him. Accordingly, the cause is remanded to the circuit court for resentencing.

¶ 50 Remanded for resentencing.

¶ 51 HYMAN, Presiding Justice, specially concurring:

¶ 52 I agree with my colleagues that Morris is entitled to a remand. I write separately to discuss the retroactivity question, and to urge the legislature repair the confusion and unfairness resulting from application of the new juvenile sentencing statutes to some juveniles but not to others, similarly situated except for bad timing.

¶ 53 As the majority notes, the Illinois Supreme Court has agreed to consider whether section 105 is retroactive, in a consolidated appeal from two cases: *People v. Hunter*, 2016 IL App (1st) 141904, and *People v. Wilson*, 2016 IL App (1st) 141500, which both hold that section 105 is not retroactive. Both cases agree that January 1, 2016 is the statute's "effective date," but they disagree as to what the "effective date" clause modifies. *Hunter* holds that a trial court can only

apply the new statute at sentencing *hearings* taking place on or after the effective date. 2016 IL App (1st) 141904, ¶ 43. But *Wilson* holds that the new statute applies to *offenses* committed on or after the effective date. 2016 IL App (1st) 141500, ¶ 16.

¶ 54 This disagreement will be ironed out by our Supreme Court. But the existence of the disagreement indicates that our legislature indefinitely expressed its intent in drafting Section 105. (For further illustrations of the confusion that can result when the legislature does not consistently express its intent for prospective application, see *People v. Patterson*, 2016 IL App (1st) 101573-B.)

¶ 55 And this disagreement has real-world consequences. Sentencing hearings rarely take place on the same date as a crime is committed. Imagine a crime that takes place on December 31, 2015, resulting in a sentencing hearing on January 2, 2016. Under *Hunter*, the juvenile will have the protections of the new statute; under *Wilson*, the juvenile will not. Further, under either *Hunter* or *Wilson*, a juvenile who is sentenced on December 31, 2015, will not have the protections of the new statute; while a juvenile sentenced only one day later will benefit.

¶ 56 A line needs to be drawn somewhere, but it seems contrary to the statute's laudable purpose—protecting juvenile offenders and giving discretion to trial courts to create appropriate, individualized sentences—to draw that line as strictly as does *Hunter* and *Wilson*. This is particularly so because the statute was rewritten in accordance with the United States Supreme Court's pronouncements regarding the unconstitutionality of juvenile sentencing schemes like our previous version.

¶ 57 It did not have to be this way; retroactivity is an old concept. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the United States Supreme Court ruled that a sentence could not be increased beyond the statutory maximum based on any fact that had not been found beyond a

reasonable doubt by a jury. In *People v. Ford*, 198 Ill. 2d 68, 73 (2001), the Illinois Supreme Court held that, though Ford was convicted well before Apprendi was issued, its rule still applied to Ford: "judicial opinions announcing new constitutional rules applicable to criminal cases are retroactive to all cases – like this one – pending on direct review at the time the new constitutional rule is declared."

¶ 58 Rather than the uncertain language that *Hunter* and *Wilson* tried to interpret, the legislature could have followed *Ford* and declared that the new statutes would apply to any case pending (either in the trial or appellate courts) at the time of the new statute's passage (or a chosen effective date). This would have encompassed many more juvenile defendants (consistent with legislative intent and judicial concerns) but also would have eliminated the vague statutory language. As *Ford* illustrates, the concept of "pending on direct review" is a familiar one to courts and would have been easier to apply.

¶ 59 Unfortunately for Morris, the new juvenile statute will not be applied in his resentencing. As the majority discusses, the minimum sentence Morris could receive under the old version of the law is 71 years—45 years for first degree murder (20 years plus 25 years for the mandatory firearm enhancement), consecutive to 26 years (6 years plus 20 years for the mandatory firearm enhancement). Under truth-in-sentencing statutes, he would have to serve just over 67 years. Morris would leave prison, at the earliest, in his eighties (assuming he lives that long).

¶ 60 Frankly, this would be only a modest reduction from the 100-year aggregate sentence that we have held to be a "de facto life sentence," and is unlikely to lessen Morris's chances of dying in prison. A remand under the old statutes puts the trial court in a tough position indeed: no matter what the characteristics that Morris successfully argues at his resentencing, the trial court would be forced to sentence him to a *de facto* life sentence, at least 67 years imprisoned. The

end result, therefore, pays lip service to the United States Supreme Court's instruction that juveniles should at least have the opportunity to show that they deserve a lesser sentence due to their immaturity.

¶ 61 But under the new sentencing law, the trial court would have discretion whether to impose the firearm enhancements. Morris's new minimum sentence would be 26 years (20 for the murder plus 6 years for attempted murder). Even if the trial court went above this minimum, it would still have the power to fashion a sentence that would allow Morris to rehabilitate himself and lead a productive and law-abiding life. This outcome would better follow the instructions from higher courts, the legislative intent, and the text of our Constitution, which states that penalties should be determined "with the objective of restoring the offender to useful citizenship." Ill. Const. Art. 1 § 11.

¶ 62 Hopefully the legislature will act quickly to address the inequity raised by this case.