

No. 1-09-3398

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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. 02 CR 31770
	)	
DEMETRIUS JOHNS,	)	The Honorable
	)	Brian K. Flaherty,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE GARCIA delivered the judgment of the court.  
Justice Palmer concurred in the judgment.  
Presiding Justice R. Gordon dissented.

**ORDER**

¶ 1 *Held:* The circuit court acted within its discretion in resentencing the defendant to 20 years' imprisonment for armed robbery following our decision on direct appeal that the original 26-year sentence was void. On resentencing, the court properly found great bodily harm was sustained by the armed robbery victim, which triggered the requirement that the defendant serve 85% of his sentence. The imposition of the 85% rate did not constitute a due process or statutory violation. The defendant's 20-year sentence for armed robbery was not disparate to the six-year sentence imposed upon his codefendant for commission of the same offense where the two were not similarly situated in light of the codefendant's conviction and consecutive sentence for first degree murder of 20 years.

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¶ 2 Following a jury trial, defendant Demetrius Johns was found guilty of armed robbery, but was acquitted of first degree murder. The circuit court of Cook County imposed an 11-year sentence with a 15-year enhancement for use of a firearm in the commission of the armed robbery, as mandated by section 18-2(b) of the Illinois Criminal Code of 1961 (Criminal Code) (720 ILCS 5/18-2(b) (West 2000)). On direct appeal, we affirmed the defendant's conviction, but vacated his sentence because the sentencing enhancement provision for armed robbery had been declared invalid by our supreme court in *People v. Hauschild*, 226 Ill. 2d 63 (2007). We remanded the matter to the circuit court "for resentencing 'within the range for armed robbery as it existed prior to being amended by Public Act 91-404, eff. January 1, 2000.'" *People v. Johns*, 387 Ill. App. 3d 8, 20 (2008) (quoting *Hauschild*, 226 Ill. 2d at 89). At resentencing, the circuit court sentenced the defendant to 20 years' imprisonment and found the defendant's actions caused great bodily harm, requiring that he serve 85% of the sentence.

¶ 3 The defendant challenges his 20-year sentence as an unlawful increase of his original sentence that violates his due process rights and section 5-5-4(a) of the Illinois Unified Code of Corrections (730 ILCS 5/5-5-4(a) (West 2008)). According to the defendant, once the 15-year sentencing enhancement was declared invalid, the cap on resentencing should have been the unenhanced portion of his original sentence of 11 years for armed robbery. The defendant argues the 20-year sentence evinces judicial and prosecutorial vindictiveness where the increased punishment is not based on anything he did after the original sentence was imposed as mandated by section 5-5-4(a). The defendant also challenges the circuit court's finding that he was responsible for great bodily harm to the victim based on his armed robbery conviction. Finally,

the defendant asserts the court abused its discretion by sentencing him to 20 years when one of two codefendants received a six-year sentence for commission of the same crime. We affirm.

¶ 4

#### BACKGROUND

¶ 5 On March 31, 2006, a jury found the defendant not guilty of murder but guilty of armed robbery. The circuit court sentenced the defendant to a total of 26 years, 15 of which constituted the enhanced penalty based on the use of a firearm (720 ILCS 5/18-2(b) (West 2000)). The facts surrounding the defendant's conviction are set forth in his direct appeal, which we do not repeat here. See *Johns*, 387 Ill. App. 3d at 9-12.

¶ 6 On direct appeal, the defendant raised three issues. We rejected his claim that his trial counsel was ineffective for her failure to raise the affirmative defense of compulsion when the evidence, as the defendant asserted, demonstrated that "the defendant was forced at gunpoint to remain with [the codefendants] as they committed an armed robbery." We found the evidence to be contrary to the defendant's version. *Id.* at 17-19. We agreed with the defendant that his enhanced sentence violated the Illinois Constitution's prohibition against disproportionate penalties because armed robbery committed with a firearm has a more severe penalty than armed violence predicated on a robbery when the two offenses have the same statutory elements. *Id.* at 19-20. We did not reach, however, the defendant's claim that the circuit court abused its discretion in sentencing the defendant to 26 years for armed robbery when his codefendant, Larry Melvin, whom the defendant claimed had a direct role in both the murder and the armed robbery, was given a six-year sentence for the same crime. *Id.* at 20. He raises that same claim before us following his resentencing of 20 years for armed robbery.

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¶ 7 Upon remand, a new sentencing hearing was held before a different judge. The parties disagreed on whether a "sentencing cap" of 11 years or 26 years applied on resentencing for the armed robbery conviction.

¶ 8 The State argued that this court vacated the defendant's 26-year sentence in its entirety based on the 15-year "add on" sentence being unconstitutional. On resentencing, according to our decision, the defendant faced the full sentencing range provided by section 18-2(b) of the Criminal Code, which the State noted was 6 to 30 years. The State argued: "[The trial judge] initially imposed 11 years, added on the 15, for a total of 26. That was Judge Baker's intent, to give this defendant 26 years based upon his actions that day. I believe that that's the appropriate sentence, Judge. It falls within the sentencing range."

¶ 9 The defendant argued that resentencing was capped by the original 11-year nonenhanced portion of his sentence. The defendant asserted section 5-8-1(c) of the Unified Code of Corrections (730 ILCS 5/5-8-1(c) (West 2000)) and *People v. Kilpatrick*, 167 Ill. 2d 439 (1995) precluded an increase in that sentence once it was imposed. Section 5-8-1(c) provides that if a sentence is set aside on direct review or on collateral attack, "the court may not increase a sentence once it is imposed." 730 ILCS 5/5-8-1(c) (West 2000). The defendant also argued that he should not be held accountable for his codefendants' murderous conduct, which inflicted grievous bodily harm, in light of the jury's verdict that he was not guilty of murder.

¶ 10 The circuit court restated the issue before it: "The first issue is whether or not I can basically start anew, or if I am capped, as the state's attorney referred, to the 11-year sentence imposed by Judge Baker." The trial judge then addressed the mandate from this court:

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"I think from reading the opinion and reading [*Hauschild*], it is crystal clear that I am not capped by that 11-year sentence. I can -- in fact, it quotes here on Page 11 of my photocopy that they vacated the defendant's sentence for the armed robbery and they remand[ed] this matter to the trial court for re-sentence within the range of armed robbery as it existed prior to being amended by Public Act 91-404 effective January 1st, 2000, which it quotes [*Hauschild*], the last phrase.

It is crystal clear that I can give anywhere between 6 and 30 years. Although I think we can never say that we know what Judge Baker's feelings were on this case. There are certainly individuals who believe that you figure out if there is a 15-year sentence, you figure out what you think is an appropriate sentence, and then you add the 15 years to whatever just to get up to the final term.

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I did have an opportunity, as I said, to review the transcripts. I reviewed the presentence investigation. I also had -- for the first time, had an opportunity to review the trial exhibits.

And just so everybody is crystal clear, I am not imposing a sentence for the murder of this -- for the murder charge or punishing Mr. Johns for imposing his right to appeal this case. I am simply going to sentence him for his acts and what he did.

And I agree with the State that I also can use in consideration the force that was used in the armed robbery. And this force went on and on and on, as far as I am concerned.

I think that the defendant needs to be punished severely for his actions. This is not the first time that he has been in the criminal justice system in Cook County. In fact, he has, it looks like, two cases as a juvenile and at least three cases as an adult.

So taking all those matters into consideration, it will be the sentence of the Court to the charge of armed robbery, 20 years Illinois Department of Corrections, three years mandatory supervised release."

¶ 11 Once the the 20-year sentence was imposed, the State moved to have the sentence served at a rate of 85% under the "truth-in-sentencing law." The State argued that the 85% rate is triggered for certain offenses when "the conduct leading to the conviction resulted in great bodily harm to the victim." To support that the victim suffered great bodily harm in the instant case, the State reminded the court of "the beating that took place, the drowning that took place and the slitting of the victim's throat," along with the gunshot to the victim's face.

¶ 12 In response, the defendant asserted a finding of great bodily harm would conflict with the jury's acquittal of the defendant of first degree murder. The defendant noted the original trial judge made no finding of great bodily harm against him. The defendant suggested, "Perhaps the Court at that time did not make a finding of great bodily harm because the Court heard the evidence, which showed the Court, as well as the jurors, that Mr. Johns himself did not cause or

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participate in great bodily harm of [the victim]."

¶ 13 The judge on resentencing concluded differently. The court explained: "Again, taking into consideration and looking at the exhibits and not even considering what apparently the fatal wound is, which was the shot in the face, the Court will make a finding of great bodily harm."

¶ 14 On the defendant's timely motion to reconsider the sentence, the circuit court permitted oral argument. The defendant again argued that his sentence should have been capped at the original 11 years for armed robbery because the additional 15 years was ruled unconstitutional. The defendant contended that the 20-year sentence was in effect a punishment for his successful appeal. The defendant also asserted that the finding of great bodily harm was outside the scope of the appellate court's mandate. The defendant argued the finding violated his due process rights under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because the great bodily harm finding "would in essence increase the sentence from one of 50 percent to one of 85 percent, and we make this argument because the Court by increasing the defendant's sentence or setting the defendant's term of 20 years at 85 percent, that would make the defendant eligible for parole no later than May - - no earlier than May of 2019. Under the original sentence of 11 years, plus the 15-year enhancement without the finding of great bodily harm, this defendant would have been eligible for parole [in] May 2015. That difference, Your Honor, is a considerable and substantial delay which does violate his due process rights."

¶ 15 In its argument, the State contended the defendant mischaracterized the original sentence because he was not sentenced to 11 years, but to a total of 26 years. The State argued that the circuit court properly considered the entire 26-year sentence for purposes of resentencing the

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defendant and that the 20-year sentence imposed was less and fell within the statutory range. The State asserted the court's finding of great bodily harm did not raise an *Apprendi* issue because the sentence did not exceed the statutory maximum.

¶ 16 The circuit court denied the defendant's motion to reconsider. The defendant timely appeals.

¶ 17 ANALYSIS

¶ 18 The defendant first argues his 20-year sentence for armed robbery violates "black letter sentencing law," citing *North Carolina v. Pearce*, 395 U.S. 711 (1969) and section 5-5-4(a) of the Unified Code of Corrections (730 ILCS 5/5-5-4(a) (West 2008)). He reasons:

"Notwithstanding evident due process prohibitions and the expressed statutory limitations, the circuit court imposed a more severe sentence than originally imposed." He contends the "more severe sentence" evinced judicial and prosecutorial vindictiveness in the absence of any showing by the State that the defendant engaged in criminal conduct since the date of his original sentence to warrant a more severe sentence. Second, the defendant asserts the circuit court's finding of great bodily harm was error for three reasons: (1) "it falls outside the resentencing scheme;" (2) "it was procedurally defaulted where the court failed to make such a finding at the original sentencing proceeding;" and (3) "such a finding by the circuit court was particularly inappropriate where [the] jury acquitted him of the conduct that constituted the court's finding of great bodily harm." Finally, the defendant avers the circuit court abused its discretion when it imposed a sentence of 20 years for the offense of armed robbery when his codefendant, Melvin, received a six-year sentence for the same offense.

¶ 19 The State responds that a new sentencing hearing was compelled when this court declared the defendant's original 26-year sentence unconstitutional. The State argues "the defendant's new sentence was proper where the 20-year sentence was not an increase of his original sentence of 26 years for armed robbery." The State also maintains that the finding of great bodily harm on resentencing was in line with the trial judge's conclusion at the original sentencing hearing that the defendant would serve his original sentence at a rate of 85%. The State asserts the circuit court at resentencing did not abuse its discretion by sentencing the defendant to 20 years' imprisonment for armed robbery even though his codefendant received a six-year sentence. The State points to differences between the codefendants. Most importantly for the State, the six-year sentence Melvin received for armed robbery is explained by the additional sentence he was required to serve for his conviction of first degree murder. According to the State, it is the totality of the sentences that each codefendants received that should be compared and that comparison renders the defendant's sentence not disparate.

¶ 20 20 Years on Resentencing

¶ 21 According to the defendant, the dispute between the parties is where the sentencing cap should be, not whether a cap exists. He contends that resentencing was capped at 11 years for his armed robbery conviction. The defendant discusses at length the State's notion of a resentencing cap.

"The State's position of a 26-year cap is patently ridiculous as it encompasses the nullified legislative add-on. In other words, the State's advancement of a 26-year cap includes a void

component, as found by the *Hauschild* Court (and this Court), and makes no sense whatsoever. Because the legislative add-on in the armed robbery context has been viewed as *void ab initio*, *People v. Coleman*, 399 Ill. App. 3d 1150, 927 N.E.2d 304, 312 (4th Dist. 2010), the State's argument presents the quixotic position of espousing a void sentence component to ratchet up the sentencing cap." (Emphasis in original omitted.)

¶ 22 To support his position that his 20-year sentence is an unlawful increase from his original 11-year nonenhanced sentence, the defendant relies upon *Pearce*, which the Illinois Supreme Court adopted in *People v. Baze*, 43 Ill. 2d 298 (1969), and section 5-5-4(a) of the Unified Code of Corrections (730 ILCS 5/5-5-4(a) (West 2008)). He contends vindictiveness is the default conclusion in the absence of a showing by the State under section 5-5-4(a) to warrant an increase in punishment.

"In not adducing *any* conduct on the part of the defendant occurring after the original sentencing to support the more severe sentence imposed, the State has failed to rebut the presumption that the increased sentence was generated by vindictiveness and thus the present 20-year sentence, *nine years more than the 11-year sentence originally imposed*, stands as an egregious violation of due process." (Emphasis in original).

¶ 23 The State responds that the original sentence was rendered void by *Hauschild* and the

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concerns over vindictiveness are misplaced when resentencing is ordered based on a void sentence. The State asserts the defendant's view of the "cap" on resentencing is too narrow when the total sentence imposed on the defendant was 26 years. Once the defendant's original sentence was declared void, the State contends, "defendant's new sentence was proper where the 20 year sentence was not an increase in his original sentence of 26 years for armed robbery." According to the State, "Unlike consecutive sentences which are separate and discrete sentences for different convictions, an enhanced sentence, is part of the sentence for the one offense." The State reasons that if the enhanced portion of the sentence is declared void, it renders the entire sentence void, not just that portion of the sentence.

¶ 24 The defendant argues that we should address the issue under a *de novo* standard of review because it raises a question of law. "[T]he issue of a harsher sentence upon remand involves due process interests and thus presents a question of law." The defendant asserts that circuit court considered the issue one of law as well and resolved it as such. As support, the defendant cites *People v. Kilpatrick*, 167 Ill. 2d 439, 443-44 (1995), *People v. Moore*, 177 Ill. 2d 421, 432-33 (1997), and *United States v. Bay*, 820 F.2d 1511, 1513 (9th Cir. 1987). The State offers no contrary contention to a *de novo* review of this issue.

¶ 25 While we find neither *Kilpatrick* nor *Moore* supports the defendant's contention of *de novo* review because neither applies a *de novo* standard of review, we agree with the defendant that the issue is best resolved as a question of law, either as a matter of statutory construction (*People v. Alcozer*, 241 Ill. 2d 248, 254 (2011)), or a matter of constitutional protection (*Pearce*, 395 U.S. at 725-26).

¶ 26 The defendant initially relies upon *Pearce* to support his argument that his 20-year sentence was improperly increased. The *Pearce* Court concluded that specific due process protections were required upon resentencing for defendants following a new trial.

"Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.

In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." *Pearce*, 395 U.S. at 725-26.

¶ 27 Our supreme court followed *Pearce* in *Baze*. The salient issue in *Baze* was whether an increased sentence imposed upon the defendant on retrial following a successful postconviction petition for the same crime violated his constitutional rights. *Baze*, 43 Ill. 2d at 300-01.

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Applying *Pearce*, the *Baze* court ruled the imposition of an increased sentence violated due process in the absence of an affirmative showing of identifiable conduct on the part of the defendant occurring after the original sentence was imposed. *Id.* at 302-03.

¶ 28 Shortly after the *Baze* decision, the Illinois legislature codified the *Pearce* rule in section 5-5-4(a) of the Unified Code of Corrections:

"(a) Where a conviction or sentence has been set aside on direct review or on collateral attack, the court shall not impose a new sentence for the same offense or for a different offense based on the same conduct which is more severe than the prior sentence less the portion of the prior sentence previously satisfied *unless the more severe sentence is based upon conduct on the part of the defendant occurring after the original sentencing.* 730 ILCS 5/5-5-4(a) (West 2008) (emphasis added)."

¶ 29 In the instant case on direct appeal, we vacated the defendant's sentence for armed robbery and remanded for resentencing " 'within the range for armed robbery as it existed prior to being amended by Public Act 91-404, eff. January 1, 2000.' " *Johns*, 387 Ill. App. 3d at 20 (quoting *Hauschild*, 226 Ill. 2d at 89). Prior to Public Act 91-404, a defendant convicted of armed robbery, a class X felony, faced a minimum of 6 years and a maximum of 30 years. 730 ILCS 5/5-8-1(a)(3) (West 1998). There is no dispute that the defendant's 20-year sentence falls within the statutory range. The defendant's argument rests upon his contention that his resentencing was capped at 11 years, based on the original nonenhanced portion of his sentence.

¶ 30 Illinois courts have consistently held that a void sentence compels a new sentencing

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hearing. "A sentence is void if it fails to conform to statutory requirements." *Hauschild*, 226 Ill. 2d at 80 (ordering a new sentencing hearing); *People v. Garcia*, 179 Ill. 2d 55, 73 (1997) (the imposition of concurrent sentences in certain instances where consecutive sentences were mandated rendered defendants' sentences void); *People v. Arna*, 168 Ill. 2d 107, 113 (1995) (because order imposing concurrent terms was void, the appellate court was not prohibited from increasing the defendant's sentence on review). On direct appeal, we found that the enhanced penalty for armed robbery while armed with a firearm violated the proportional penalties clause, which rendered the entire sentence void. *Johns*, 387 Ill. App. 3d at 20. A void sentence compelled a new sentencing hearing. *Id.* (citing *Hauschild*, 226 Ill. 2d at 80). Though we declared the entire sentence void, in effect the defendant argues the 11-year portion of the 26-year sentence must stand and bind the circuit court on resentencing. However, the defendant offers no authority to support that position. Nor does he offer a reason for this court to order a resentencing hearing if, as the defendant contends, he faced no more than an 11-year "cap" on resentence, unless the defendant believes the circuit court might have been inclined to impose a lesser sentence.

¶ 31 To be clear, our holding on this issue is that the original sentence in its entirety was void, which mandated a new sentencing hearing. Though we remanded for a new sentencing hearing, suggesting that the circuit court could impose a sentence within the penalty range of section 18-2(b) of the Criminal Code as it existed prior to being amended by Public Act 91-404, it seems clear that the defendant faced a maximum sentence of 26 years as originally imposed. That cap, however, plays no role in the defendant's claim.

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¶ 32 The 20 years imposed on resentencing was clearly less than the 26-year sentence originally imposed and clearly fell within the sentencing range of "not less than 6 years and not more than 30 years" (730 ILCS 5/5-8-1(a)(3) (West 1998)) for the class X felony of armed robbery. In the absence of clear authority to the contrary, the 20 years imposed on resentencing was lawful and did not amount to an increased penalty under *Baze* or violate section 5-5-4(a).

¶ 33 Great Bodily Harm

¶ 34 The defendant next contends the circuit court erred in entering a finding of great bodily harm to trigger the 85% rate for his sentence for three reasons: (1) the State's request fell "outside the re-sentencing scheme;" (2) the issue was "defaulted by the circuit court's failure to make such a finding at the original sentencing hearing;" and (3) "the trial evidence contradicts this finding that any great bodily harm can be attributed to [the defendant], even on an accountability theory, where all the evidence adduced at trial indicated that [he] had withdrawn from the criminal enterprise before the robbery had been completed."

¶ 35 The State responds that the original trial judge concluded that the 85% sentencing rate applied to his original sentence so no error could occur on resentencing when a finding was made to trigger the same rate. According to the State, "application of the truth-in-sentencing provision falls within proper resentencing guidelines because it only affects the manner in which defendant serves his sentence and not the range of the sentence imposed. Thus, besides the fact that defendant was already serving his sentence at eighty-five percent, since truth-in-sentencing only affects the manner in which defendant serves his sentence, the court's determination cannot be considered an increase in defendant's sentence." The State also asserts the evidence supported a

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finding of great bodily harm where the great force used against the victim was in furtherance of the armed robbery and not simply in the course of committing the murder.

¶ 36 We reject the defendant's contention that the State's request for a finding of great bodily harm "falls outside the resentencing scheme." As we made clear above, the "resentencing scheme" was the statutory range for the class X felony of armed robbery before the sentencing enhancement provision as passed by the legislature. The 20 years imposed by the circuit court was within the statutory range for an armed robbery conviction as the statute existed before it was amended. 730 ILCS 5/5-8-1(a)(3) (West 1998). The sentence imposed on resentencing did not fall outside the permissible sentencing range.

¶ 37 The defendant suggests the circuit court did not make a finding of great bodily harm during the original sentencing proceedings because the court "was under a misapprehension that 85% time was mandatory." After the circuit court imposed the original sentence of 26 years, the following colloquy occurred between the assistant State's Attorney and the court:

"MR. FELGENHAUER: Is that sentence to be served at eighty-five percent?

THE COURT: That is my understanding of the statute. The legislature made that finding.

MR. FELGENHAUER: Did you make a specific finding that based on the fact that Eugene Williams was, in fact, killed; that there was a finding of great bodily harm to satisfy the statute?

THE COURT: Well, he was killed, and I think that satisfies it."

¶ 38 The defendant claims the State should not have been allowed to ask for a "more onerous"

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sentence on resentencing when no actual finding of great bodily harm was made at the original sentencing hearing. The defendant is mistaken that a "more onerous" sentence was imposed on resentencing. The original trial judge was clear in his remarks that the 85% rate applied to the 26-year sentence imposed. The special finding on resentencing made by the trial judge only placed the defendant in the same position of having to complete 85% of his sentence as he was required to complete of his original sentence. We see nothing more onerous in the resentence than in his original sentence.

¶ 39 The only question we address here is whether the circuit court's finding of great bodily harm on resentencing resulted in a statutory violation or an unconstitutional heightening of the penalty imposed on the defendant.

¶ 40 " 'Truth-in-sentencing' is a label applied to a change in the statutory method the Department of Corrections uses to calculate good-conduct credit." *People v. Salley*, 373 Ill. App. 3d 106, 109 (2007). The truth-in-sentencing law under section 3-6-3(a)(2)(iii) of the Unified Code of Corrections (730 ILCS 5/3-6-3(a)(2)(iii) (West 2008)) provides "that a prisoner serving a sentence for \*\*\* armed robbery \*\*\* when the court has made and entered a finding, pursuant to subsection (c-1) of section 5-4-1 of this Code, that the conduct leading to conviction for the enumerated offense resulted in great bodily harm to the victim, shall receive no more than 4.5 days of good conduct credit for each month of his or her sentence of imprisonment." In contrast, section 3-6-3(a)(2.1) of the Unified Code of Corrections provides that for offenses not enumerated in subsection (a)(2), a prisoner "shall receive one day of good conduct credit for each day of his or her sentence," which would reduce his period of imprisonment in half. 730 ILCS

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5/3-6-3(a)(2.1) (West 2008). In other words, without a finding of great bodily harm, a defendant convicted of armed robbery could be eligible for early release after serving 50% of his or her prison sentence.

¶ 41 The difference between the good conduct credit rules does not pertain to the sentencing range of the offense itself. We are aware of no authority that casts doubt upon good conduct rules that pertain to the manner in which a sentence is carried out, as opposed to different sentencing ranges for similar offenses with identical elements. See *People v. Hawkins*, 409 Ill. App. 3d 564, 572-73 (2011). In *Hawkins*, the defendant was convicted of three counts of aggravated criminal sexual assault and sentenced to consecutive sentences of seven years for each count. The defendant alleged that his mandatory consecutive sentences violated the proportionate penalties clause because the offense of aggravated kidnaping did not mandate consecutive sentences, even though, according to the defendant, it had identical elements. *Id.* at 566. The court found that even if the two offenses had identical elements, the mandatory consecutive sentencing structure would not violate the proportionate penalties clause because the offenses had the same sentencing range, and the structure affected only the manner in which the sentence was carried out and not the punishment. *Id.* at 572-73.

¶ 42 Illinois courts have reached a similar conclusion under the truth-in-sentencing provision requiring a defendant to serve 85% of his or her sentence, a finding that does not enlarge the sentencing range for the offense under *Apprendi*. In *People v. Robinson*, 383 Ill. App. 3d 1065 (2008), the defendant was convicted of armed robbery, vehicular hijacking, and vehicular invasion after a jury trial. After sentencing, the circuit court found that the defendant was

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required to serve 85% of his sentence because he inflicted great bodily harm on one of the victims. *Id.* at 1068. The defendant argued that the truth-in-sentencing provision violated due process because the finding of great bodily harm was not submitted to the jury or required to be proved beyond a reasonable doubt and yet clearly increased the time he would remain incarcerated. *Id.* at 1071. The *Robinson* court rejected the argument because the sentence imposed for the underlying offense was not affected. *Id.* Because our truth-in-sentencing law does not change the actual sentence imposed based on a judicial fact-finding, the finding of great bodily harm does not trigger a due process or *Apprendi*-type violation. *Id.* Rather, the finding determines the percentage of the actual sentence imposed that the defendant must serve. *Id.*

¶ 43 In the instant case, as in *Hawkins* and *Robinson*, the truth-in-sentencing provision did not alter the sentencing range the defendant faced for armed robbery; the provision only impacted the manner in which the sentence is to be carried out. We reject the defendant's argument that the circuit court's finding that great bodily harm was inflicted upon the armed robbery victim gave rise to an increased sentence over his original sentence, which the original sentencing judge concluded would also be served at a rate of 85%. *Hawkins*, 409 Ill. App. 3d at 574; *Robinson*, 383 Ill. App. 3d at 1071.

¶ 44 Nor is there any question that the harm inflicted upon the victim constituted great bodily harm. "Although the term great bodily harm is not susceptible of a precise legal definition, it requires an injury of a greater and more serious character than an ordinary battery." (Emphasis omitted.) *People v. Mimes*, 2011 IL App (1st) 082747, ¶ 29 (citing *People v. Figures*, 216 Ill. App. 3d 398, 401 (1991)). Great bodily harm does not require hospitalization of the victim, or

permanent disability or disfigurement, but instead centers on the injuries that the victim received.

*Id.* Whether a victim's injuries rise to the level of great bodily harm is a question of fact.

*Figures*, 216 Ill. App. 3d at 401. Thus, as long as the evidence was sufficient to support a finding of great bodily harm, the circuit court's determination will be affirmed. *Id.* at 401-02.

¶ 45 In this case, the record shows that the victim was beaten, slashed by a razor in the throat, drowned, and ultimately fatally shot in the head. The jury found the defendant accountable for the armed robbery based on the aid he provided before, during, and after he and his codefendants arrived at the Knights' Inn with the shared intent to commit a robbery. On direct appeal, we observed: "[O]ur examination of the record finds it devoid of any evidence that the defendant performed any conduct under compulsion that amounted to armed robbery." *Johns*, 387 Ill. App. 3d at 14. Nor does the record support the defendant's claim before us "that [he] had withdrawn from the criminal enterprise before the robbery had been completed." The defendant was convicted of armed robbery; he may not challenge that conviction under the guise of the sentencing issue raised before us.

¶ 46 In sum, we reject the defendant's claim that the finding of great bodily harm fell outside the resentencing scheme ordered by this court; nor do we agree that the original sentencing hearing precluded the finding of great bodily harm on resentencing; and finally, the trial evidence amply supports that the defendant was accountable, upon his conviction of armed robbery, for the great bodily harm inflicted upon the victim.

¶ 47 Claim of Disparate Sentencing

¶ 48 Finally, the defendant contends his 20-year sentence constituted an abuse of discretion

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when codefendant Melvin received a six-year sentence for the same offense. To support his claim that his sentence was disparate, the defendant asserts he played a far lesser role than Melvin in the armed robbery and had only one prior misdemeanor conviction, compared to Melvin's three felony convictions.

¶ 49 The State responds that culpability for the offenses committed is reflected in the totality of the sentences imposed on each defendant, not by the isolated comparison of the sentences for armed robbery. Melvin was convicted and sentenced for both armed robbery and first degree murder. Thus, the defendant and Melvin were not in comparable positions given that Melvin was convicted of two offenses. According to the State, the original sentencing court acted within its discretion to mete out punishment to the defendant based on his sole conviction of armed robbery and to Melvin for his two convictions.

¶ 50 Generally, similarly situated defendants should not receive grossly disparate sentences; however, the disparity in sentences for the same offenses is not by itself a violation of fundamental fairness. *People v. Caballero*, 179 Ill. 2d 205, 216 (1997). The State contends *People v. Martinez*, 372 Ill. App. 3d 750 (2007), supports the different sentences imposed on the defendant and on his codefendant for the same offense of armed robbery.

¶ 51 In *Martinez*, the defendant was sentenced to 20 years' imprisonment for armed robbery. A codefendant was sentenced to 10 years' imprisonment for armed robbery and 40 years' imprisonment for murder. The appellate court rejected the defendant's claim that his sentence was disproportionate based on the uncontestable fact that he received a sentence twice as harsh as his codefendant for armed robbery. The court determined that "the two defendants were not

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similarly situated" given that the codefendant was sentenced for murder as well. *Id.* at 760.

¶ 52 In his reply brief, the defendant argues that *People v. Godinez*, 91 Ill. 2d 47 (1982), undercuts the holding in *Martinez*. In *Godinez*, the defendant and his brother, among others, were convicted of armed robbery. In addition, the defendant was convicted of aggravated kidnaping. The defendant and his brother were sentenced at a joint sentencing hearing. The defendant received a sentence of 24 years for armed robbery and a concurrent 10-year sentence for aggravated kidnaping. The defendant's brother received a 15-year sentence for armed robbery. The appellate court reduced the defendant's 24-year armed robbery sentence to his brother's 15-year sentence. The court reasoned that nothing in the record explained the disparity in the sentences for the same offense. *Godinez*, 91 Ill. 2d at 54. The supreme court restored the 24-year sentence. The court took a different view of the record: "[T]he difference in sentences can be supported by the difference in the roles of the defendant and [his brother] in the crimes." *Id.*

¶ 53 According to the instant defendant, *Godinez* supports his position: "[I]mplicit in the *Godinez* holding is that there is no axiomatic restriction based on one less conviction between defendants." The defendant reads *Godinez* to suggest that separate convictions alone do not support disparate sentences. He appears to suggest that a showing of the different "roles" of the codefendants in the crimes is necessary to support a greater sentence imposed on one codefendant over another. In other words, according to the defendant, it matters not that codefendant Melvin was also given a consecutive sentence for first degree murder because the role the defendant played in the armed robbery did not merit a 20-year sentence when his more

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culpable codefendant was sentenced to a mere six years for the same offense.

¶ 54 We reject the defendant's reading of *Godinez* for an "implicit" holding that supports his position. We find nothing in the supreme court's decision that undermines this court's decision in *Martinez*. The outcome in *Martinez* was not undermined by *Godinez*. We are guided by *Martinez* in rejecting the defendant's claim that he received a disparate sentence for armed robbery by his narrow comparison of the sentence codefendant Melvin received for the same offense, while ignoring that Melvin was also sentenced to consecutively serve 20 years for first degree murder.

¶ 55 In accordance with *Martinez*, the defendant and codefendant Melvin are not similarly situated for purposes of examining only the sentences imposed for armed robbery. *Martinez*, 372 Ill. App. 3d at 760. The circuit court did not err in sentencing the defendant to 20 years for his role in the armed robbery of the victim that sustained great bodily harm, who was also murdered.

¶ 56 CONCLUSION

¶ 57 The circuit court did not err in sentencing the defendant to 20 years' imprisonment for armed robbery after we vacated the defendant's original 26-year sentence as void on direct appeal. Where the original trial judge concluded that the 85% rate applied to the defendant's original sentence, we find no due process or statutory violation in the resentencing judge's finding that the armed robbery victim suffered great bodily harm to trigger the 85% rate regarding the defendant's 20-year sentence. We reject the defendant's claim that his 20-year sentence for armed robbery was disparate when compared to the six-year sentence of codefendant Melvin when Melvin also was sentenced to consecutively serve 20 years for first degree murder.

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¶ 58 Affirmed.

¶ 59 PRESIDING JUSTICE ROBERT E. GORDON, dissenting:

¶ 60 I must respectfully dissent for the following reasons.

¶ 61 First, defendant's sentence increased from his original sentence, and all parties agree that an increase is not allowed. Under the original sentence of 11 years, plus the 15-year enhancement without the finding of great bodily harm, this defendant would have been eligible for parole in May 2015. By increasing defendant's term to 20 years at 85%, defendant is not eligible for parole before May 2019. Basic math shows that is an increase of 4 years.

¶ 62 The original trial judge was under the misapprehension that 85% was required by the legislature, and thus he did not make a special finding of great bodily harm. See the majority opinion at ¶39. The bottom line is that no finding was made.

¶ 63 Where a sentence is set aside on appeal, the trial court on remand "shall not" impose a "more severe" sentence, unless the more severe sentence is based on conduct by the defendant since the original sentencing. 730 ILCS 5/5-4(a) (West 2008). There is no claim that the remanded sentence is based on new conduct; and no matter how you try to juggle the math, 4 more years is more severe.

¶ 64 Second, the State argues that if the enhanced portion of a sentence is declared void, the entire judgment is void, not just the enhancement (majority opinion, at ¶ 23); and the majority agrees, finding "no authority" for the contrary position (majority opinion, at ¶ 31). However, over 20 years ago in *People v. Perruquet*, 181 Ill. App. 3d 660, 663 (1989), the appellate court held: "Where a court imposes a sentence in excess of what a statute permits, the legal and

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authorized portion of the sentence is not void, but the excess portion of the sentence is void."

Citing *Perruquet* with approval, our supreme court held more recently in *People v. Thompson*, 209 Ill. 2d 19, 24-26 (2004) that where a trial court lacked the authority to impose an extended term sentence, "the extended-term portion of that sentence is void." Our supreme court then vacated only the extended term portion of that sentence. *Thompson*, 209 Ill. 2d at 29.

¶ 65 The majority states that defendant fails to offer "a reason for this court to order a resentencing hearing if the defendant faced no more than an 11-year 'cap' on resentencing, unless the defendant contends the trial court might have been inclined to impose a lesser sentence." Majority opinion, at ¶31. It has been many years since defendant was sentenced, and it was certainly possible that factors in mitigation appeared during that time. Whether the trial court was inclined to impose a lesser sentence was a ruling we felt was best made in the first instance by the trial court. In addition, a trial court on remand may impose a more severe sentence if the more severe sentence is based on conduct by the defendant since the original sentencing. 730 ILCS 5/5-4(a) (West 2008). Again, this was a factual determination that we felt was best left to the trial court in this case.

¶ 66 For the foregoing reasons, I must dissent.