

Nos. 1-13-3198 and 1-14-0535
(CONSOLIDATED)

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

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 87 CR 812
)	
DARRYL HOUSE,)	Honorable
)	Angela Munari Petrone,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Ellis and Cobbs concurred in the judgment.

O R D E R

¶ 1 *Held:* We affirm the *sua sponte* dismissal of defendant's section 2-1401 petition over his constitutional challenge to the exclusive jurisdiction provision of the Illinois Juvenile Court Act. We vacate the \$105 frivolous filing fee because defendant's instant section 2-1401 petition was his first such petition.

¶ 2 Defendant Darryl House appeals the *sua sponte* dismissal of his *pro se* petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)) by the circuit court of Cook County. In this consolidated appeal (Nos. 1-13-3198 and 1-14-0535), defendant does not argue the merits of his petition. Instead, he contends, for the

1-13-3198 and 1-14-0535 cons.

first time on appeal, that the Illinois Juvenile Court Act's (Act) exclusive jurisdiction provision (Ill. Rev. Stat. 1986, ch. 37, par. 702-7(1), later revised and codified at 705 ILCS 405/5-120 (West 2012)) violated his constitutional rights by automatically excluding all 17-year-old minors charged with felonies from juvenile court jurisdiction. He also contends that the circuit court erred in assessing him a \$105 frivolous filing fee because the instant section 2-1401 petition was his first such petition. We affirm in part and vacate in part.

¶ 3 Following a 1988 jury trial, defendant was convicted of armed robbery and the murder of Richard Sax on November 1, 1986, and sentenced to 80 years' imprisonment. Defendant was 17 years old on the date of the crimes. This court affirmed the judgment on direct appeal. *People v. House*, 232 Ill. App. 3d 480 (1992). Defendant subsequently filed three unsuccessful post-conviction petitions, and this court affirmed the circuit court's dismissals of those petitions. *People v. House*, Nos. 1-95-0493 (1997), 1-00-3040 (2002), and 1-00-0107 (2002) (unpublished orders under Supreme Court Rule 23). Defendant then filed fourth and fifth post-conviction petitions, which were dismissed and not appealed.

¶ 4 On August 4, 2011, defendant filed the instant section 2-1401 petition, alleging that his extended-term sentence was void where it was based on his lack of remorse, he was illegally prosecuted by the Cook County State's Attorney's Office instead of the Illinois Attorney General, the State failed to provide clear and convincing evidence as to how his custodial injuries were sustained, and he was legally innocent. On August 27, 2013, the circuit court dismissed the section 2-1401 petition as untimely. The court further found that the allegations were barred by *res judicata*, lacked merit and were unsupported. The court concluded that the petition was

1-13-3198 and 1-14-0535 cons.

frivolous and untimely, and assessed defendant "\$90 for filing a frivolous petition, plus \$15 in mailing fees, pursuant to 705 ILCS 1-5/27.2(a) (West 2011)." Defendant filed a timely notice of appeal (No. 1-13-3198), and a late notice of appeal (No. 1-14-0535). We consolidated the appeals on April 18, 2014.

¶ 5 On appeal, defendant abandons the claims raised in his petition, and contends, for the first time, that the Illinois Juvenile Court Act's exclusive jurisdiction provision (Ill. Rev. Stat. 1986, ch. 37, par. 702-7(1)) violated his constitutional rights by automatically excluding all 17-year-old minors charged with felonies from juvenile court jurisdiction without consideration of their youth and its attendant circumstances. He contends that a challenge to the constitutionality of a statute may be raised at any time, citing *People v. McCarty*, 223 Ill. 2d 109, 123 (2006).

¶ 6 The State responds that defendant's new constitutional challenge is not properly before this court because it is an as-applied challenge to the statute which is not one of those recognized by this court as being exempt from the typical rules of forfeiture and procedural bars in section 2-1401 of the Code, citing *People v. Thompson*, 2015 IL 118151, ¶39. The State also contends that defendant cannot rely on *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012), for his contention that his youth and its attendant circumstances should be considered in determining whether he should be excluded from juvenile court jurisdiction because *Miller* does not apply retroactively to defendant and further, the retroactivity of *Miller* has no direct bearing on the resolution of the issue. The State also argues that in *People v. Patterson*, 2014 IL 115102, our

1-13-3198 and 1-14-0535 cons.

supreme court rejected the same constitutional arguments raised here, but regarding the automatic transfer provision of the Act¹.

¶ 7 Defendant responds that his constitutional challenge is not an as-applied challenge, but a facial one. He also contends that, as the exclusive jurisdiction provision was void *ab initio*, *Thompson* does not bar this court from rendering a decision on the issue. *Thompson*, 2015 IL 118151, ¶32. We agree with defendant that he is mounting a facial constitutional challenge to the statute, which may be raised for the first time on appeal.

¶ 8 An as applied challenge requires the defendant to show that the statute violates the constitution as it applies to him. *People v. Garvin*, 219 Ill. 2d 104, 117 (2006). In contrast, a facial challenge seeks to invalidate the statute itself, and a statute deemed facially invalid has no force and effect upon any person or entity regardless of the specific circumstances. *People v. Nance*, 189 Ill. 2d 142, 146 (2000).

¶ 9 In *Thompson*, 2015 IL 118151, ¶39, the defendant specifically raised an as-applied challenge, and the supreme court found that such a challenge was not one of the challenges recognized by the court as "exempt from the typical rules of forfeiture and procedural bars in section 2-1401" and was therefore forfeited. *Id.* ¶39. Here, defendant specifically contends that he is raising a facial challenge, and not an as-applied challenge.

¹ The automatic transfer provision of the Act automatically transfers certain minors, who were at least 16 years of age at the time of the offense and who were charged with first degree murder, aggravated criminal sexual assault or aggravated battery with a firearm (minor personally discharged a firearm), from the jurisdiction of the juvenile court to the adult criminal court. 705 ILCS 405/5-130 (West 2008).

1-13-3198 and 1-14-0535 cons.

¶ 10 Defendant's argument demonstrates that he is contending that the statute should be deemed facially invalid as having no force and effect upon any person or entity regardless of the specific circumstances. For example, defendant contends that Illinois' statutory scheme is cruel and unusual because it mandated adult prosecution and sentencing for "all 17-year-olds" based on a predetermination that those juveniles do not share the inherent characteristics of youth that render them categorically less culpable than adults. (Emphasis in original.) He also contends that at the time of the offense in this case, "every child who was 17 years old" and charged with a crime in Illinois was automatically excluded from juvenile court jurisdiction and faced the same sentencing provision as adult offenders. Accordingly, defendant is raising a facial constitutional challenge that may be raised for the first time on appeal. *Thompson*, 2015 IL 118151, ¶32.

¶ 11 We now turn to the merits of defendant's contention that the exclusive jurisdiction provision of the Act is facially unconstitutional by automatically excluding all 17-year-old minors charged with felonies from juvenile court jurisdiction without consideration of their youth and its attendant circumstances. At the time of the offenses, the Act provided that 17-year-old minors charged with felonies were automatically excluded from juvenile court jurisdiction. Ill. Rev. Stat. 1986, ch. 37, par. 702-7(1). Defendant contends that this provision violates his eighth amendment right against cruel and unusual punishment, and his due process rights, including under the rational basis test. Defendant acknowledges that the supreme court in *Patterson*, 2014 IL 115102, ¶106, recently rejected a challenge to the automatic transfer statute of the Act, finding that neither the eighth amendment nor the proportionate penalties clause applied to the statute because it did not impose any actual penalty. Defendant recognizes that this

1-13-3198 and 1-14-0535 cons.

court cannot overrule *Patterson*, but "preserves this claim for further review and urges that, to the extent *Patterson* can be applied to the exclusive jurisdiction statute, it was wrongly decided."

We review *de novo* the constitutionality of the statute. *Patterson*, 2014 IL 115102, ¶90.

¶ 12 In *Patterson*, 2014 IL 115102, ¶¶93-110, the supreme court, in analyzing the constitutionality of the automatic transfer statute, rejected the defendant's procedural and substantive due process, eighth amendment and proportionate penalties claims. The court rejected defendant's reliance on *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller*, 132 S. Ct. 2455, in arguing the distinctive nature of juveniles. *Id.* ¶97. The court further stated that the automatic transfer statute is not a sentencing statute, and that access to juvenile courts is not a constitutional right because the Illinois juvenile court system is a creature of the legislature. *Id.* ¶104. The same reasoning utilized in rejecting constitutional challenges to the automatic transfer statute is equally applicable to the exclusive jurisdiction provision.

¶ 13 Further, in *People v. Harmon*, 2013 IL App (2d) 120439, the court rejected the same arguments defendant raises here. The court noted that *Roper*, *Graham*, *J.D.B. v. North Carolina*, 564 U.S. 261 (2011) and *Miller*, 132 S. Ct. 2455, stand for the proposition that a sentencing body must have the chance to take into account mitigating circumstances, *i.e.*, the youth of a juvenile and the attendant characteristics, before sentencing a juvenile to the harshest possible penalty, which was either the death penalty or life imprisonment without the possibility of parole. *Id.* ¶54. As in the case at bar, neither of these punishment penalties were at issue in *Harmon*. The court further stated that the trial court was able to consider the defendant's age, as well as other

1-13-3198 and 1-14-0535 cons.

circumstances, in determining the sentence. *Id.* The court also found that, as the eighth amendment prohibits "cruel and unusual *punishments*" and the exclusive jurisdiction provision does not impose punishment but rather specifies the forum in which a defendant's guilt may be adjudicated, the provision is not subject to the eighth amendment. (Emphasis in original.)

Harmon, 2013 IL App (2d) 120439, ¶55. The court similarly rejected proportionate penalties and due process arguments. *Id.* ¶¶56, 62.

¶ 14 We further observe that in *People v. Fiveash*, 2015 IL 117669, ¶21, our supreme court has held that adjudication in a juvenile court is not a matter of a constitutional right. The court noted that it had recognized the need to consider juveniles' unique characteristics in the eighth amendment context in *People v. Miller*, 202 Ill. 2d 328, 341-42, and that the United States Supreme Court had done so in *Roper*, *Graham*, and *Miller v. Alabama*. *Id.* ¶45. However, neither it nor the Supreme Court had ever held that the failure to address the inherent differences between teen and adult offenders creates a due process violation when the teen, as here, is potentially subjected to a prison sentence involving a term of years rather than the death penalty or natural life in prison. *Fiveash*, 2015 IL 117669, ¶45 (citing *Patterson*, 2014 IL 115102, ¶¶97-98). Thus, we find no due process violation here, especially where the trial court was able to consider defendant's youth and its attendant circumstances when sentencing him. See *Harmon*, 2013 IL App (2d) 120439, ¶62. Accordingly, we conclude that the exclusive jurisdiction provision of the Act does not violate the eighth amendment or defendant's right to due process. *Id.* ¶¶56, 62.

1-13-3198 and 1-14-0535 cons.

¶ 15 Defendant next contends that the circuit court erred in imposing a \$105 frivolous filing fee pursuant to section 22-105(a) of the Code (735 ILCS 5/22-105(a) (West 2012)) where the instant section 2-1401 petition was his first such petition. The State responds that the court properly imposed \$105 in filing fees pursuant to section 27.2a of the Clerks of Courts Act (705 ILCS 105/27.2a (West 2012)).

¶ 16 We observe that defendant is raising this issue for the first time on appeal. However, the State does not argue forfeiture, and thus we will address the issue. *People v. Beachem*, 229 Ill. 2d 237, 241 n. 2 (2008).

¶ 17 Section 27.2a(g)(2) of the Clerks of Courts Act provides that if a petition to vacate or modify any final judgment or order of court is filed later than 30 days after the entry of the judgment or order, the clerk of the circuit court must charge a filing fee of a minimum of \$75, up to a maximum fee of \$90. 705 ILCS 105/27.2a(g)(2) (West 2012). When the clerk is required to mail, the fee will be a minimum of \$10 and a maximum of \$15 plus the cost of postage. 705 ILCS 105/27.2a(h) (West 2012).

¶ 18 Section 21 of the Court of Claims Act specifically authorizes the circuit court to impose fees on a prisoner "in the manner provided in Article XXII" of the Code upon a specific finding that the prisoner's pleading, motion or other filing is frivolous. 705 ILCS 505/21 (West 2012); *People v. Gale*, 376 Ill. App. 3d 344, 357 (2007).

¶ 19 Turning to article XXII, section 22-105(a) of the Code provides, in relevant part, that if a prisoner files a second or subsequent petition for relief from judgment under section 2-1401 of

1-13-3198 and 1-14-0535 cons.

the Code, and the court makes a specific finding that it is frivolous, the prisoner is responsible for full payment of the filing fees and actual court costs. 735 ILCS 5/22-105(a) (West 2012).

¶ 20 Here, the court relied on section 27.2a of the Clerks of Courts Act (705 ILCS 105/27.2a(h) (West 2012)) in assessing the filing fee, and stated that it was imposing the fee because the petition was frivolous. However, under section 22-105 of the Code, a prisoner is not responsible for full payment of the fees and costs for filing a frivolous section 2-1401 petition, unless that petition is a "second or subsequent petition." 735 ILCS 5/22-105(a) (West 2012). This was defendant's first section 2-1401 petition. Therefore, the court erred in assessing the fees and costs. Accordingly, we vacate the \$105 fees and costs assessed.

¶ 21 Affirmed in part; vacated in part.