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2019 IL App (5th) 160481-U

NOTICE
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NO. 5-16-0481

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	St. Clair County.
)	
v.)	No. 15-CF-614
)	
JAMES DOWDY,)	Honorable
)	John Baricevic,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE OVERSTREET delivered the judgment of the court. Justices Welch and Chapman concurred in the judgment.

ORDER

¶ 1 *Held:* The defendant did not raise his as-applied constitutional challenge in the circuit court; therefore, the record on appeal is insufficient for the appellate court to address his as-applied constitutional challenge, based on the proportionate penalties clause, in a direct appeal of his sentence.

¶ 2 The defendant, James Dowdy, was charged with burglary for stealing socks out of an unlocked car. He pled guilty but mentally ill. Because of prior felony convictions, the circuit court was required to sentence the defendant as a Class X offender (730 ILCS 5/5-4.5-95(b) (West 2014)) with a sentencing range of 6 to 30 years in the Department of Corrections (*id.* § 5-4.5-25(a)). The circuit court sentenced the defendant to 14 years of imprisonment. The defendant now appeals his sentence, arguing that his sentence violates

the proportionate penalties clause in the Illinois Constitution (Ill. Const. 1970, art. I, § 11). For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 The parties agree that the defendant suffers from a mental impairment that includes a fetish involving female socks, autism, and an obsessive compulsive disorder. Prior to the defendant's conviction in the present case, his criminal history included three felony residential burglary convictions and one felony attempt residential burglary conviction stemming from his sock fetish. His past crimes were nonviolent but involved breaking into the victim's homes in order to steal socks. The circuit court's sentences for each subsequent crime have become progressively more severe.

¶ 5 In December 1994, the defendant was found guilty of residential burglary and was initially sentenced to four years of probation but was later sentenced to three years in the Department of Corrections after his probation was revoked. In December 1998, he was found guilty of residential burglary and sentenced to six years in the Department of Corrections. In February 2001, he was found guilty of attempted residential burglary and was sentenced to seven years in the Department of Corrections. Finally, in January 2009, he was found guilty, but mentally ill, of residential burglary and sentenced to 12 years in the Department of Corrections.

¶ 6 The present case concerns the defendant's sentence for his fifth felony conviction. In March 2016, he pleaded guilty, but mentally ill, to burglary and was sentenced to 14 years in the Department of Corrections. He committed this latest burglary while on mandatory supervised release stemming from his 2009 conviction and sentence. The

defendant's conviction and sentence in the present case stem from events that occurred in May 2015. At that time, the defendant had been out of prison for about eight months since completing his last term of imprisonment for residential burglary. He was living in Belleville, Illinois, and many people in the community were aware of the defendant's criminal history and sock fetish. Angela Hutchinson lived near the defendant. She called the Belleville Police Department after finding socks in her back yard that she believed the defendant had left. Investigators also learned that another witness had seen the defendant around Hutchinson's house.

¶ 7 Therefore, on May 13, 2015, officers parked an unlocked vehicle near Hutchinson's residence. They equipped the vehicle with a motion-activated alarm and placed a surveillance camera in the area. Inside the vehicle, they placed several items of clothing, including female socks, in a laundry basket. On May 18, 2015, the defendant opened one of the car's doors and took several socks out of the laundry basket. The surveillance camera recorded images of the defendant during the burglary. Officers later recovered the socks at the defendant's house along with a handwritten story about a gnome named Elmer that liked to steal socks of girls between the ages of 10 and 14. They also recovered notebooks containing handwritten listings of children's names, ages, and socks they were wearing.

¶ 8 The State charged the defendant with burglary in violation of section 19-1(a) of the Criminal Code of 2012 (720 ILCS 5/19-1(a) (West 2014)). Specifically, the State alleged that, on May 18, 2015, the defendant knowingly entered into a motor vehicle without authority and with intent to commit theft. The circuit court appointed a

psychiatrist, Dr. Daniel J. Cuneo, “as a defense expert to evaluate defendant’s sanity at the time of the alleged offense.” Dr. Cuneo had previously evaluated the defendant in 1993, 1997, 2001, 2007, and 2008, in conjunction with the defendant’s past criminal conduct. On March 11, 2016, Dr. Cuneo submitted a report of his new evaluation.

¶ 9 In his report, Dr. Cuneo concluded that the defendant “was suffering from a substantial disorder of thought, mood, and behavior (Autism Spectrum Disorder[;] Fetishistic Disorder, Nonliving Objects[;] and Obsessive Compulsive Disorder) at the time of the alleged offense which impaired his judgment and effected his behavior, but not to the extent that he was unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.” He concluded that the defendant was intellectually limited, but not “mentally retarded,” and that the defendant knew that breaking into a car and stealing socks was wrong. He opined that the defendant “was legally sane at the time of the alleged offense.”

¶ 10 Dr. Cuneo added that the defendant’s “mental illness was the central factor that brought about his behavior in his current offense in striking [*sic*] similar to his behavior in every other one of his convictions.” Dr. Cuneo reported that the defendant had stolen hundreds of pairs of women’s socks since he was 12 years old and that the only time he did not take women’s socks was when he was either in prison or in jail. Dr. Cuneo believed that the defendant’s condition would not get better in prison and that imprisonment would not act as a deterrent toward his sock fetish.

¶ 11 Dr. Cuneo noted that a previous doctor had recommended that the defendant be given a clinical trial of “selective serotonin re uptake inhibitors such as Prozac, Paxil,

Zoloft, and Luvox,” and that the defendant reported “that he had done best when he had been placed on a medication regime that included Prozac.” Dr. Cuneo reported that when the defendant committed the offense at issue, he was not on any medications. Dr. Cuneo recommended that, if the defendant were to be given probation, “he be evaluated for placement on one of these medications to help him deal with his obsessive compulsive behaviors, including his sock fetish” and that his probation include individual treatment and involvement in a structured daily program “or a partial hospitalization program through one of the community mental health centers.”

¶ 12 On March 29, 2016, the defendant appeared in court and entered a plea of guilty but mentally ill. The circuit court conducted the sentencing hearing on June 9, 2016. At the sentencing hearing, the circuit court heard testimony about the defendant’s previous burglaries stemming from his sock fetish, testimony from a counselor who had just started providing him therapy sessions at the time he committed the offense, testimony from his mother who described the defendant’s struggles with mental health issues while growing up and as an adult, and testimony from Dr. Cuneo.

¶ 13 At the conclusion of the hearing, the circuit court sentenced the defendant to 14 years in the Department of Corrections. In sentencing the defendant, the circuit court explained as follows:

“What ought to happen *** is we ought to have in the State of Illinois a secure facility where I would be certain and the community would be certain that [the defendant] is cared for and treated until cured. I don’t have that ability.

Pursuant to this plea, [the defendant] has to go to the Department of Corrections. I have no confidence that they will provide him any treatment, even though both parties agree that he's guilty but mentally ill. The current recommendations from Governor Rauner's office do not include mental health treatment, in fact reduce the resources that we have available. So, what ought to happen can't happen.

So, as everybody knew when he pled guilty, he's going to the Department of Corrections. The issue is for how long.

* * *

In aggravation, you are a repeat offender. Although treatment was sought by you and *** in mitigation, that you want treatment, at this point, it has not been successful, and that your offense was committed while you were on mandatory supervised release.

In mitigation, pursuant to the *** guilty but mentally ill plea, there's no question that [the defendant] is autistic, has a fetish that results in part from that autism, that he has assumed responsibility for his actions, he has pled to a nonviolent property offense, and all his prior offenses are nonviolent and property, that he wants treatment, that he has some motivation, he has significant cognitive delay, and I'm sure that some of his issues are pursuant to the social stigma that, I think, probably can be generalized in your mom's testimony about you being

bullied. *** Those are factors in mitigation as to what your sentence should be, they are not excuses for your behavior.”

¶ 14 The court noted that when the defendant broke into houses to steal socks, he went in and out without a lot of damage but that most of the people in the community did not know that. The court told the defendant, “when you violate the integrity of a home, it affects dramatically people’s lives” because “they can’t sleep at night” and they “don’t feel safe.” The court noted that merely because the defendant committed a property crime and not a crime against a person did not “mean that persons aren’t affected by [the defendant’s] actions.”

¶ 15 The court noted that its sentence needed to be proportionate to the crime but also took into account the defendant’s criminal record, concluding that “crimes need to have increasing punishment.” The court, therefore, sentenced the defendant “to fourteen years in the Illinois Department of Corrections, followed by three years of mandatory supervised release.” The court stated that it would recommend that the Department of Corrections consider the defendant for treatment for his obsessive compulsive disorder, autism, and fetish, but stated that it was “pessimistic” that the Department of Corrections would provide the defendant treatment.

¶ 16 The defendant filed a motion to reconsider his sentence in which he argued that his sentence was unduly harsh and not in keeping with his history and the alternatives available to the court to assist him in his rehabilitation and that the circuit court failed to give appropriate consideration to mitigating factors. The circuit court denied the defendant’s motion to reconsider and offered a further explanation of its sentencing

decision. The court stated that it considered the entire nature of the offense and the defendant's criminal history. It stated that its "primary focus was if rehabilitation should be considered." The court explained as follows:

"As to this defendant, there have been numerous attempts at rehabilitation. Efforts were made by his family, by probation services, and by punishment through the Department of Corrections, followed by mandatory supervised release. None of these worked. The defendant continues to violate the law. Lesser sentences have not worked, they have not generated any behavior modification in [the defendant].

Alternative sentencing was not available. The defendant pled to a charge requiring incarceration. Though I believe the security provided by a prison may not be needed, society has not been protected previously with lesser sentences. A secure facility is needed or the defendant's actions suggest he will continue to violate. Or, in other words, he has not shown an ability to be rehabilitated. It is the defendant's continued inability to conform that generated the sentence. I point out as well the sentence given is far below the maximum allowed."

¶ 17 The defendant now appeals his sentence.

¶ 18 ANALYSIS

¶ 19 On appeal, the defendant challenges his sentence under the proportionate penalties clause of the Illinois Constitution. He did not raise this challenge in the proceedings below.

¶ 20 The proportionate penalties clause of the Illinois Constitution states: "All penalties shall be determined both according to the seriousness of the offense and with the

objective of restoring the offender to useful citizenship.” Ill. Const. 1970, art. I, § 11. To succeed on a proportionate penalties claim, a defendant must show either (1) that the punishment for the offense is cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community or (2) that similar offenses are compared and the conduct that creates a less serious threat to the public health and safety is punished more harshly. *People v. Klepper*, 234 Ill. 2d 337, 348 (2009). In the present case, the defendant argues that his sentence is cruel, degrading, and so wholly disproportionate to the offense as to shock the moral sense of the community. The Illinois Supreme Court has declined to define what kind of punishment qualifies as disproportionate under this standard because “as our society evolves, so too do our concepts of elemental decency and fairness which shape the ‘moral sense’ of the community.” *People v. Miller*, 202 Ill. 2d 328, 339 (2002).

¶ 21 In the present case, the parties agree that the defendant’s proportionate penalties challenge is an “as-applied constitutional challenge” rather than a “facial” challenge. “A party raising a facial challenge must establish that the statute is unconstitutional under any possible set of facts, while an as-applied challenge requires a showing that the statute is unconstitutional as it applies to the specific facts and circumstances of the challenging party.” *People v. Harris*, 2018 IL 121932, ¶ 38. Here, the defendant argues that, as applied to his specific circumstances, the circuit court’s sentence of 14 years of imprisonment for stealing socks violates the proportionate penalties clause.

¶ 22 Following the Illinois Supreme Court’s recent decision in *Harris*, which we discuss in detail below, we conclude that we are unable to consider the defendant’s as-

applied challenge because he did not raise his challenge in the circuit court and the record is, therefore, not sufficiently developed in terms of the defendant's specific circumstances. Therefore, we conclude that the defendant's as-applied constitutional challenge is premature. *Id.* ¶ 46. Also, following *Harris*, we decline to remand this matter for an evidentiary hearing, but note that the defendant is "not necessarily foreclosed from raising his as-applied challenge in another proceeding." *Id.* ¶ 48.

¶ 23 In order to explain the Illinois Supreme Court's decision in *Harris*, we must briefly outline some of the case law leading up to the supreme court's decision in that case. In *Miller v. Alabama*, 567 U.S. 460, 479 (2012), the United States Supreme Court held that a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders violates the eighth amendment to the United States Constitution.¹ The Court's reasoning was based on a conclusion that children were different than adults for purposes of sentencing; they were less deserving of punishment because of their diminished culpability and greater prospects of reform. *Id.* at 471.

¶ 24 In *People v. Holman*, 2017 IL 120655, our Illinois Supreme Court expanded on the *Miller* decision, holding that a discretionary *de facto* life sentence for a juvenile offender is unconstitutional under the eighth amendment unless the sentencing court,

¹The present case concerns the proportionate penalties clause of the Illinois Constitution rather than the eighth amendment to the United States Constitution. It appears that the relationship between the clauses is currently unclear. The Illinois Supreme Court has indicated that the proportionate penalties clause places greater limitations on the legislature than the eighth amendment. *People v. Clemons*, 2012 IL 107821, ¶¶ 36-37. However, the Illinois Supreme Court has also held that these clauses are "co-extensive." *People v. Patterson*, 2014 IL 115102, ¶ 106. It is sufficient for our analysis to simply note that they address similar concerns.

prior to sentencing, considers the characteristics specific to juveniles that were articulated by the Supreme Court in *Miller*. *Holman*, 2017 IL 120655, ¶ 46.

¶ 25 Finally, in *People v. Coty*, 2018 IL App (1st) 162383, *appeal allowed*, No. 123972 (Ill. Jan. 31, 2019), a case decided shortly before the Illinois Supreme Court’s decision in *Harris*, the appellate court extended “the *Miller* line of cases” to adults with intellectual disabilities who receive discretionary *de facto* life sentences. *Id.* ¶¶ 75-76. In the present case, the defendant cites *Coty* in support of his argument that his sentence violates the proportionate penalties clause.

¶ 26 In *Coty*, a 52-year-old intellectually impaired defendant received a 50-year sentence for predatory criminal sexual assault of a minor, which the *Coty* court held was a *de facto* life sentence. *Id.* ¶¶ 1, 79. Citing *Miller* and its progeny, the court analyzed whether the sentence was unconstitutional “as applied” under the proportionate penalties clause. *Id.* ¶¶ 49, 59-76.

¶ 27 The *Coty* court held that the *de facto* life sentence was unconstitutional as applied in that case because “the record indicate[d] that the trial court was not presented with current evidence of and, thus, could not have fully considered the attendant characteristics of the defendant’s intellectual disability.” *Id.* ¶ 82. The court stated that the lower court “was without the necessary facts from which to determine whether the defendant could be restored to useful citizenship or whether he was so irretrievably depraved and of such danger of recidivism that a natural life sentence was warranted.” *Id.* ¶ 86. The court vacated the defendant’s sentence and remanded for a new sentencing hearing with instructions for the sentencing court “to give serious consideration to the

attendant characteristics of the defendant’s intellectual disability and the fact that his disability ‘diminish[es] both [his] culpability and the need for retribution’ particularly in the contexts of this, a nonhomicide offense.” *Id.* ¶ 87.

¶ 28 Although the *Coty* court conducted an analysis under the proportionate penalties clause, its holding nullified the procedure leading up to the defendant’s sentence. The court did not reduce the defendant’s sentence or hold that the defendant’s 50-year sentence was cruel, degrading, and so wholly disproportionate to the offense as to shock the moral sense of the community. Instead, the court held that the sentencing court improperly failed to consider “the attendant characteristics of the defendant’s intellectual disability” and remanded for a new sentencing hearing.

¶ 29 A little over two months after the appellate court decided *Coty*, the Illinois Supreme Court issued its decision in *Harris*, which, as noted above, we believe controls our analysis in this case. In *Harris*, the Illinois Supreme Court emphasized that an as-applied challenge depends on the unique facts and circumstances of the person making the challenge; therefore, such a challenge requires a developed record with respect to the facts and circumstances facing the person making the challenge. *Harris*, 2018 IL 121932, ¶ 39. The Illinois Supreme Court stated that a court is not capable of making an “as-applied” determination of unconstitutionality without an evidentiary hearing and findings of fact and that any finding that a statute is unconstitutional “as-applied” is premature prior to an evidentiary hearing. *Id.*

¶ 30 In *Harris*, a defendant raised an “as-applied” proportionate penalties clause challenge after he was sentenced to 76 years’ imprisonment for convictions of first

degree murder, attempted first degree murder, and aggravated battery. *Id.* ¶ 1. He argued that due to his age (18 at the time of sentencing) and other mitigating circumstances, his *de facto* life sentence “shock[ed] the moral sense of the community.” *Id.* ¶ 36. The defendant, however, did not raise his as-applied challenge in the trial court. *Id.* ¶ 40. Therefore, the lower court did not conduct an evidentiary hearing on his claim and did not make any factual findings with respect to the defendant’s specific circumstances. *Id.*

¶ 31 On appeal, the *Harris* court noted that a critical point was “whether the record ha[d] been developed sufficiently to address the defendant’s constitutional claim.” *Id.* ¶ 41. The court noted that the record included only “basic information about defendant, primarily from the presentence investigation report.” *Id.* ¶ 46. The record did not include “sufficient information about [the defendant’s] personal history to determine whether the evolving science on juvenile maturity and brain development applie[d] to him,” information that the Supreme Court relied on in *Miller*. *Id.*

¶ 32 In the present case, the defendant cites *Coty* and asks us to extend its analysis based on the *Miller* line of cases to his specific circumstances. However, before we can address the legal implications of the *Miller* line of cases to the defendant’s specific circumstances, the lower court must make factual findings to establish the defendant’s specific circumstances relevant to his challenge. Here, the circuit court has not conducted an evidentiary hearing to determine the defendant’s specific circumstances relevant to an as-applied proportionate penalties clause challenge. Accordingly, the record is not sufficiently developed for us to address the defendant’s argument.

¶ 33 The defendant argues that the record is sufficient because evidence of his mental impairment was presented at the sentencing hearing. It is important to note, however, that the court considered the defendant's mental illness in the context of evaluating aggravating and mitigating factors. In addition, Dr. Cuneo was appointed only to "evaluate defendant's sanity at the time of the alleged offense." We cannot determine from the record whether Dr. Cuneo's testimony is complete with respect to all of the defendant's relevant circumstances when Dr. Cuneo did not examine the defendant for that purpose or testify at an evidentiary hearing held for that purpose. Neither the defendant nor the State has presented evidence of the defendant's specific circumstances in the context of an as-applied proportionate penalties clause challenge, and the circuit court has not made the necessary findings of fact for complete analysis under the constitutional standard.

¶ 34 For example, on appeal, the State asks us to search the Department of Corrections' internet website pages for information concerning its facilities that, the State argues, are available with a specific mission to reduce recidivism through a full spectrum of services, including mental health services. The State also argues that, according to Dr. Cuneo, the primary treatment the defendant needed was Prozac and that we should not presume that the defendant will not get Prozac while incarcerated. We cannot determine anything from the record with respect to the defendant's possible treatments while in prison because there was no evidentiary hearing on the defendant's as-applied challenge. In addition, with no evidence to consider, we cannot determine the legal significance of what this type of evidence may be in the context of a proportionate penalties clause challenge.

¶ 35 For his part, the defendant asks us to look at, among other things, Dr. Cuneo's report and make a factual determination with respect to his diminished culpability, even though Dr. Cuneo did not examine the defendant for that purpose and reported that the defendant's mental illness did not impair his ability "to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." We decline to make these factual inquiries in the first instance on appeal.

¶ 36 We recognize that in *People v. Holman*, 2017 IL 120655, the Illinois Supreme Court addressed an as-applied challenge raised for the first time on appeal. However, the Illinois Supreme Court has distinguished its *Holman* decision because, according to the Illinois Supreme Court, the *Holman* defendant's "Miller claim '[did] not require factual development.' " *Harris*, 2018 IL 121932, ¶ 43 (distinguishing *Holman*). Here, for the reasons we have explained above, the defendant's proportionate penalties claim requires factual development. The record before us is insufficient for us to conclude that the defendant's sentence violates the proportionate penalties clause; therefore, *Harris* is controlling authority.

¶ 37 In support of his request that we address his as-applied challenge based on the record before us, the defendant cites *People v. Busse*, 2016 IL App (1st) 142941. In that case, a defendant, who had been convicted of burglarizing vending machines on prior occasions, was sentenced to 12 years in the Department of Corrections for stealing \$44 in quarters from a vending machine. *Id.* ¶¶ 1-2. The court held that the punishment was disproportionate to the offense and, therefore, the sentencing court abused its discretion

in sentencing the defendant to 12 years. *Id.* ¶¶ 3-4. The court reduced the defendant’s sentence to a six-year sentence. *Id.* ¶ 4.

¶ 38 In that case, at the defendant’s sentencing hearing, the State had argued for a “substantial sentence” based on the defendant’s 28 past convictions, including seven felony convictions, several of which were for burglary or theft from coin-operated machines. *Id.* ¶ 15. Because of the defendant’s past convictions, he was subject to Class X sentencing. *Id.* The sentencing court considered the defendant’s past criminal history and stated that perhaps a 12-year sentence would make an impression on the defendant, whom the court labeled a “career thief.” *Id.* ¶ 17.

¶ 39 In reversing the sentence, the *Busse* court held that the circuit court abused its discretion, noting that the defendant’s criminal history did not include harm to any other human beings and did not include any serious crimes. *Id.* ¶ 31. The court concluded that the defendant’s sentence was too severe in relation to the seriousness of the defendant’s crime. *Id.* ¶ 27. The court noted that the defendant had not raised a constitutional challenge to his sentence; nonetheless, the court noted that “the principle that penalties must be determined according to the seriousness of the offense guide[d] [its] consideration of whether [the defendant’s] sentence was excessive.” *Id.* ¶ 28.

¶ 40 In the present case, *Busse* is not persuasive authority, and we will not follow its reasoning as a basis for reducing the defendant’s sentence to six years.

¶ 41 First, as noted above, we believe the Illinois Supreme Court’s decision in *Harris* directs us not to address the defendant’s as-applied challenge prior to an evidentiary hearing.

¶ 42 Second, *Busse* is distinguishable. Here, unlike *Busse*, the defendant’s criminal history includes repeated residential burglaries. Although the burglary at issue involved an unlocked car, rather than a residence, the less serious nature of the offense was likely the result of proactive law enforcement efforts in placing a decoy car near Hutchinson’s home after officers learned of the defendant’s activity around her home. Also, the defendant’s history of burglarizing residences is far more serious than the *Busse* defendant’s history of “penny-ante pilferage” of vending machines. *Busse*, 2016 IL App (1st) 142941, ¶ 31. Residential burglary involves actual serious harm and the potential for serious harm to the victims whose homes the defendant invaded. See *People v. Dean*, 363 Ill. App. 3d 454, 465-66 (2006) (residential burglary is a serious offense that involves a high risk of harm to members of the public); *People v. Sturlic*, 130 Ill. App. 3d 120, 130 (1985) (“The legislature has determined that residential burglary contains more possibility for danger and serious harm than places not used as dwellings.”); and *People v. Torres*, 327 Ill. App. 3d 1106, 1114 (2002) (“When a thief invades the privacy of one’s home, a place where the owners (or renters) and their family expect to be relaxed, safe, and secure, they steal more than the possessions that they carry out the door.”).

¶ 43 Third, *Busse* offers no useful guidance in analyzing an as-applied constitutional challenge since the *Busse* court offered no constitutional analysis in reaching its decision. *Busse*, therefore, does not persuade us to reduce the defendant’s sentence to six years’ imprisonment in this direct appeal prior to an evidentiary hearing on the defendant’s as-applied constitutional claim.

¶ 44 Dr. Cuneo reported that the defendant was mentally ill but that he was able to appreciate the criminality of his conduct and to conform to the requirements of the law. The defendant's criminal history includes crimes that, while nonviolent, involved serious offenses and serious harm to others. The defendant does not deny that the circuit court properly sentenced him to prison. He takes issue only with the term of his prison sentence, 14 years instead of the minimum 6 years, arguing that the circuit court was obligated to sentence him to the minimum of 6 years under the proportionate penalties clause. We cannot make that conclusion based on the record before us. We will not speculate that all of the specific circumstances relevant to the defendant's challenge are before us in the record when the circuit court has not conducted an evidentiary hearing or made any factual findings with respect to all of the specific circumstances relevant to the defendant's claim. In *Harris*, the Illinois Supreme Court established that this is an improper procedure in handling an as-applied constitutional challenge that is fact specific, such as the defendant's challenge here. The defendant's claim under the proportionate penalties clause is premature and, as noted by the supreme court in *Harris*, we believe the defendant's claim is "more appropriately raised in another proceeding." *Harris*, 2018 IL 121932, ¶ 48.

¶ 45 Following oral argument in this matter, the State filed a motion to cite additional authority that we have taken with the case. The State asks us to consider *People v. Lundy*, 2018 IL App (1st) 162304, and conclude that the defendant's sentence was not disproportionate. We grant the State's motion to cite additional authority. However, for

the reasons we have stated above, we believe the Illinois Supreme Court's decision in *Harris* controls the outcome of this case.

¶ 46 CONCLUSION

¶ 47 For the foregoing reasons, the defendant's conviction and sentence are hereby affirmed.

¶ 48 Affirmed.