SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721
(217) 782-2035

Ronald D. Smith
Reg. No. M49583
Hill Correctional Center
P.O. Box 1700
Galesburg IL 61402

FIRST DISTRICT OFFICE
160 North LaSalle Street, 20th Floor
Chicago, IL 60601-3103
(312) 793-1332
TDD: (312) 793-6185

January 27, 2021

In re: People State of Illinois, respondent, v. Ronald D. Smith, petitioner.
Leave to appeal, Appellate Court, Second District.
126570

The Supreme Court today DENIED the Petition for Leave to Appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on 03/03/2021.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

No. 2-19-0196
Summary Order filed July 28, 2020

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 11-CF-1546
RONALD D. SMITH,	)	Honorable Jeffrey S. MacKay,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

SUMMARY ORDER

¶ 1 In 2014, defendant, Ronald D. Smith, entered a negotiated guilty plea to attempted first degree murder (720 ILCS 5/8-4(a), (c)(1)(B)) (West 2010)) and aggravated discharge of a firearm (*id.* § 24-1.2(a)(2)). He was sentenced to an aggregate prison term of 31 years, which included a 20-year firearm enhancement on the attempted murder conviction. In December 2016, defendant filed a *pro se* petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2016)). In his section 2-1401 petition, defendant relied on *People v. Morgan*, 203 Ill. 2d 470 (2003), *overruled by People v. Sharpe*, 215 Ill. 2d 481 (2005), to argue that the judgment was void because the firearm enhancement violated the proportionate penalties

clause of the state constitution. The State moved to dismiss, arguing that the judgment was valid under the amended version of the statute effective at the time of the crime. The trial court granted the motion. In November 2018, defendant filed another section 2-1401 petition, again relying on *Morgan* to argue that the firearm enhancement was void and distinguishing *Sharpe*, which overruled *Morgan*. The State moved to dismiss, repeating its arguments made in response to the first section 2-1401 petition. The trial court granted the motion. Defendant timely appealed, and the trial court appointed the Office of the State Appellate Defender.

¶ 2 Pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and *People v. Lee*, 251 Ill. App. 3d 63 (1993), the appellate defender moves to withdraw as counsel. In her motion, counsel states that she read the record and found no issue of arguable merit. Counsel further states that she advised defendant of her opinion. Counsel supports her motion with a memorandum of law providing a statement of facts, a list of potential issues, and arguments why those issues lack arguable merit. Defendant has filed a response to the motion.

¶ 3 We agree with counsel that there is no arguable basis for challenging the dismissal of defendant's section 2-1401 petition. Counsel first notes that defendant's reliance on *Morgan* is misplaced. In *Morgan*, our supreme court struck down the enhancement for attempted first degree murder that applied where "a firearm was in defendant's possession." 203 Ill. 2d at 491-92 (citing 720 ILCS 5/8-4 (West 2000) (attempt statute). Using a cross-comparison analysis, the court held that the enhancement was unconstitutionally disproportionate to the penalty for second degree murder. *Id.* But *Morgan* was overruled by *Sharpe*, which effectively revived the constitutionality of the enhancement. See *People v. Hauschild*, 226 Ill. 2d 63, 76 (2007) (discussing *Morgan* and *Sharpe*). Moreover, counsel correctly notes that the matter is barred by principles of *res judicata*.

¶ 4 " 'The doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the parties or their privies on the same cause of action.' " *People v. Johnson*, 2015 IL App (2d) 140388, ¶ 6 (quoting *People v. Carroccia*, 352 Ill. App. 3d 1114, 1123 (2004)). It bars relitigating " 'any issues which have previously been decided by a reviewing court.' " *Id.* (quoting *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005)). Here, the issue of the constitutionality of the enhancement was previously raised by defendant and decided by the trial court in defendant's first section 2-1401 petition.

¶ 5 Defendant has filed a response to counsel's motion to withdraw. Defendant continues to incorrectly argue that *Sharpe* did not overrule *Morgan* or revive the enhancement. He does not address whether *res judicata* applied to his second petition.

¶ 6 Finally, counsel correctly notes that there is no basis for arguing that the dismissal of the petition violated any procedural rules.

¶ 7 After examining the record, the motion to withdraw, and the memorandum of law, we agree with counsel that this appeal presents no issue of arguable merit. Thus, we grant the motion to withdraw, and we affirm the judgment of the circuit court of Du Page County.

¶ 8 Affirmed.

ILLINOIS APPELLATE COURT
SECOND DISTRICT

55 SYMPHONY WAY
ELGIN, IL 60120
(847) 695-3750

MANDATE

Panel: Honorable Susan Fayette Hutchinson
Honorable Mary S. Schostok
Honorable Donald C. Hudson

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
RONALD D. SMITH,
Defendant-Appellant.

Appeal No.: 2-19-0196
County/Agency: DuPage County
Trial Court/Agency Case No.: 11CF1546

BE IT REMEMBERED, that on the 28th day of July, 2020, the final judgment of the Illinois Appellate Court, Second District, was entered of record as follows:

Affirmed

In accordance with Illinois Supreme Court Rule 368, this mandate is issued. As clerk of the Illinois Appellate Court, Second District, and keeper of the records, files, and seal thereof, I certify that the foregoing is a true statement of the court's final judgment in the above cause. Pursuant to Illinois Supreme Court Rule 369, the clerk of the circuit court shall file the mandate promptly.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the Illinois Appellate Court, Second District, this 9th day of March, 2021.

Jeffrey H Kaplan

Clerk of the Court

(EXHIBIT 2)

the Constitution of the State of Illinois, the laws of the United States, or the laws of the State of Illinois by any person or persons, agrees with another to inflict physical harm on any other person or the threat of physical harm on any other person and either the accused or a co-conspirator has committed any act in furtherance of that agreement.

(b) Co–conspirators. It shall not be a defense to conspiracy against civil rights that a person or persons with whom the accused is alleged to have conspired:

(1) has not been prosecuted or convicted; or

(2) has been convicted of a different offense; or

(3) is not amenable to justice; or

(4) has been acquitted; or

(5) lacked the capacity to commit an offense.

(c) Sentence. Conspiracy against civil rights is a Class 4 felony for a first offense and a Class 2 felony for a second or subsequent offense.

Laws 1961, p. 1983, § 8–2.1, added by P.A. 92–830, § 5, eff. Jan. 1, 2003.

5/8–3. Defense

§ 8–3. Defense. It is a defense to a charge of solicitation or conspiracy that if the criminal object were achieved the accused would not be guilty of an offense.

Laws 1961, p. 1983, § 8–3, eff. Jan. 1, 1962.

Formerly Ill.Rev.Stat.1991, ch. 38, ¶ 8–3.

5/8–4. Attempt

§ 8–4. Attempt.

(a) Elements of the offense.

A person commits the offense of attempt when, with intent to commit a specific offense, he or she does any act that constitutes a substantial step toward the commission of that offense.

(b) Impossibility.

It is not a defense to a charge of attempt that because of a misapprehension of the circumstances it would have been impossible for the accused to commit the offense attempted.

(c) Sentence.

A person convicted of attempt may be fined or imprisoned or both not to exceed the maximum provided for the offense attempted but, except for an attempt to commit the offense defined in Section 33A–2 of this Code:

(1) the sentence for attempt to commit first degree murder is the sentence for a Class X felony, except that

(A) an attempt to commit first degree murder when at least one of the aggravating factors specified in paragraphs (1), (2), and (12) of subsection (b) of Section 9–1 is present is a Class X felony for which the sentence shall be a term of imprisonment of not less than 20 years and not more than 80 years;

(B) an attempt to commit first degree murder while armed with a firearm is a Class X felony for which 15 years shall be added to the term of imprisonment imposed by the court;

(C) an attempt to commit first degree murder during which the person personally discharged a firearm is a Class X felony for which 20 years shall be added to the term of imprisonment imposed by the court;

(D) an attempt to commit first degree murder during which the person personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person is a Class X felony for which 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court; and

(E) if the defendant proves by a preponderance of the evidence at sentencing that, at the time of the attempted murder, he or she was acting under a sudden and intense passion resulting from serious provocation by the individual whom the defendant endeavored to kill, or another, and, had the individual the defendant endeavored to kill died, the defendant would have negligently or accidentally caused that death, then the sentence for the attempted murder is the sentence for a Class 1 felony;

(2) the sentence for attempt to commit a Class X felony is the sentence for a Class 1 felony;

(3) the sentence for attempt to commit a Class 1 felony is the sentence for a Class 2 felony;

(4) the sentence for attempt to commit a Class 2 felony is the sentence for a Class 3 felony; and

(5) the sentence for attempt to commit any felony other than those specified in items (1), (2), (3), and (4) of this subsection (c) is the sentence for a Class A misdemeanor.

Laws 1961, p. 1983, § 8–4, eff. Jan. 1, 1962. Amended by Laws 1967, p. 2595, § 1, eff. Aug. 3, 1967; P.A. 77–2638, § 1, eff. Jan. 1, 1973; P.A. 78–342, § 1, eff. Oct. 1, 1973; P.A. 80–1099, § 1, eff. Feb. 1, 1978; P.A. 81–923, § 1, eff. Jan. 1, 1980; P.A. 84–1450, § 2, eff. July 1, 1987; P.A. 87–921, § 1, eff. Jan. 1, 1993; P.A. 88–680, Art. 35, § 35–5, eff. Jan. 1, 1995; P.A. 91–404, § 5, eff. Jan. 1, 2000. Re-enacted by P.A. 91–696, Art. 35, § 35–5, eff. April 13, 2000; P.A. 96–710, § 25, eff. Jan. 1, 2010.

Formerly Ill.Rev.Stat.1991, ch. 38, ¶ 8–4.

Validity

Enhanced penalties for attempted first degree murder with a handgun as a Class X felony, with mandatory addition of 15, 20, or 25 years to life to a sentence, were held unconstitutionally disproportionate under Illinois Constitution Art. I, § 11 by People v. Morgan, 2003, 272 Ill.Dec. 160, 203 Ill.2d 470, 786 N.E.2d 994, because a defendant can receive a harsher sentence if the victim survives than if the victim dies. But, see People v. Sharpe, 216 Ill.2d 481 (2005).

Ex 4, p. 4

5/8–5. Multiple Convictions

§ 8–5. Multiple Convictions. No person shall be convicted of both the inchoate and the principal offense.

Laws 1961, p. 1983, § 8–5, eff. Jan. 1, 1962.

Formerly Ill.Rev.Stat.1991, ch. 38, ¶ 8–5.

5/8–6. Offense

§ 8–6. Offense. For the purposes of this Article, "offense" shall include conduct which if performed in another State would be criminal by the laws of that State and which conduct if performed in this State would be an offense under the laws of this State.

Laws 1961, p. 1983, § 8–6, eff. Jan. 1, 1962.

Formerly Ill.Rev.Stat.1991, ch.38, ¶ 8–6.

EXHIBIT 20+22

armed violence and armed robbery statutes.

¶ 22 In *Clemons,* decided after the enactment of Public Act 95–688, we declined the State's invitation to overrule *Hauschild* or abandon the identical elements test. *Clemons,* 2012 IL 107821, ¶¶ 19, 26, 53, 360 Ill.Dec. 293, 968 N.E.2d 1046. In the present case, we decide the issue left unanswered in *Clemons:* whether, following the legislature's enactment of Public Act 95–688, the State can obtain an enhanced sentence for armed robbery. *Id.* ¶¶ 51–52. We note that our appellate court has not ruled consistently on this issue. Compare *People v. Brown,* 2012 IL App (5th) 100452, 360 Ill.Dec. 165, 968 N.E.2d 658, and *People v. Malone,* 2012 IL App (1st) 110517, 365 Ill.Dec. 365, 978 N.E.2d 387 (holding that Public Act 95–688 revived the armed robbery sentencing enhancement), with *People v. Gillespie,* 2012 IL App (4th) 110151, 363 Ill.Dec. 191, 974 N.E.2d 988, and *People v. McFadden,* 2012 IL App (1st) 102939, —— Ill.Dec. ——, —— N.E.2d ——, 2012 WL 6028631 (holding that Public Act 95–688 did not revive the armed robbery sentencing enhancement).

¶ 23 With this background, we consider the parties' arguments.

¶ 24 III

¶ 25 The State urges us to reverse the appellate court judgment and hold that Public Act 95–688 revived the sentencing enhancement in the armed robbery statute. Relying on *Hauschild,* the State maintains that just as Public Act 91–404 revived the offense of armed violence based on robbery by amending the armed robbery statute, Public Act 95–688 revived the sentencing enhancement for armed robbery by amending the armed violence statute. The State disputes that, under the void *ab initio* doctrine, the legislature could only revive the armed robbery sentencing enhancement by amending and/or reenacting that statute. The State explains that unlike other constitutional violations, an identical elements proportionality violation arises from the relationship **132 *81 between *two* statutes. Therefore, at least two ways exist to remedy the constitutional violation: amend the challenged statute or amend the comparison statute. Here, the legislature opted to amend the comparison statute. The State also posits that amendment of the armed robbery statute was unnecessary because *Hauschild* simply rendered the statute unenforceable until the constitutional infirmity was remedied.

EXHIBIT 22

¶ 26 Defendant argues that although Public Act 95–688 may have remedied the constitutional infirmity in the armed robbery statute identified in *Hauschild,* Public Act 95–688 did not revive the sentencing enhancement in that statute. Defendant contends that once *Hauschild* declared the armed robbery sentencing enhancement unconstitutional the statute was void *ab initio,* and "the enhancement never existed." Defendant maintains that unless and until the legislature reenacts the sentencing enhancement in the armed robbery statute, it remains a nullity.

EXHIBIT 20

¶ 27 We agree with the State. Public Act 95–688 revived the sentencing enhancement for armed robbery.

[2] [3] ¶ 28 When a statute is held facially unconstitutional, *i.e.,* unconstitutional in all its applications (see *In re Rodney H.,* 223 Ill.2d 510, 521, 308 Ill.Dec. 292, 861 N.E.2d 623 (2006)), the statute is said to be void *ab initio. Lucien v. Briley,* 213 Ill.2d 340, 344–45, 290 Ill.Dec. 574, 821 N.E.2d 1148 (2004); *Hill v. Cowan,* 202 Ill.2d 151, 156, 269 Ill.Dec. 875, 781 N.E.2d 1065 (2002); see also *People v. Gersch,* 135 Ill.2d 384, 390, 142 Ill.Dec. 767, 553 N.E.2d 281 (1990) (" '[w]hen a statute is held unconstitutional in its entirety, it is void *ab initio* ' " (quoting *Manuel,* 94 Ill.2d at 244–45, 68 Ill.Dec. 506, 446 N.E.2d 240)); *Perlstein v. Wolk,* 218 Ill.2d 448, 455, 300 Ill.Dec. 480, 844 N.E.2d 923 (2006) (an unconstitutional statute is void "from the beginning"). The void *ab initio* doctrine is based on the theory that:

> " 'An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.' " *Id.* at 454, 300 Ill.Dec. 480, 844 N.E.2d 923 (quoting *Norton v. Shelby County,* 118 U.S. 425, 442, 6 S.Ct. 1121, 30 L.Ed. 178 (1886)).

¶ 29 Contrary to defendant's argument, the void *ab initio* doctrine does not mean that a statute held unconstitutional "never existed." As we recognized in *Perlstein,* " '[t]he actual existence of a statute,' " prior to a determination that the statute is unconstitutional, " 'is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration.' " *Perlstein,* 218 Ill.2d at 461, 300 Ill.Dec. 480, 844 N.E.2d 923 (quoting *Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371, 374, 60 S.Ct. 317, 84 L.Ed. 329 (1940)). Moreover, to construe the void *ab initio* doctrine as rendering a statute nonexistent is tantamount to saying that this court may repeal a statute. See *Certain Taxpayers v. Sheahen,* 45 Ill.2d 75, 81, 256 N.E.2d 758 (1970) ("effect of repeal is

to obliterate the statute repealed as completely as though it had never been passed as a law and never existed"). Such a result, however, would contravene our separation of powers clause. Ill. Const. 1970, art. II, § 1.

[4] ¶ 30 The power to enact laws, and the concomitant power to repeal those laws, reside in the General Assembly. *Allegis Realty Investors v. Novak*, 223 Ill.2d 318, 334–35, 307 Ill.Dec. 592, 860 N.E.2d 246 (2006); *Hilberg v. Industrial Comm'n*, 380 Ill. 102, 106, 43 N.E.2d 671 (1942); **133 *82 34 Ill. L. and Prac. *Statutes* §§ 3, 35 (2001). Our function is to interpret those laws, determining and giving effect to the legislature's intent. *Allegis Realty Investors*, 223 Ill.2d at 334–35, 307 Ill.Dec. 592, 860 N.E.2d 246; *Best v. Taylor Machine Works*, 179 Ill.2d 367, 378, 228 Ill.Dec. 636, 689 N.E.2d 1057 (1997); *Droste v. Kerner*, 34 Ill.2d 495, 504, 217 N.E.2d 73 (1966); see also *Perlstein*, 218 Ill.2d at 471, 300 Ill.Dec. 480, 844 N.E.2d 923 (" 'courts have no real power to repeal or abolish a statute' " (quoting Laurence H. Tribe, American Constitutional Law § 3–3, at 28 (2d ed. 1988))); *Henrich v. Libertyville High School*, 186 Ill.2d 381, 394, 238 Ill.Dec. 576, 712 N.E.2d 298 (1998) ("Courts have no legislative powers; courts may not enact or amend statutes."). Although we are obligated to declare an unconstitutional statute invalid and void (*Best*, 179 Ill.2d at 378, 228 Ill.Dec. 636, 689 N.E.2d 1057; *Gersch*, 135 Ill.2d at 398, 142 Ill.Dec. 767, 553 N.E.2d 281), such a declaration by this court cannot, within the strictures of the separation of powers clause, repeal or otherwise render the statute nonexistent. Accordingly, when we declare a statute unconstitutional and void *ab initio*, we mean only that the statute was constitutionally infirm from the moment of its enactment and is, therefore, unenforceable. As a consequence, we will give no effect to the unconstitutional statute and instead apply the prior law to the parties before us. See, *e.g.*, *Hauschild*, 226 Ill.2d at 88–89, 312 Ill.Dec. 601, 871 N.E.2d 1 (remanding for resentencing under statute as it existed prior to the adoption of the unconstitutional amendment); accord *Clemons*, 2012 IL 107821, ¶ 60, 360 Ill.Dec. 293, 968 N.E.2d 1046. See also *Gersch*, 135 Ill.2d at 390, 142 Ill.Dec. 767, 553 N.E.2d 281 ("The effect of enacting an unconstitutional amendment to a statute is to leave the law in force as it was before the adoption of the amendment."). In short, a statute declared unconstitutional by this court " 'continues to remain on the statute books' " (*Perlstein*, 218 Ill.2d at 471, 300 Ill.Dec. 480, 844 N.E.2d 923 (quoting Laurence H. Tribe, American Constitutional Law § 3–3, at 28 (2d ed. 1988))), and unless and until the constitutional violation is remedied, our decision stands as an impediment to the operation and enforcement of the statute.

¶ 31 Ordinarily, when this court declares a statute unconstitutional, or otherwise invalid, the only way in which the legislature may remedy the statute's infirmity is by amending or reenacting *that* statute. For example, when a statute is held unconstitutional because it was adopted in violation of the single subject rule, the legislature may revive the statute by reenacting the same provision, but in a manner that does not offend the single subject rule. *People v. Ramsey*, 192 Ill.2d 154, 157, 248 Ill.Dec. 882, 735 N.E.2d 533 (2000); see also *Lebron v. Gottlieb Memorial Hospital*, 237 Ill.2d 217, 250, 341 Ill.Dec. 381, 930 N.E.2d 895 (2010) (legislature was free to reenact provisions of Public Act 94–677 deemed invalid solely on severability grounds). When a statute is found to violate the proportionate penalties clause under the identical elements test, however, amendment or reenactment of *that* statute is not the legislature's only recourse. This is so because of the unique nature of an identical elements proportionality violation.

[5] ¶ 32 A proportionate penalties violation, under the identical elements test, occurs when "two offenses have identical elements but disparate sentences." *Hauschild*, 226 Ill.2d at 85, 312 Ill.Dec. 601, 871 N.E.2d 1; see also *Sharpe*, 216 Ill.2d at 503–05, 298 Ill.Dec. 169, 839 N.E.2d 492 (discussing the origin of identical elements proportionality review). Thus, unlike other constitutional violations which are based on the manner in which a single statute operates, an identical elements proportionality **134 *83 violation arises out of the relationship between two statutes—the challenged statute, and the comparison statute with which the challenged statute is out of proportion. *E.g.*, *People v. Christy*, 139 Ill.2d 172, 177, 151 Ill.Dec. 315, 564 N.E.2d 770 (1990) (comparing armed violence predicated on kidnapping with a category I weapon and aggravated kidnapping); *Lewis*, 175 Ill.2d at 414, 222 Ill.Dec. 296, 677 N.E.2d 830 (comparing armed violence predicated on robbery committed with a category I weapon and armed robbery); *Hauschild*, 226 Ill.2d at 85–86, 312 Ill.Dec. 601, 871 N.E.2d 1 (comparing armed robbery while armed with a firearm and armed violence based on robbery with a category I or II weapon). Although only the statute with the greater penalty will be found to violate the proportionate penalties clause (*Sharpe*, 216 Ill.2d at 504, 298 Ill.Dec. 169, 839 N.E.2d 492), that violation is entirely dependent upon the existence of the comparison statute, *i.e.*, the statute with identical elements but a lesser penalty. In light of this peculiar feature of an identical elements proportionality violation, the legislature has more options available to it should it wish to remedy the constitutional violation and revive the statute. The legislature may amend the challenged statute held unconstitutional, amend the comparison statute, or amend

Scopies EXHIBIT 12

EXHIBIT 12

In the course of our decision, we held Public Act 92-607, which suspended the 2003 COLA, constitutionally infirm and void *ab initio*. *Jorgensen*, 211 Ill.2d at 309, 285 Ill.Dec. 165, 811 N.E.2d 652. Here, plaintiffs do not request that we "suspend" constitutional requirements by enforcing an unconstitutional statute. Rather, plaintiffs ask that we consider the equities of this case and allow their complaint to proceed. *Jorgensen* does not aid in our resolution of this issue.

[1, 2] We acknowledge that defendants' position—advocating strict application of the void *ab initio* doctrine—has a certain surface appeal, creating as it would a bright-line rule which could be applied with relative ease. Defendants' position, however, unduly discounts the real-life consequences flowing from a statutory enactment. When the General Assembly enacts legislation such as Public Act 89-7, that legislation is presumptively valid. See, *e.g.*, *In re Marriage of Bates*, 212 Ill.2d 489, 509, 289 Ill.Dec. 218, 819 N.E.2d 714 (2004) ("Statutes are presumed constitutional"); *Beanbien v. Ryan*, 198 Ill.2d 294, 298, 260 Ill.Dec. 842, 762 N.E.2d 501 (2001) (statutory enactments are "cloaked with the presumption of validity"). Individuals, including plaintiffs here, "are entitled to rely on State statutes when 'making decisions and in shaping their conduct.'" *Board of Commissioners of the Wood Dale Public Library District v. County of Du Page*, 103 Ill.2d 422, 429, 83 Ill.Dec. 224, 469 N.E.2d 1370 (1984), quoting *Lemon v. Kurtzman*, 411 U.S. 192, 199, 93 S.Ct. 1463, 1468, 36 L.Ed.2d 151, 160 (1973). See also *Adukia v. Finney*, 315 Ill.App.3d 766, 770, 248 Ill.Dec. 854, 735 N.E.2d 174 (2000) (recognizing, in a post-*Rest* case, that "a party should not be penalized for his good-faith reliance on existing law"). Individuals are not required or empowered to determine whether the law is constitutional; that duty belongs to the judiciary. *Gersch*, 135 Ill.2d at 398-99, 142 Ill.Dec. 767, 553 N.E.2d 281. Strict application of the void *ab initio* doctrine fails to take into account these realities, creating a "Catch-22." Individuals are entitled to rely on a legislative enactment, presuming it is valid, but must suffer the consequences of doing so should this court later hold that law unconstitutional.

Although defendants note that courts in other jurisdictions strictly apply the void *ab initio* doctrine (*e.g.*, *Spanish Cove Sanitation, Inc. v. Louisville-Jefferson County Metropolitan Sewer District*, 72 S.W.3d 918, 921 (Ky.2002); *McGuire v. C & L Restaurant, Inc.*, 346 N.W.2d 605, 614 (Minn.1984)), our research reveals that courts do not do so universally. As discussed below, courts in other jurisdictions frequently consider the equities of a case and will take steps to ameliorate the harsh results from the doctrine's strict application. Whether Illinois should adopt a similar approach is the issue we now consider.

II. An Equitable Approach

As noted above, Illinois' void *ab initio* doctrine has its roots in the early case of *Norton v. Shelby County*, 118 U.S. 425, 6 S.Ct. 1121, 30 L.Ed. 178 (1886). Under the *Norton* rule, the invalid statute is "eliminated entirely from the consideration of a case." O. Field, The Effect of an Unconstitutional Statute 3 (1935). No weight is given to the fact that the statute was enacted by the legislature, approved by the Governor, and relied upon by the people prior to it being declared invalid by a court. O. Field, The Effect of an Unconstitutional Statute 3 (1935). Under this approach, some courts have gone so far as to rule that "an unconstitutional statute could not protect an officer who executed it or a person who acted in reliance upon it for personal liability for the consequences of their actions." 1 N. Singer, Sutherland on Statutory Construction § 2:7, at 47 (6th ed.2002).

EXHIBIT 30

The failure of the *Norton* rule to consider the reliance interests of individuals was described early on by the New Jersey Supreme Court as follows:

> "The vice of the doctrine of *Norton v. Shelby County* * * * is that it fails to recognize the right of the citizen, which is to accept the law as it is written, and not to be required to determine its validity. The latter is no more the function of the citizen than is the making of the law. * * * To require the citizen to determine for himself, at his peril, to what extent, if at all, the legislature has overstepped the boundaries defined by the constitution * * * would be to place upon him an intolerable burden." *Lang v. Mayor & Chief of Police*, 74 N.J.L. 455, 459, 68 A. 90 (1907).

The United States Supreme Court has also recognized that inequities can result from strict application of the *Norton* rule. See *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940); *Lemon v. Kurtzman*, 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973). In *Chicot County*, Chief Justice Hughes, writing for a unanimous Court, noted that "broad statements," such as those in *Norton*, "as to the effect of a determination of unconstitutionality must be taken with qualifications." *Chicot County*, 308 U.S. at 374, 60 S.Ct. at 318, 84 L.Ed. at 332. The Court explained that "[t]he actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration." *Chicot County*, 308 U.S. at 374, 60 S.Ct. at 318, 84 L.Ed. at 333.

The Court again took up the shortcomings of the *Norton* rule in the *Lemon* case. There, Chief Justice Burger (in a plurality opinion) acknowledged the difficulty in attempting to reconcile "the constitutional interests reflected in a new rule of law with reliance interests founded upon the old." *Lemon*, 411 U.S. at 198, 93 S.Ct. at 1468, 36 L.Ed.2d at 160. Chief Justice Burger recognized that although the logic of *Norton* may have been appealing "in the abstract," "statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct." *Lemon*, 411 U.S. at 199, 93 S.Ct. at 1468, 36 L.Ed.2d at 160.

Numerous courts are in agreement that *Norton* represents the old rule as to the effect of an unconstitutional statute. See, *e.g.*, *Ryan v. County of DuPage*, 45 F.3d 1090, 1094 (7th Cir.1995) (acknowledging that the "old doctrine," under *Norton*, pursuant to which unconstitutional statutes are void *ab initio* "has been abandoned"); *Trucke v. Erlemeier*, 657 F.Supp. 1382, 1391 (N.D.Iowa 1987) (observing that the United States Supreme Court abandoned the *Norton* rationale and suggesting that "if *Norton* and its progeny were decided today, the outcome would be different"); *United States v. DePoli*, 628 F.2d 779, 782 (2d Cir.1980) (recognizing that the *Norton* view, under which an unconstitutional law is treated as having had no effects whatsoever from the date of its enactment, has been replaced by a more "realistic approach"); *W.R. Grace & Co. v. Department of Revenue*, 137 Wash.2d 580, 594 & n. 10, 973 P.2d 1011, 1017 & n. 10 (1999) (rejecting parties' reliance on the now-abandoned void *ab initio* doctrine and referring to *Norton* as "antiquated Supreme Court authority"); *American Manufacturers Mutual Insurance Co. v. Ingram*, 301 N.C. 138, 147-50, 271 S.E.2d 46, 51-52 (1980) (stating that, "[d]epending on the circumstances, courts have employed other rules which avoid the hard and fast consequences of the rule enunciated in *Norton*,"

otherside please

holding that *Joyce* would apply retroactively to Gersch's case, we stated:

> "A constitutionally repugnant enactment suddenly cuts off rights that are guaranteed to every citizen (Ill. Const.1970, art. I, § 1 ('All men * * * have certain inherent and inalienable rights')), and instantaneously perverts the duties owed to those citizens. To hold that a judicial decision that declares a statute unconstitutional is not retroactive would forever prevent those injured under the unconstitutional legislative act from receiving a remedy for the deprivation of a guaranteed right. This would clearly offend all sense of due process under both the Federal and State Constitutions. [Citations.] Along with these considerations, we note that this court has expressly held that a defendant cannot be prosecuted under an unconstitutional act." *Gersch*, 135 Ill.2d at 397–98, 142 Ill.Dec. 767, 553 N.E.2d 281.

We concluded that "where a statute is violative of constitutional guarantees, we have a duty not only to declare such a legislative act void, but also to correct the wrongs wrought through such an act by holding our decision retroactive." *Gersch*, 135 Ill.2d at 399, 142 Ill.Dec. 767, 553 N.E.2d 281. To correct the wrong wrought in Gersch's case, we reversed his conviction and remanded the cause for a new trial. *Gersch*, 135 Ill.2d at 401–02, 142 Ill.Dec. 767, 553 N.E.2d 281.

Unlike the statute at issue in *Gersch*, the portion of Public Act 89–7 that removed section 13–214.3(d) from the attorney malpractice statute of limitations did not "suddenly cut off rights guaranteed to every citizen" or even to these particular defendants. Attorneys in this state possess no constitutional guarantee of a particular limitations or repose period for malpractice actions. Thus, the change made in the repose period by Public Act 89–7 did not perpetrate a "wrong" against defendants requiring correction. Indeed, the amendment to the repose period was rendered invalid simply because it could not be severed from the balance of Public Act 89–7, and not because it contravened any constitutional principle. In other words, the invalidity of the amendment to section 13–214.3 was simply "collateral damage" from the force of this court's declaration in *Best* that the core provisions of Public Act 89–7 were substantively unconstitutional. Under these circumstances, and in contrast to the *Gersch* case, failing to adhere strictly to void *ab initio* principles would not deprive defendants of a remedy for the deprivation of a constitutional right because no such right is implicated.

Notwithstanding these important factual distinctions between *Gersch* and the present case, defendants argue that the void *ab initio* doctrine must be strictly applied in this civil case just as it was in *Gersch*. Defendants note that *Gersch*, itself, contains citation to civil cases from this court applying the doctrine. *E.g.*, *Gersch*, 135 Ill.2d at 390, 142 Ill.Dec. 767, 553 N.E.2d 281, citing *Van Driel Drug Store, Inc. v. Mahin*, 47 Ill.2d 378, 265 N.E.2d 659 (1970). The civil cases cited in the *Gersch* opinion establish, at most, that the void *ab initio* doctrine *can* be applied to a civil case; they do not establish that the doctrine *should* be applied to civil cases generally, or to this civil case in particular. Moreover, the *Gersch* opinion left open the issue of whether application of the void *ab initio* doctrine is always appropriate in cases outside the area of criminal prosecutions:

> "We must note, however, that courts have been struggling with the potentially harsh results of the *ab initio* doctrine, particularly where law enforcement officials have relied in good faith on the validity of a statute [citations], or where the invalidation of rules of criminal procedure would allow otherwise guilty criminals to win their freedom [citation]. Attempting to avoid these problems, courts have attempted to temper the *ab initio* doctrine's harsh results * * * to minimize unfairness. [Citation.] However, scholars have noted that in the area of *criminal prosecution*, the *ab initio* principle is especially appropriate." (Emphasis added.) *Gersch*, 135 Ill.2d at 399–400, 142 Ill.Dec. 767, 553 N.E.2d 281.

We are, therefore, reluctant to extend the reach of *Gersch* beyond cases involving criminal prosecutions.

Defendants also cite our more recent decisions in *Petersen v. Wallach*, 198 Ill.2d 439, 261 Ill.Dec. 728, 764 N.E.2d 19 (2002), and *Jorgensen v. Blagojevich*, 211 Ill.2d 286, 285 Ill.Dec. 165, 811 N.E.2d 652 (2004). Defendants argue that *Petersen* and *Jorgensen* establish that the void *ab initio* doctrine must be applied in this case despite the possibility of harsh results. We disagree.

As defendants note, *Petersen* and the present case involve the same statute. At issue in *Petersen*, however, was the proper construction of section 13–214.3(d). *Petersen* states: "The sole issue presented by this appeal is whether the exception to the six-year statute of repose for attorney malpractice actions * * * applies only in cases where the assets of the deceased pass by way of the Probate Act * * *." *Petersen*, 198 Ill.2d at 441, 261 Ill.Dec. 728, 764 N.E.2d 19. In the course of deciding *that* issue, we quoted with favor the following passage from an earlier case:

> "'"Where the words employed in a legislative enactment are free from ambiguity or doubt, they must be given effect by the courts even though the consequences may be harsh, unjust, absurd or unwise. [Citations.] Such consequences can be avoided only by a change of the law, not by judicial construction."'" *Petersen*, 198 Ill.2d at 447, 261 Ill.Dec. 728, 764 N.E.2d 19, quoting *County of Knox ex rel. Masterson v. The Highlands, L.L.C.*, 188 Ill.2d 546, 557, 243 Ill.Dec. 224, 723 N.E.2d 256 (1999), quoting *People ex rel. Pauling v. Miselic*, 32 Ill.2d 11, 15, 203 N.E.2d 393 (1964).

Whether, under our rules of statutory construction, an absurd or unjust result should impact our reading and application of a clearly worded statute is unrelated to the issue of whether the void *ab initio* doctrine should be applied in a given case.

Defendants are correct that, in a footnote, the *Petersen* opinion implicitly applies the void *ab initio* doctrine. *Petersen*, 198 Ill.2d at 443 n. 1, 261 Ill.Dec. 728, 764 N.E.2d 19. We note, however, that neither the plaintiff nor the defendant attorney argued that the void *ab initio* doctrine should not apply in that case. Consequently, we were not asked to consider whether it is ever appropriate to temper the doctrine's harsh results. Any harsh results in *Petersen* resulted from our construction of the statute, not from application of the void *ab initio* doctrine. Defendants' reliance on *Petersen* is misplaced.

The *Jorgensen* case is also distinguishable from the present dispute. At issue in *Jorgensen* was "whether the General Assembly and the Governor violated the Illinois Constitution when they attempted to eliminate the cost-of-living adjustments [COLAs] to judicial salaries provided by law for the 2003 and 2004 fiscal years." *Jorgensen*, 211 Ill.2d at 287, 285 Ill.Dec. 165, 811 N.E.2d 652. We answered that question in the affirmative and refused to "suspend" constitutional requirements for economic reasons, namely, the impact on the state's budget. *Jorgensen*, 211 Ill.2d at 316, 285 Ill.Dec. 165, 811 N.E.2d 652.

EXHIBIT (1)

The attempt statute, 730 ILCS 5/8-4 was first declared unconstitutional as violative of the single-subject provision of the Illinois Constitution in *People v. Cervantes*, 189 Ill.2d 80 (1999). The statute was re-enacted by Public Act 91-696, effective April 13, 2000. The statute was again declared unconstitutional as violative of the proportionate penalties provision of the Illinois Constitution in *People v. Morgan*, 203 Ill.2d 470 (2003). *Morgan* focused on the 15-20-25 year firearm enhancement that was by added by Public Act 91-404, effective January 1, 2000.

12. Effective January 1, 2010, Public Act 96-710 added subsection 730 ILCS 5/8-4(C)(1)(E), which addressed the concerns raised in *Morgan* by essentially acknowledging a "second degree" attempt.

EXHIBIT 2

13. In 2011, when Defendant-Petitioner committed his offense, the attempt murder statute, 720 ILCS 5/8-4(c)(E) (West 2010), contained a subsection that permitted defendants to introduce mitigation evidence similar to evidence that would have reduced a first degree murder charge to second degree murder. If defendants showed by preponderance of the evidence these mitigating factors, the court would reduce the felony classification to a Class 1 felony and sentence the defendant accordingly.

14. The cases cited by Defendant-Petitioner in support of his proportionate penalty argument, *Morgan*, 203 Ill.2d 470 (2003), *People v. Sharpe*, 216 Ill.2d 481 (2005), and *People v. Douglas*, 371 Ill.App.3d 21 (1st Dist. 2007), are not helpful to Defendant-Petitioner's argument. Subsection (c)(E) was not added to 720 ILCS 5/8-4 until January 1, 2010. See Public Act 96-710 (effective January 1, 2010). Therefore, *Morgan* is inapplicable to Defendant-Petitioner. *Sharpe* and *Douglas* are similarly unhelpful to Defendant-Petitioner because they do not discuss mitigating factors for attempt murder.

EXHIBIT 3

15. Because this Court had jurisdiction to sentence Defendant-Petitioner, and because

PREPONDERANT: adj; having great weight, Power, importance, or numbers—
PERPONDERANCE.
PREPONDERATE: Exceed in weight, influence, number, etc.; prevail,

EXHIBIT 4

Looking to the language in subsection (a) of the attempt statute, we noted in *Lopez* that the offense of attempted second degree murder, if it existed, would require a showing that the defendant intended to commit the "specific offense" of second degree murder. See 720 ILCS 5/8–4(a) (West 2000); *Lopez,* 166 Ill.2d at 449, 211 Ill.Dec. 481, 655 N.E.2d 864. Second degree murder, like first degree murder, requires the intent to kill, but also requires the presence of a mitigating circumstance which reduces the defendant's culpability and, accordingly, the applicable sentencing range. 720 ILCS 5/9–2 (West 2000). This court then reasoned that, "for an attempted second degree murder, the defendant must intend the presence of a mitigating factor, which is an impossibility." *Lopez,* 166 Ill.2d at 449, 211 Ill.Dec. 481, 655 N.E.2d 864.

It was argued in *Lopez* that the failure to recognize attempted second degree murder as an offense rendered the attempt statute unconstitutional under the proportionate penalties clause of the Illinois Constitution. In support of this argument, defendants pointed out that, if attempted second degree murder was not a recognized offense, a person who acted with the intent to kill, but failed to cause the death of the victim, would necessarily be convicted of attempted *first degree* murder, a Class X felony, punishable by a term of imprisonment between 6 and 30 years (720 ILCS 5/8–4(c)(1) (West 2000); 730 ILCS 5/5–8–1(a)(3) (West 2000)), whether or not mitigating circumstances existed. At the same time, however, if a person acted with the intent to kill and succeeded in killing the victim, the person, having been charged with first degree murder, would have the opportunity ***480** to reduce his culpability, as well as the applicable sentencing range, by introducing evidence that mitigating circumstances existed. If successful in proving the mitigating circumstances, the person would be convicted of the lesser offense of second degree murder, a Class 1 felony, punishable at that time by a term of imprisonment between 4 and 15 years (720 ILCS 5/9–2(d) (West 1992)) or, perhaps, a term of probation (730 ILCS 5/5–6–1 (West 1992)). Thus, defendants argued, the failure to recognize attempted second degree murder as an offense resulted in the possibility that a defendant would be sentenced to a greater term of imprisonment if the victim lived than if the victim died. *Lopez,* 166 Ill.2d at 450, 211 Ill.Dec. 481, 655 N.E.2d 864. On this basis, defendants argued that the penalty for attempted first degree murder was disproportionate to the severity of the offense.

This court acknowledged in *Lopez* that, where mitigating circumstances are present, a defendant who intends to kill is subject to a greater sentencing range when the victim lives than when the victim ****1001** *****167** dies. Nonetheless, this court held that the attempt statute was not rendered unconstitutional. Although the sentencing range for attempted first degree murder was broader than the sentencing range for second degree murder, the sentencing range for attempted first degree murder encompassed the sentencing range for second degree murder. Thus, we concluded, "the disparity in sentencing range here is [not] cruel, degrading, or so wholly disproportionate to the offense committed as to shock the moral sense of the community." *Lopez,* 166 Ill.2d at 450–51, 211 Ill.Dec. 481, 655 N.E.2d 864. Moreover, we held that, in the absence of a proportionate penalties violation, the wording of the attempt statute, which required us to hold that attempted second degree murder could not exist as an offense in this state, was a matter better addressed to the legislature. *Lopez,* 166 Ill.2d at 449–50, 211 Ill.Dec. 481, 655 N.E.2d 864.

***481** Against this backdrop, we are now asked to consider the validity of the attempt statute as amended by Public Act 91–404. The Act creates a mandatory sentencing scheme which increases the penalty for the offense of attempted first degree murder based on the extent to which a firearm is involved in the commission of the offense. Pursuant to the amended statute, a defendant whose actions demonstrate an intent to kill, but do not result in death, is subject to sentencing ranges of 21 to 45 years, 26 to 50 years, or 31 years to natural life, depending on whether a firearm was in the defendant's possession, discharged, or the cause of bodily harm. At the same time, however, no provision has been made for one charged with attempted first degree murder to introduce mitigation evidence. Accordingly, the mandatory enhanced sentencing ranges created by the Act are applicable without regard to whether defendant acted under extreme provocation or while possessing an unreasonable belief that his actions were necessary for his defense.

Defendant argues here, as he did before the circuit court, that the attempt statute has been rendered unconstitutional by the addition of this mandatory enhanced sentencing scheme. The circuit court ruled that, because the mandatory enhanced sentencing ranges are applicable whether or not defendant acted under extreme provocation or while possessing an unreasonable belief that his actions were necessary for his defense, the sentencing scheme, as set forth in subsections (c)(1)(B), (c)(1)(C), and (c)(1)(D) of the attempt statute, violates the proportionate penalties clause of our state constitution, which requires the legislature to proportion penalties "according to the seriousness of the offense." Ill.

EXHIBIT 3

defendant in *Hill,* if convicted of the offense ****1003 ***169** charged, would be sentenced under any other sentencing provision of the "15–20–25 to life" sentencing scheme. Accordingly, this court held that the defendant in *Hill* had no standing to challenge the constitutionality of the sentences attached to the distinctly separate and uncharged offenses set forth in sections 12–11(a)(4) and 12–11(a)(5) of the Code (720 ILCS 5/12–11(a)(4), (a)(5) (West 2000)). *Hill,* 199 Ill.2d at 445–46, 264 Ill.Dec. 670, 771 N.E.2d 374. See also *People v. Falbe,* 189 Ill.2d 635, 644, 244 Ill.Dec. 901, 727 N.E.2d 200 (2000) (defendants do not have standing to challenge a statute as it might be applied to others).

Unlike the situation in *Hill,* however, the charged offense in the case at bar does not limit defendant's exposure to a single sentence. If convicted of the offense charged, defendant, in the case at bar, may be sentenced under any provision of the "15–20–25 to life" sentencing scheme, depending on the facts proved at trial. Thus, we conclude that the defendant here has standing to challenge the constitutionality of the sentencing scheme in its entirety.

There is another matter which we feel compelled to address, although the parties have not raised it. Defendant argues, and the circuit court found, that the attempt statute, as amended, is unconstitutional under the proportionate penalties clause when mitigating circumstances exist which would have reduced the underlying offense of first degree murder to second degree murder. The circuit court found that, when mitigating circumstances are present, the mandatory enhanced sentencing scheme subjects a defendant convicted of attempted first ***485** degree murder to penalties which are not set according to the seriousness of the offense. In the case at bar, however, defendant is challenging the constitutionality of the statute prior to trial and, thus, he has not yet alleged or established the existence of statutory mitigating circumstances in this case. Thus, one might suggest that defendant's constitutional challenge comes too soon. We find, however, that defendant's challenge to the constitutionality of the attempt statute at this juncture is not premature.

EXHIBIT 3

[5] Defendant's challenge to the constitutionality of the attempt statute is rooted in the fact that attempted second degree murder is not a recognized offense in this state and, barring its existence, the presence of mitigating circumstances is not relevant to a charge of attempted first degree murder. Thus, as a practical matter, the defendant here, like every defendant charged with attempted first degree murder, may be prevented from introducing mitigating evidence at trial. In other words, because defendant's culpability cannot be reduced by proof that he acted under extreme provocation or while possessing an unreasonable belief that his actions were necessary for his defense, there would be no purpose for introducing this type of mitigation evidence at trial and defendant may be foreclosed from doing so. Moreover, even should defendant be able to introduce mitigation evidence at trial, because attempted second degree murder is not a recognized offense, the jury would never be instructed to consider whether the mitigation evidence was sufficient to reduce defendant's culpability. Defendant would never have the opportunity to have a jury decide whether he acted under extreme provocation or while possessing an unreasonable belief that his actions were necessary for his defense. For this reason, defendant may be in no better position after trial to argue the unconstitutionality of the statute and the matter may ***486** evade appellate review. Further, denying defendant the opportunity to challenge the constitutionality of the attempt statute at this juncture would hamper ****1004 ***170** his ability to shape a defense to the charge of attempted first degree murder. Thus, we conclude that, in the case at bar, defendant's challenge to the constitutionality of the statute is not premature.

Constitutionality EXHIBIT 3

[6] [7] [8] Turning now to the central issue in this appeal, we consider whether the circuit court was correct when it found that the attempt statute, as amended by Public Act 91–404, unconstitutionally violates the proportionate penalties clause of the Illinois Constitution. The standard by which we review a court's ruling that a statute is unconstitutional is *de novo. People v. Carney,* 196 Ill.2d 518, 526, 256 Ill.Dec. 895, 752 N.E.2d 1137 (2001); *People v. Malchow,* 193 Ill.2d 413, 418, 250 Ill.Dec. 670, 739 N.E.2d 433 (2000). We begin our assessment with the understanding that all statutes carry a strong presumption of constitutionality. *People v. Wright,* 194 Ill.2d 1, 24, 251 Ill.Dec. 469, 740 N.E.2d 755 (2000); *People v. Maness,* 191 Ill.2d 478, 483, 247 Ill.Dec. 490, 732 N.E.2d 545 (2000). To overcome this presumption, the party challenging the statute bears a heavy burden of clearly establishing its constitutional infirmities. *People v. Kimbrough,* 163 Ill.2d 231, 237, 206 Ill.Dec. 84, 644 N.E.2d 1137 (1994). Any reasonable construction which affirms a statute's constitutionality must be adopted, and any doubt regarding a statute's construction must be resolved in favor of the statute's validity. *Burger v. Lutheran General Hospital,* 198 Ill.2d 21, 32, 259 Ill.Dec.

753, 759 N.E.2d 533 (2001); *People v. Shephard,* 152 Ill.2d 489, 499, 178 Ill.Dec. 724, 605 N.E.2d 518 (1992).

When analyzing whether a proportionate penalties violation has been demonstrated, the ultimate issue is whether the penalty attached to the offense has been set by the legislature "according to the seriousness of the offense." Ill. Const.1970, art. I, § 11. In *People v. Lombardi,* 184 Ill.2d 462, 474, 235 Ill.Dec. 478, 705 N.E.2d 91 (1998), we discussed three analyses which courts have employed when assessing ***487** proportionality claims: (1) whether the penalty is cruel, degrading or so wholly disproportionate to the offense committed as to shock the moral sense of the community (*People v. Bailey,* 167 Ill.2d 210, 236, 212 Ill.Dec. 608, 657 N.E.2d 953 (1995); *People v. Gonzales,* 25 Ill.2d 235, 240, 184 N.E.2d 833 (1962)); (2) whether the described offense, when compared to a similar offense, carries a more severe penalty although the proscribed conduct creates a less serious threat to the public health and safety (*People v. Davis,* 177 Ill.2d 495, 503, 227 Ill.Dec. 101, 687 N.E.2d 24 (1997); *People v. Farmer,* 165 Ill.2d 194, 210, 209 Ill.Dec. 33, 650 N.E.2d 1006 (1995); *People v. Wisslead,* 94 Ill.2d 190, 194–97, 68 Ill.Dec. 606, 446 N.E.2d 512 (1983)); or (3) whether the described offense, when compared to an offense having identical elements, carries a different sentence (*People v. Lewis,* 175 Ill.2d 412, 417–18, 222 Ill.Dec. 296, 677 N.E.2d 830 (1996)). These three analyses provide the general framework for evaluating whether a proportionate penalties clause violation has been established.

In the case at bar, the circuit court, applying the first prong of the *Lombardi* test, held that the attempt statute, as amended by Public Act 91–404, violates the proportionate penalties clause of our state constitution. Ill. Const.1970, art. I, § 11. More specifically, the circuit court found that, because the statute does not permit the introduction of statutory mitigating factors, the penalties imposed on one convicted of attempted first degree murder under the mandatory enhanced sentencing scheme are not set according to the seriousness of the offense. In other words, because the mandatory enhancements to the sentencing range for an attempted ****1005 ***171** first degree murder conviction are added without regard to whether mitigating circumstances are present, the penalties for that offense are, in some instances, so disproportionate to the offense committed that they " ' "shock the moral sense of the community." ' " *Bailey,* 167 Ill.2d at 236, 212 Ill.Dec. 608, 657 N.E.2d 953, quoting *People v. Gonzales,* 25 Ill.2d 235, 240, 184 N.E.2d 833 (1962), quoting *People ex rel. Bradley v. Illinois State Reformatory,* 148 Ill. 413, 421–22, 36 N.E. 76 (1894).

[9] [10] ***488** Initially, we acknowledge that the legislature has the authority to set the nature and extent of criminal penalties and that courts may not interfere with such legislation unless the challenged penalty is clearly in excess of the very broad and general constitutional limitations applicable. *People ex rel. Carey v. Bentivenga,* 83 Ill.2d 537, 542, 48 Ill.Dec. 228, 416 N.E.2d 259 (1981). We further acknowledge that the legislative purpose for enacting Public Act 91–404 is the deterrence of the use of firearms in the commission of offenses. The presence of firearms during the commission of an offense always poses an extreme danger, not only to intended victims, but also to innocent bystanders. Thus, we will not second-guess the legislature's determination that the protection of society necessitates the imposition of severe penalties whenever a firearm is used in the course of an offense. See *Hill,* 199 Ill.2d at 457–58, 264 Ill.Dec. 670, 771 N.E.2d 374. Thus, we cannot say that, where mitigating circumstances are not present, it would be cruel, degrading or so wholly disproportionate to the offense committed to subject a defendant who commits the offense of attempted first degree murder to mandatory add-on sentences of 15 years, 20 years or 25 years to life, depending on whether a firearm is present, discharged or the cause of bodily injury. Nor would the imposition of these penalties run counter to the general sentencing directive that "the penalty for committing an attempt may not exceed the maximum penalty for the offense attempted." The penalty for first degree murder is a term of imprisonment between 20 and 60 years (730 ILCS 5/5–8–1(a)(1)(a) (West 2000)), which must be enhanced by the addition of 15 years, 20 years, or 25 years to life, depending on whether the defendant, in committing the offense, was in the possession of a firearm, discharged a firearm, or caused bodily injury or death as a result of the use of a firearm (730 ILCS 5/5–8–1(a)(1)(d) (West 2000)). We conclude, then, that the mandatory enhanced sentencing ***489** scheme added to the offense of attempted first degree murder does not make the penalty for committing an attempt exceed the maximum penalty for the offense attempted and, therefore, the penalty is not inherently unconstitutional.

[11] As the circuit court recognized, however, the difficulty stems from the fact that the wording of the attempt statute makes the offense of attempted second degree murder an inherent impossibility. For this reason, where the offense attempted would otherwise constitute second degree murder (*i.e.,* first degree murder where mitigating circumstances are present), the defendant cannot be convicted of attempted second degree murder, but must be convicted of attempted first degree murder. Accordingly, it is possible, as we acknowledged in *Lopez,* that the penalty for the attempt will exceed the maximum

EXHIBIT 35

(EXHIBIT 11)

penalty for the actual underlying offense, *i.e.*, second degree murder. Under the statutory scheme, when a firearm is *not* involved in the commission of the offense, the penalty for attempted first degree murder is not so disparate that the statute is rendered unconstitutional by the defendant's inability to prove the existence of mitigating circumstances. However, **1006 ***172 when a firearm *is* involved in the offense and the mandatory enhanced sentencing scheme applies, the penalty ranges for attempted first degree murder far exceed the penalty range for second degree murder. Because the enhanced penalties apply without regard to the defendant's ability to prove the existence of mitigating circumstances, we conclude that the attempt statute is rendered unconstitutional.

When Public Act 91–404 was enacted, the wording of the general attempt provision was not changed and, accordingly, the offense of attempted second degree murder remains an inherent impossibility. Moreover, no provision was made for the introduction of mitigating *490 evidence that would lessen a defendant's culpability for an attempted first degree murder. Instead, the Act created a mandatory enhanced sentencing scheme that substantially increases the penalty for attempted first degree murder when a firearm is involved in the offense. Under the amended statute, then, a defendant whose actions would have resulted in a conviction for second degree murder if the victim died, must be convicted of attempted first degree murder if the victim lives. In addition, when a gun is used in the commission of the offense, the defendant will be subject to the mandatory enhanced sentencing scheme. As a result, based on the statute as it is now written, where mitigating circumstances exist the penalty for an *attempt* to commit murder involving the use of a firearm will *always* be greater than the penalty for the underlying offense committed, *i.e.*, second degree murder.

The inequity of the situation created by the amended attempt statute is graphically demonstrated by the example proposed by the circuit court judge in this case. The court stated:

> "Assume that we have a woman who has suffered physical abuse at the hands of her husband or boyfriend for many years. After growing tired of this abuse, she decides to stop the cycle of abuse by killing her companion and decides to kill her companion with a firearm. While her decision to kill her companion is unlawful, her decision to kill him with a firearm is understandable since most women will not fare well in the attempt to kill a man with a knife or a club. This is not an unusual situation and several women have been charged with murder under similar circumstances in Central Illinois in the recent past. * * * In this example, if the woman is successful in killing her companion, the mitigation factors can be raised, and there is some possibility that a jury could return a verdict of [s]econd [d]egree [m]urder. But * * * if the woman fails to kill her companion, but does inflict serious bodily harm on him, she faces a minimum sentence of 31 years. She has *491 made a terrible mistake in not making sure that she has killed her companion!"

As the above example makes clear, under the current laws of this state, the defendant who intends to kill and, while using a firearm, succeeds in killing his or her victim has the opportunity to present mitigation evidence, the proof of which will result in a conviction on the lesser offense of second degree murder and, accordingly, exposure to a sentencing range of 4 to 20 years. If the victim does not die, however, the defendant is foreclosed from presenting mitigating evidence in the hopes of securing a conviction on a lesser offense and, correspondingly, a lesser sentence. In fact, where mitigating circumstances are present, the defendant who possesses a gun with the intent to kill and who takes a substantial step toward the commission of the offense of murder will be subject to a sentencing range where the *minimum* **1007 ***173 sentence is one year greater than the *maximum* sentence available if the same defendant actually fired the gun and caused the victim's death.

In sum, we find the attempt statute (720 ILCS 5/8–4 (West 2000)), as amended by Public Act 91–404, is unconstitutional because it permits a defendant convicted of attempted first degree murder to be subject to penalties that are not set according to the seriousness of the offense. The amended statute provides that a defendant who intends to kill but fails to cause the death of his victim shall be convicted of attempted first degree murder, whether or not mitigating circumstances exist, and shall be sentenced to a term of imprisonment between 6 and 30

EXHIBIT 11

EXHIBIT 34

was unconstitutional rendered offense void ab initio, and required vacatur of convictions, and (2) State could not amend charging instruments on appeal.

Affirmed in part and reversed in part.

Rathje, J., dissented and filed opinion.

1. Assault and Battery ⇐48

Determination by Supreme Court that legislative enactment through which offense of predatory criminal sexual assault was created was unconstitutional, based on violation of single subject rule of State Constitution, rendered offense void ab initio, and required vacatur of convictions obtained under statute.

2. Indictment and Information ⇐159(1)

When a defendant is convicted of an offense later held unconstitutional, State may not amend the charging instrument on appeal. S.H.A. 725 ILCS 5/111–5.

3. Indictment and Information ⇐162

State could not amend instruments charging defendants with offense of predatory criminal sexual assault on appeal following defendants' convictions, where during pendency of which enactment creating offense had been held unconstitutional as violative of single subject rule, and offense was thus rendered void ab initio; proposed amendments sought to cure a substantive defect and were not a mere formality, as crime charged had been rendered nonexistent at time defendants had committed charged acts. S.H.A. 725 ILCS 5/111–5.

4. Indictment and Information ⇐162

Formal defects in a charging instrument may be amended by the State at any time. S.H.A. 725 ILCS 5/111–5.

5. Criminal Law ⇐1186.3

Indictment and Information ⇐56

Defect caused by charging an offense based upon a statute not in effect when the alleged offense occurred is fatal, rendering the entire instrument invalid, and warranting reversal of conviction for offense.

Richard S. London, Staff Atty., State's Atty. Appellate Prosecutor, Elgin, Lisa Anne Hoffman, Asst. Atty. Gen., Chicago, State's Attorney Lake County, for the People in No. 85524.

Barbara R. Paschen, Asst. State Appellate Defender, Elgin, for Gomecindo Tellez–Valencia in No. 85524.

Lawrence J. Essig, Asst. State Appellate Defender, Springfield, for Robbie J. Moore in No. 85532.

Lisa Anne Hoffman, Asst. Atty. Gen., Chicago, State's Atty. Vermilion County, Danville, State's Attys. App. Pros., Springfield, for the People in No. 85532.

Justice HEIPLE delivered the opinion of the court:

Both defendants in this consolidated appeal were convicted of predatory criminal sexual assault of a child. While defendants' respective appeals were pending, this court invalidated Public Act 89–428, which created this offense. Subsequently, in case No. 85524, the appellate court reversed defendant Gomecindo Tellez–Valencia's conviction, holding that the State could not amend the charging instrument on appeal. 295 Ill.App.3d 122, 229 Ill.Dec. 634, 692 N.E.2d 407. However, the appellate court in No. 85532 affirmed defendant Robbie J. Moore's conviction, allowing the State to amend the charge on appeal to aggravated criminal sexual assault. 295 Ill.App.3d 676, 230 Ill.Dec. 553, 694 N.E.2d 184. We consolidated the two cases, and now hold that, when a defendant is convicted of an offense later held unconstitutional, the State may not amend the charging instrument on appeal.

BACKGROUND

Defendants were both charged with and convicted of predatory criminal sexual assault of a child for acts committed in the spring of 1996. Subsequent to defendants' convictions, and while their appeals were

pending, this court held that Public Act 89–428 was enacted in violation of the single subject rule (Ill. Const.1970, art. IV, § 8) and declared the Act unconstitutional in its entirety. *Johnson v. Edgar*, 176 Ill.2d 499, 224 Ill.Dec. 1, 680 N.E.2d 1372 (1997). Shortly thereafter, the General Assembly passed Public Act 89–462, reenacting the offense of predatory criminal sexual assault of a child. Public Act 89–462 did not become effective, however, until May 29, 1996, and by its language, does not apply to offenses occurring before that date.

On appeal, both defendants argued that their convictions were invalid because they were based upon charging instruments that failed to state an offense. The Second District of the Appellate Court reversed the conviction of defendant Tellez–Valencia, holding that only the grand jury could make a substantive change to the defendant's indictment. 295 Ill.App.3d at 127, 229 Ill.Dec. 634, 692 N.E.2d 407. The Fourth District of the Appellate Court, however, reached the opposite result in defendant Moore's case, holding that the State could amend the trial court's judgment and sentencing order to change the name of the offense of which defendant was convicted from predatory criminal sexual assault of a child to aggravated criminal sexual assault, thereby effectively amending defendant's indictment on appeal. In so holding, the court in *Moore* noted the identical nature and elements of the two offenses, and reasoned that such an amendment constituted a mere formality, thus affirming the conviction. 295 Ill.App.3d at 683–84, 230 Ill.Dec. 553, 694 N.E.2d 184. We granted leave to appeal in order to resolve this conflict in the appellate court.

ANALYSIS

[1] When Public Act 89–428 was held unconstitutional by this court's ruling in *Johnson v. Edgar*, 176 Ill.2d 499, 224 Ill. Dec. 1, 680 N.E.2d 1372 (1997), the offense of predatory criminal sexual assault of a child was rendered void *ab initio*; that is, it was as if the law never existed. See *People v. Gersch*, 135 Ill.2d 384, 390, 142 Ill.Dec. 767, 553 N.E.2d 281 (1990). Although the General Assembly later reenacted the offense, this reenactment had the effect of creating an entirely new criminal statute. Each defendant's charging instrument thus failed to state an offense because the statute under which each was charged and prosecuted was not in effect when the alleged offenses occurred. Accordingly, defendants' convictions for predatory criminal sexual assault of a child cannot stand.

EXHIBIT

EXHIBIT

[2, 3] The State argues that amendment of defendants' charging instruments on appeal to change the name of the offense charged from predatory criminal sexual assault of a child to aggravated criminal sexual assault is merely a formality because the elements of the two crimes, as well as the statutory language and penalties as applied to defendants, are identical. The State reasons that defendants are not prejudiced in any way by such an amendment because each was apprised of the nature and elements from which to prepare a defense, regardless of the specific name given to the alleged criminal act.

[4, 5] While we acknowledge that formal defects in a charging instrument may be amended by the State at any time (see 725 ILCS 5/111–5 (West 1998)), we disagree with the State's characterization of the proposed amendment in the cases at bar as a mere formality. The committee comments to section 111–5 of the Code of Criminal Procedure of 1963 specifically exclude failure to charge a crime from those defects in a charge considered merely formal and which may be cured by amendment at any time, instead labeling this a substantive defect. See 725 ILCS 5/111–5, Committee Comments–1963 (Smith–Hurd 1992). Further, the defect caused by charging an offense based upon a statute not in effect when the alleged offense occurred is fatal, rendering the entire instrument invalid, and warranting reversal of

(EXHIBIT 13)

both statutes.

¶ 33 Defendant argues, however, that under our decision in *Manuel,* the legislature may not revive an unconstitutional statute through amendment of a different statute. *Manuel* does not stand for such a broad proposition of law. In *Manuel,* we rejected the State's argument that an amendment to certain sections of the Illinois Controlled Substances Act (Ill.Rev.Stat.1979, ch. 56 ½, ¶ 1401(e), (f)) could revive a different section of that act which "this court *subsequently* holds unconstitutional." (Emphasis added.) *Manuel,* 94 Ill.2d at 244, 68 Ill.Dec. 506, 446 N.E.2d 240. In other words, the legislature could not have intended revival of a statute which had not yet been declared unconstitutional. See *Malone,* 2012 IL App (1st) 110517, ¶ 88, 365 Ill.Dec. 365, 978 N.E.2d 387. In contrast to the sequence of events in *Manuel,* Public Act 95–688 was enacted after, not before, this court declared the armed robbery sentencing enhancement unconstitutional.

¶ 34 To the extent that *Manuel* could be read as holding that revival of a statute cannot be effected through amendment of a different statute, *Hauschild* effectively overruled *Manuel.* As discussed above, *Hauschild* considered the effect of Public Act 91–404 on the offense of armed violence predicated on robbery, which *Lewis* held violated the proportionate penalties clause when compared to armed robbery. *Hauschild,* 226 Ill.2d at 84, 312 Ill.Dec. 601, 871 N.E.2d 1. *Hauschild* held that Public Act 91–404 revived that armed violence offense "when it amended the sentence for certain armed robberies." *Id.* Thus, *Hauschild* recognized that a statute held unconstitutional under the identical elements test for proportionality could be revived through amendment of the comparison statute. Although defendant here notes that Public Act 91–404 also amended the armed violence statute, that fact was immaterial to our analysis in *Hauschild* and was not a basis of our holding in that case. Moreover, the amendments made to the armed violence statute in Public Act 91–404 did not help cure the proportionality violation identified in *Lewis.*

¶ 35 The issue we address in the present case is analogous to the issue addressed in *Hauschild,* and we necessarily reach a similar result. Just as Public Act 91–404 revived the offense of armed violence based on robbery by amending the armed robbery statute, we now hold that Public Act 95–688 revived the sentencing enhancement **135 *84 in the armed robbery statute by amending the armed violence statute. In this case, as in *Hauschild,* the legislature revived the unconstitutional statute by curing the proportionality violation through amendment of the comparison statute. Appellate court cases which hold to the contrary are overruled.

¶ 36 We recognize that the legislature could have signaled its intent to revive the armed robbery sentencing enhancement by amending the armed violence statute and simultaneously reenacting the armed robbery sentencing provision. As already discussed, however, reenactment of the armed robbery sentencing provision was not required as a matter of law because *Hauschild* did not render the sentencing enhancement nonexistent; it rendered the sentencing enhancement unenforceable.

¶ 37 Furthermore, the legislature's intent to revive the sentencing enhancement is plain enough, even in the absence of reenactment of that provision. As our case law illustrates, this court has had an ongoing dialogue with the legislature concerning the constitutionality of various statutes increasing the penalties for certain felonies when the offender possesses or uses a firearm during the commission of the offense. See *Sharpe,* 216 Ill.2d at 490–523, 298 Ill.Dec. 169, 839 N.E.2d 492 (discussing the history of our proportionate penalties clause jurisprudence). Public Act 95–688 was simply the latest reaction to a declaration from this court concerning the constitutionality of one of these statutes. Enacted within a few months of *Hauschild,* Public Act 95–688 not only remedied the proportionate penalties violation identified in *Hauschild,* it did so in a manner that tracked our analysis in *Hauschild.* We indicated in *Hauschild* that although the legislature had previously excluded armed robbery as a predicate felony for armed violence, it had not excluded robbery, and, therefore, we could proceed with an identical elements analysis. *Hauschild,* 226 Ill.2d at 85, 312 Ill.Dec. 601, 871 N.E.2d 1. Public Act 95–688 amended the armed violence statute so that robbery can no longer serve as a predicate offense for armed violence.

¶ 38 Although discerning legislative intent can sometimes be a "thorny task" (*O'Casek v. Children's Home & Aid Society of Illinois,* 229 Ill.2d 421, 441, 323 Ill.Dec. 2, 892 N.E.2d 994 (2008)), the legislature's intent when it enacted Public Act 95–688 is clear. To the extent any residual doubt exists, it is erased through examination of the legislative history of Public Act 95–688. See 95th Ill. Gen. Assem., Senate Proceedings, July 26, 2007, at 8 (statements of Senator Cullerton) (stating that the bill underlying Public Act 95–688 addresses an Illinois Supreme Court decision that held the legislature violated the proportionate penalties clause and that the bill "corrects that").

(EXHIBIT 13)

(EXHIBIT 13)

¶ 39 CONCLUSION

¶ 40 For the reasons stated, the trial court properly sentenced defendant to an enhanced term pursuant to section 18–2(b) of the armed robbery statute. Accordingly, we reverse the judgment of the appellate court, and affirm the judgment of the circuit court.

¶ 41 Appellate court judgment reversed.

¶ 42 Circuit court judgment affirmed.

Chief Justice KILBRIDE and Justices FREEMAN, THOMAS, GARMAN, KARMEIER, and BURKE concurred in the judgment and opinion.

All Citations

2013 IL 114122; 986 N.E.2d 75, 369 Ill.Dec. 126

End of Document

n June 9, 1981. The trial court granted ach defendant's motion to dismiss, holding hat section 404 was unconstitutional under his court's opinion in *People v. Wagner* 1982), 89 Ill.2d 308, 60 Ill.Dec. 470, 433 N.E.2d 267. The State appealed directly ere pursuant o our Rule 603 (87 Ill.2d R. 03). We consolidated the causes.

[1] The defendant in *Wagner* had been onvicted of delivery of a noncontrolled ubstance represented to be a controlled ubstance (heroin) which was punishable nder section 404 as a Class 3 felony with a ossible $15,000 fine. At the time of Wagner's offense, delivery of an actual Schedule V or V controlled substance was punishable as a Class 4 felony with a possible fine f $10,000 for the Schedule IV offense and 5,000 for the Schedule V offense. (Ill.Rev. tat.1977, ch. 56½, pars. 1401(e), (f).) A najority of this court held that because ection 404 punished delivery of the noncontrolled substance more severely than delivery of a controlled substance, it "is not easonably designed to remedy the evil which the legislature determined to be a greater threat o the public" (89 Ill.2d 308, 313, 60 Ill.Dec. 470, 433 N.E.2d 267) and, as uch, violated the due process clause of the llinois Constitution (Ill. Const.1970, art. I, ec. 2). Although not applicable in that ase, the court noted that the legislature, on September 14, 1979, by Public Act 81–583, mended sections 401(e) and (f) to make elivery of a Schedule IV or V controlled ubstance a Class 3 felony. The permissible ines remained unchanged.

The State argues here, relying on two lecisions of the appellate court (*People v. Burks* (1982), 108 Ill.App.3d 433, 64 Ill.Dec. 57, 438 N.E.2d 1376, *rev'd* (Feb. 18, 1983), No. 57261; *People v. Johnson* (1982), 106 Ill.App.3d 759, 62 Ill.Dec. 731, 436 N.E.2d 757), that *Wagner* does not preclude a prosecution under section 404 "as amended" because that decision is applicable only to the statutory scheme in effect at the time of that defendant's offense. Further, the State submits that the continued fine disparity does not rise to constitutional magnitude (*People v. Johnson* (1982) 106 Ill.App.3d 759, 765–66, 62 Ill.Dec. 731 436 N.E.2d 757), or, alternatively, is severable from the remainder of the statute (*People v. Burks* (1982), 108 Ill.App.3d 433, 433, 64 Ill.Dec. 57, 438 N.E.2d 1376). As defendant points out, the difficulty with the State's position concerning the nonapplicability of *Wagner* to these prosecutions is that section 404 was not amended by the legislature. Public Act 81–583, upon which the State relies, specifically amended sections 401 and 402 of the Illinois Controlled Substances Act, and, as noted in *People v. Bradley* (1980), 79 Ill.2d 410, 418, 38 Ill.Dec. 575, 403 N.E.2d 1029, thereby remedied the unconstitutional penalty disparity that had previously existed between delivery and possession of the same type of controlled substance. While we agree that the fortuitous effect of the amendment was to change the statutory scheme so as to remedy the unconstitutional classification addressed in *Wagner*, we cannot agree that the amendment to sections 401 and 402 can operate to, in essence, revive a different statute which this court subsequently holds unconstitutional.

[2] When a statute is held unconstitutional in its entirety, it is void *ab initio* see, *e.g., Van Driel Drug Store, Inc. v. Mahin* (1970), 47 Ill.2d 378, 381–82, 265 N.E.2d 659; *People v. Clardy* (1929), 334 Ill. 160, 165–64, 165 N.E. 638; *Mills v. Peoples Gas Light & Coke Co.* (1927), 327 Ill. 508, 535, 158 N.E. 814; *Quitman v. Chicago Transit Authority* (1952), 348 Ill.App. 481, 109 N.E.2d 373 16 Am.Jur.2d *Constitutional Law* sec. 256 (1979)), and it is clear that defendants here cannot be prosecuted under an unconstitutional act (*e.g., People v. Meyerowitz* (1975), 61 Ill.2d 200, 335 N.E.2d 1). Had the legislature amended section 404, as it now has (Pub. Act 82–968, eff. Sept. 7, 1982) we would then have been in a position to examine anew its validity within what would then be a new statutory scheme. At the time of these offenses, however, section 404 had not been amended, and we therefore hold that *Wagner* precludes these prosecutions. To the extent that the appellate

Preclude: make impossible.

88-680 violates the single-subject rule of Section 8 of Article IV of the Illinois Constitution. P.A.s 91-54, 91-155, 91-404, 91-690, 91-691, 91-692, 91-693, 91-694, 91-695, and 91-696 re-enacted portions, but not all, of the substance of P.A. 88-680. *People v. Dainty*, 299 Ill.App.3d 235 (3rd Dist. 1998), *People v. Williams*, 302 Ill.App.3d 975 (2nd Dist. 1999), *People v. Edwards*, 304 Ill.App.3d 250 (2nd Dist. 1999), and *People v. Cervantes*, 189 Ill.2d 80 (1999). (These cases are also reported in this Part 1 of this Report under "Finance" and "Corrections" and in Part 2 of this Report under "Criminal Offenses".) P.A. 90-590 repealed the offending Sections.

CRIMINAL OFFENSES

720 ILCS 5/10-5 (West 1998). **Criminal Code of 2012.**[2] Provision that made evidence of luring or attempted luring prima facie evidence of other than a lawful purpose created a *per se* unconstitutional, but severable, mandatory presumption that denied due process by shifting the burden of proof to the defendant. *People v. Woodrum*, 223 Ill.2d 286 (2006). P.A. 97-160 amended the provision to authorize the trier of fact to infer that luring or attempted luring is for other than an unlawful purpose.

720 ILCS 5/10-5.5 (West 1994). **Criminal Code of 2012.** The provision of the unlawful visitation interference statute prohibiting the imposition of civil contempt sanctions under the Illinois Marriage and Dissolution of Marriage Act after a conviction for unlawful visitation interference was an undue infringement on the court's inherent powers under the separation of powers provision of Article II, Section 1 of the Illinois Constitution. Public Act 96-710, effective January 1, 2010, removed the offending provision. *People v. Warren*, 173 Ill.2d 348 (1996).

720 ILCS 5/11-20.1 (P.A. 88-680). **Criminal Code of 2012.** Provisions amended by P.A. 88-680 were unconstitutional because P.A. 88-680 violated the single-subject rule of Section 8 of Article IV of the Illinois Constitution. P.A. 91-54 re-enacted the changes in Section 11-20.1 made by P.A. 88-680. *People v. Dainty*, 299 Ill.App.3d 235 (3rd Dist. 1998), *People v. Williams*, 302 Ill.App.3d 975 (2nd Dist. 1999), and *People v. Edwards*, 304 Ill.App.3d 250 (2nd Dist. 1999). (These cases are also reported in Part 1 of this Report under "Finance", "Courts", and "Corrections".)

720 ILCS 5/12-6 (Ill. Rev. Stat. 1983, ch. 38, par. 12-6). **Criminal Code of 2012.** Provision of intimidation statute making it an offense to threaten to commit any crime no matter how minor or insubstantial is unconstitutional as being overbroad in violation of the First Amendment to the United States Constitution. *U.S. ex rel. Holder v. Circuit Court of the 17th Judicial Circuit*, 624 F.Supp. 68 (N.D.Ill. 1985). Public Act 96-1551, effective July 1, 2011, limited the applicability of this provision to felonies and Class A misdemeanors.

---

[2] Effective January 1, 2013, the Criminal Code of 1961 was renamed the Criminal Code of 2012 by P.A. 97-1108. This Report uses "Criminal Code of 2012" in all instances. A conversion table for the Criminal Code re-write can be found online at http://ilga.gov/commission/lrb/Criminal-Code-Rewrite-Conversion-Tables.pdf

HN15 **Local Officials, Customs & Policies**
When an official authorizes constitutionally inadequate procedures, the official's liability is not negated by a showing that he or she did not intend to deprive the plaintiff of due process of law. Any state-of-mind requirement of the due process clause is satisfied if the official authorizes a system with the intention that it will operate to deprive persons of life, liberty, or property, whether or not he intends the deprivation to be without due process of law. There is no authority for the proposition that an intentional deprivation of life, liberty, or property does not give rise to a due process violation because the failure to provide due process was without fault. More like this Headnote

Shepardize - Narrow by this Headnote (33) 8

Constitutional Law > Bill of Rights > Fundamental Rights
> Cruel & Unusual Punishment

Constitutional Law > ... > Fundamental Rights > Procedural Due Process >
Scope of Protection

HN16 **Fundamental Rights, Cruel & Unusual Punishment**
Delegating decisionmaking authority and discretion in exercising that authority is not in and of itself indicative of constitutionally inadequate process. There are times, in fact, where delegation of discretion is imperative to the functioning of an efficient and fair system, whether in the prisons or elsewhere. Procedural due process requires that an inmate with a challenge to the calculation of his release date promptly be listened to by someone having authority to decide the challenge or pass it on for further review and decision; due process does not, however, require that records officers refer every argument made by an inmate, regardless of its plausibility, to a deputy attorney general. The cost of such a requirement would far outweigh its marginal utility in reducing the risk of overstays. More like this Headnote

Shepardize - Narrow by this Headnote (19) 3

Constitutional Law > ... > Fundamental Rights > Procedural Due Process >
Scope of Protection

HN17 **Procedural Due Process, Scope of Protection**
Although it is appropriate to inquire whether custom and practice has displaced the de jure system, custom and practice can provide a basis for liability under this theory only if the official can realistically be said to have approved the displacement of the de jure system with whatever the offending custom or practice is found to be. Although that approval need not be expressly articulated, in order for the official to be held responsible for an "established state procedure" his or her conduct must in some manner communicate approval of that procedure to others. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Shepardize - Narrow by this Headnote (11) △1 ◆3

Criminal Law & Procedure > ... > Murder ▾ > First-Degree Murder ▾ > General Overview ▾

Criminal Law & Procedure > Criminal Offenses ▾ > Homicide, Manslaughter & Murder ▾ > General Overview ▾

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder ▾ > Voluntary Manslaughter ▾ > General Overview ▾

HN6 **Murder, First-Degree Murder**
The legislature amended § 9-2 of the Criminal Code of 1961, Ill. Rev. Stat. ch. 38, para. 9-2 (1985) in 1986. This revision renames the offense of murder and abolishes voluntary manslaughter. Murder is now known as first degree murder, and voluntary manslaughter has been replaced by second degree murder. More like this Headnote

Shepardize - Narrow by this Headnote (0)

Criminal Law & Procedure > ... > Murder ▾ > First-Degree Murder ▾ > General Overview ▾

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder ▾ > Murder ▾ > General Overview ▾

Criminal Law & Procedure > ... > Murder ▾ > Second-Degree Murder ▾ > General Overview ▾

HN7 **Murder, First-Degree Murder**
Second degree murder is first degree murder plus the existence of one of the two statutory mitigating circumstances. First and second degree murder are similar in that they have the same mental states. What distinguishes the two offenses is the presence of the mitigating circumstance, which reduces first degree murder to second degree murder. However, the mitigating circumstances are not elements of the crime. In fact, first and second degree murder have the same elements. Second degree murder is simply a lesser mitigated offense, a concept new to Illinois. More like this Headnote

Shepardize - Narrow by this Headnote (4) ◆2

Criminal Law & Procedure > ... > Murder ▾ > First-Degree Murder ▾ > General Overview ▾

EXHIBIT 21

(EXHIBIT 6)

tion in this case is suspension for three months.

Respondent suspended.

WARD, J., took no part in the consideration or decision of this case.

94 Ill.2d 242
446 N.E.2d 240

The PEOPLE of the State of Illinois, Appellant,

v.

Michael MANUEL, Appellee.

The PEOPLE of the State of Illinois, Appellant,

v.

Michael HUSKEY, Appellee.

The PEOPLE of the State of Illinois, Appellant,

v.

William J. CLINTON, Appellee.

Nos. 56482, 56662 and 56663.

Supreme Court of Illinois.

Feb. 18, 1983.

Defendants were charged with violating section 404 of the Controlled Substances Act. The Circuit Court, Jackson County, Richard E. Richman, J., dismissed on constitutional grounds, and the State took direct appeal. The Supreme Court, Underwood, J., held that although following decision holding section 404 unconstitutional the legislature amended sections 401 and 402 the amendment did not revive section 404 so as to permit prosecution thereunder before the legislature specifically amended that section.

Affirmed.

1. Drugs and Narcotics ⇐43

Although following decision that section 404 of Controlled Substances Act violated due process as punishing delivery of an uncontrolled substance more severely than delivery of controlled substance the legislature amended sections 401 and 402 to make delivery of a Schedule IV or V controlled substance a class 3 felony the amendment did not revive section 404 so as to permit subsequent prosecution thereunder before the legislature specifically amended that section; disapproving *People v. Johnson,* 106 Ill.App.3d 759, 62 Ill.Dec. 731, 436 N.E.2d 757. S.H.A. ch. 56½, ¶¶ 1401, 1401(e, f), 1402, 1404; S.H.A. Const. Art. 1, § 2; U.S.C.A. Const.Amends. 5, 14.

2. Statutes ⇐63

When a statute is held unconstitutional in its entirety it is void ab initio.

Randy E. Blue, Deputy State Appellate Defender, Fifth Judicial Dist., Mount Vernon, for defendants-appellees; John Clemons, State's Atty., Murphysboro, of counsel.

Tyrone C. Fahner, Atty. Gen., State of Ill., Michael B. Weinstein, Ellen M. Flaum, Asst. Attys. Gen., Chicago, for appellant.

UNDERWOOD, Justice:

Defendants Michael L. Manuel (cause No. 56482), Michael Huskey (cause No. 56662), and William J. Clinton (cause No. 56663) were charged by information in the circuit court of Jackson County with violating section 404 of the Illinois Controlled Substances Act (Ill.Rev.Stat.1979, ch. 56½, par. 1404). Manuel was charged with two counts of delivery of a noncontrolled substance represented to be a controlled substance (cocaine) allegedly occurring on March 18 and 20, 1981; Huskey was charged with two counts of delivery of a noncontrolled substance represented to be a controlled substance (amphetamine) allegedly occurring on February 3 and 13, 1981; and Clinton was charged with one count of delivery of a noncontrolled substance represented to be a controlled substance (amphetamine) allegedly occurring

Against this statutory backdrop, we consider the nature and timing of the malpractice action at issue here.

II. The Malpractice Action

Plaintiffs' cause of action for legal malpractice stems from defendants' preparation, on October 23, 1992, of the last will and testament of Lawrence A. Perlstein, Deena Perlstein's husband. Generally, plaintiffs alleged that defendants negligently prepared the will, thereby preventing the Lawrence A. Perlstein Trust from disbursing $300,000 to Scott Schneider, Deena Perlstein's son, and causing other damages.

Lawrence Perlstein died on September 23, 1995. On October 16, 1995, the circuit court of Lake County admitted the will to probate and issued letters of office to Deena Perlstein. On January 8, 1996, the attorneys for the trustees of the Lawrence A. Perlstein Trust rendered an opinion that the trustees should not fund the trust on the ground that Lawrence Perlstein had not properly exercised the power of appointment in his will. On January 26, 1996, the trustees notified Deena Perlstein that the trust would not be funded.

At the time Deena Perlstein learned that her late husband's trust would not be funded, the changes wrought by Public Act 89–7 had been on the statute books for almost a year. As noted above, following the passage of Public Act 89–7, a two-year limitations period and a six-year repose period applied—without exception—to all attorney malpractice actions. See 735 ILCS 5/13–214.3(b), (c) (West 1996). According to defendants, the two-year limitations period would have expired, at the latest, on January 26, 1998 (two years from the date Deena Perlstein purportedly had knowledge that the trust would not be funded), and the six-year repose period would have expired October 23, 1998 (six years after the date defendants prepared the will). Plaintiffs filed their legal malpractice action in the circuit court of Cook County on January 8, 1998, clearly within the limitations and repose periods.[1]

Defendants moved to dismiss the complaint with prejudice, arguing that it was time-barred. See 735 ILCS 5/2–619(a)(5) (West 2002). According to defendants, because *Best* declared Public Act 89–7 unconstitutional, the act was void *ab initio*. In effect, Public Act 89–7 "never was." Thus, defendants argued that the exception to the statute of repose set forth in section 13–214.3(d), which Public Act 89–7 sought to remove, "never ceased to have validity." Under subsection (d), plaintiffs cause of action should have been commenced "within the time for filing claims against the estate or a petition contesting the validity of the will of the deceased person, whichever is later." 735 ILCS 5/13–214.3(d) (West 1994). In this case, the later date was the claims-filing date: April 26, 1996. See 755 ILCS 5/18–3 (West 1996). In defendants' view, plaintiffs' complaint, filed January 8, 1998, was 20 months late.

Plaintiffs countered that the void *ab initio* doctrine does not govern this case. Plaintiffs relied on Illinois case law holding that where a legislative change in a statute of repose would otherwise instantaneously bar a plaintiff's cause of action, the plaintiff will be allowed a reasonable period of time in which to file its cause of action. See, *e.g.*, *Moore v. Jackson Park Hospital*, 95 Ill.2d 223, 69 Ill.Dec. 191, 447 N.E.2d 408 (1983); *Goodman v. Harbor Market, Ltd.*, 278 Ill.App.3d 684, 215 Ill.Dec. 263, 663 N.E.2d 13 (1995). Plaintiffs posited that the result should be no different where the change in the statute of repose results from a judicial decision, rather than legislative action. Thus, plaintiffs argued that their complaint, filed just three weeks following this court's decision in *Best*, was filed within a reasonable period of time following the change in the law.

1. Plaintiffs voluntarily dismissed the Cook County suit on September 5, 2001, and refiled it in the circuit court of Lake County on April 10, 2002. Defendants admit that the refiled action relates back to the earlier filed action. Thus, for purposes of determining the timeliness of plaintiffs' complaint, the parties agree that the relevant filing date is January 8, 1998.

The circuit court acknowledged that the result might be harsh, but nonetheless applied the void *ab initio* doctrine and dismissed plaintiffs' complaint with prejudice. The appellate court reversed, holding that such a result would be fundamentally unfair. The appellate court found that the filing of plaintiffs' complaint, just three weeks after the *Best* decision, was within a reasonable period of time after the change in the repose period for malpractice actions and that the complaint was not time-barred. 349 Ill.App.3d at 169–70, 284 Ill.Dec. 808, 810 N.E.2d 598. The appellate court remanded the cause for additional proceedings. 349 Ill.App.3d at 171, 284 Ill.Dec. 808, 810 N.E.2d 598. This appeal followed.

ANALYSIS

The classic formulation of the void *ab initio* doctrine, and the one followed in Illinois, is found in the early case of *Norton v. Shelby County*, 118 U.S. 425, 6 S.Ct. 1121, 30 L.Ed. 178 (1886). There, the Court considered whether an unconstitutional state statute that created a county board could give validity to the acts of the board. The Court answered in the negative, stating in relevant part:

> "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton*, 118 U.S. at 442, 6 S.Ct. at 1125, 30 L.Ed. at 186.

See *People v. Gersch*, 135 Ill.2d 384, 399, 142 Ill.Dec. 767, 553 N.E.2d 281 (1990) ("An unconstitutional law 'confers no right, imposes no duty and affords no protection. It is * * * as though no such law had ever been passed,'" quoting *People v. Schraeberg*, 347 Ill. 392, 394, 179 N.E. 829 (1932), in turn citing *Board of Highway Commissioners v. City of Bloomington*, 253 Ill. 164, 176, 97 N.E. 280 (1911), in turn citing *Norton*, 118 U.S. 425, 6 S.Ct. 1121, 30 L.Ed. 178). Thus, under the *Norton* rule, an unconstitutional statute is void *ab initio*, *i.e.*, void "from the beginning." See Black's Law Dictionary 1604 (8th ed.2004).

Defendants argue that our case law mandates strict application of the void *ab initio* doctrine in both civil and criminal cases, irrespective of the consequences, and that the appellate court erred in failing to apply the doctrine in this civil case. Plaintiffs argue that the better approach takes into account the equities of a case, and that under the equities here, their complaint should be allowed to proceed. We consider these arguments in turn.

I. Strict Application of the Void *Ab Initio* Doctrine

In support of their argument for strict application of the void *ab initio* doctrine, defendants rely principally on the *Gersch* opinion. In *Gersch*, we considered whether our earlier decision in *People ex rel. Daley v. Joyce*, 126 Ill.2d 209, 127 Ill.Dec. 791, 533 N.E.2d 873 (1988), should apply retroactively to Gersch's case. In *Joyce*, we held that section 115–1 of the Code of Criminal Procedure of 1963 (Ill.Rev.Stat. 1987, ch. 38, par. 115–1), which granted the State a right to demand a jury in certain criminal trials, was unconstitutional. Gersch argued in his direct appeal that the State's jury demand in his case violated his constitutional right to a bench trial. In