IN THE SUPREME COURT OF IOWA
Supreme Court No. 18–0563

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JARROD DALE MAJORS,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR TAYLOR COUNTY
THE HONORABLE JOHN D. LLOYD, JUDGE

APPELLEE'S BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Majors was convicted of committing attempted murder in 2002, fifteen days before adulthood. His sentence included a mandatory minimum. He was resentenced, and the parties developed a record at resentencing that included relevant facts and an expert's assessment. The court found that Majors committed a solo crime that involved careful planning, and that none of the *Lyle*/*Roby* factors had significant mitigating weight. Did the court abuse its discretion in re-imposing the applicable minimum sentence for attempted murder?

Authorities

Graham v. Florida, 560 U.S. 48 (2010)
Miller v. Alabama, 567 U.S. 460 (2012)
Roper v. Simmons, 543 U.S. 551 (2005)
Majors v. State, No. 12–1090, 2013 WL 2637599 (Iowa Ct. App. June 12, 2013)
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State v. Null, 836 N.W.2d 41 (Iowa 2013)
State v. Roby, 897 N.W.2d 127 (Iowa 2017)
State v. Seats, 865 N.W.2d 545 (Iowa 2015)
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State v. White, 903 N.W.2d 331 (Iowa 2017)
Veal v. State, 779 N.W.2d 63 (Iowa 2010)
Elizabeth Scott et al., *Juvenile Sentencing Reform in a Constitutional Framework*, 88 Temp. L. Rev. 675 (2016)
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LAURENCE STEINBERG, AGE OF OPPORTUNITY; LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE 91–92 (2015)
Sally Satel & Scott O. Lilienfeld, *Neuro-Expert Testifies for Tsarnaev*, Wash. Post (May 11, 2015)

II. *Roby* clarified that there is a presumption against imposing minimums for juvenile offenders, and that expert evidence is required before the court may do so. The State retained an expert witness for resentencing. Majors did not. Was his trial counsel ineffective?

Authorities

Strickland v. Washington, 466 U.S. 668 (1984)
Brewer v. State, 444 N.W.2d 77 (Iowa 1989)
Brown v. State, No. 14–1646, 2016 WL 351459 (Iowa Ct. App. Jan. 27, 2016)
Dunbar v. State, 515 N.W.2d 12 (Iowa 1994)
Gear v. State, No. 08–1150, 2009 WL 1886839 (Iowa Ct. App. July 2, 2009)
Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)
Schertz v. State, 380 N.W.2d 404 (Iowa 1985)
State v. Keller, 760 N.W.2d 451 (Iowa 2009)
State v. Lemburg, 257 N.W.2d 39 (Iowa 1977)
State v. McKettrick, 480 N.W.2d 52 (Iowa 1992)
State v. Roby, 897 N.W.2d 127 (Iowa 2017)
State v. Wills, 696 N.W.2d 20 (Iowa 2005)
Thorndike v. State, 860 N.W.2d 316 (Iowa 2015)

ROUTING STATEMENT

Majors seeks retention. *See* Def's Br. at 11. But this appeal only involves an application of *Lyle* and *Roby* in juvenile resentencing—Majors only alleges that the resentencing court misapplied the analysis from those decisions and that applying them correctly is impossible without testimony from a defense expert. *See* Def's Br. at 26–79. Majors does not make any real demand for any expansion of juvenile sentencing jurisprudence beyond those established legal principles—he claims the resentencing court erred by failing to follow guidance already given, not because more guidance is needed. Therefore, this appeal can be resolved through application of settled legal principles, and transfer to the Iowa Court of Appeals is appropriate. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

Jarrod Dale Majors appeals from resentencing on two counts: attempted murder, a Class B felony, in violation of Iowa Code section 707.11 (2001); and burglary in the second degree, a Class C felony, in violation of Iowa Code section 713.5 (2001). Majors was fifteen days from his 18th birthday and acted alone, arming himself with weapons and duct tape, lying in wait with the intent to rape Hollie Peckham.

Majors accepted a plea deal that included substantial charging concessions (although the State re-filed a dismissed burglary charge because his frivolous appeal violated a negotiated appeal waiver). *See Majors v. State*, No. 12–1090, 2013 WL 2637599, at *2–3 (Iowa Ct. App. June 12, 2013). Majors was sentenced to a 25-year prison term for attempted murder and a 10-year term for second degree burglary, to run consecutively, along with the 70% mandatory minimum before parole eligibility on his sentence for attempted murder.

Subsequently, *Lyle* declared the automatic imposition of that minimum for juvenile offenders was unconstitutional under Article I, section 17 of the Iowa Constitution, and Majors was resentenced. *See State v. Lyle*, 854 N.W.2d 378, 403 (Iowa 2014) ("[T]his case will require all juvenile offenders who are in prison under a mandatory minimum sentence to be returned to court for resentencing.").

After that 2014 resentencing hearing, the court ruled that "the defendant is the exceptional case in which sentences providing for the maximum period of incarceration, including a mandatory minimum sentencing provision, are appropriate." *See* Ruling (9/26/14) at 11–12; App. 56–57. Accordingly, the court re-imposed the 70% minimum before parole eligibility. *See* Judgment (9/26/14) at 2; App. 60.

Majors appealed that resentencing decision. The Iowa Court of Appeals affirmed because it found "[t]he district court did provide an individualized sentencing hearing, imposed a sentence within the allowable statutory framework, and carefully considered the factors stated in *Null* and *Lyle* to the extent the record reflected information on each factor." *See State v. Majors*, No. 14–1670, 2016 WL 3272074, at *6 (Iowa Ct. App. June 15, 2016). The Iowa Supreme Court granted further review and reversed for another resentencing "consistent with the sentencing factors as explained in *Roby*," decided that same day. *See State v. Majors*, 897 N.W.2d 124, 127 (Iowa 2017) (citing *State v. Roby*, 897 N.W.2d 127 (Iowa 2017)).

Majors was resentenced. The State presented expert testimony from Dr. Theresa Clemmons, a board-certified psychiatrist who had interviewed Majors and reviewed his prior assessments and records. Dr. Clemmons "found nothing about his age at the time of the offense that mitigated against a mandatory sentence." Ruling (3/21/18) at 6; App. 92. The resentencing court analyzed all five *Lyle*/*Roby* factors and concluded that they did not meaningfully mitigate culpability in this specific case, and it re-imposed the 70% minimum sentence before parole eligibility. Majors now appeals, challenging that ruling.

Course of Proceedings

Beyond the proceedings already described, the State generally accepts Majors' description of the relevant course of proceedings. *See* Iowa R. App. P. 6.903(3); Def's Br. at 12–25.

Facts

The Iowa Court of Appeals summarized the underlying facts in its opinion that resolved Majors's appeal from an order dismissing his second post-conviction application:

> In May 2002, Jarrod Majors broke into the family home of Jamie and Holly Peckham while they were attending a church meeting with their two young children. Armed with a loaded rifle affixed with a makeshift silencer, a large machete, and a roll of duct tape, Majors pulled a ski mask over his face and hid in a closet while he awaited the family's return. When the family returned home, Jamie settled the children in the living room and Holly walked upstairs to her bedroom.
>
> Upon entering her bedroom, a man wearing a ski mask jumped out of a closet and pointed a loaded rifle at Holly's head. Holly screamed for her husband and ran from the room. Majors chased after Holly as she fell down a flight of stairs. Holly recovered from her fall and managed to escape the home in an effort to contact the neighbors for help.
>
> Jamie Peckham heard the commotion from another room in the home and arrived in time to see a masked man chasing after his wife with a rifle. Jamie wrestled the gun away from the assailant and tackled him to the floor. The masked man then pulled out a machete and tried to further attack Jamie.

As Jamie struggled to subdue the assailant, Holly contacted a neighbor, Gene Ehlers, for help. She then called 911. When Gene arrived at the Peckham home, he saw Jamie on top of a masked man. The masked man was swinging a machete at Jamie. Gene wrestled the machete out of the assailant's hands and helped hold him down until the police could arrive. When the police arrived, officers handcuffed the assailant and removed the man's mask. Officers immediately identified the masked man as Jarrod Majors. Majors was seventeen years old at the time—less than one month from his eighteenth birthday.

In June 2002, while in jail, Majors made two requests for psychiatric treatment because of suicidal ideations. The district court ordered Majors to undergo psychiatric evaluation at the Iowa Medical and Classification Center. Majors reportedly admitted that he "asked to come for psychiatric evaluations so that he could get out of the jail and possibility help with his defense." Other inmates reported to hospital staff that Majors asked them "how he could look more psychiatrically ill so that it would help with his case." After psychiatric assessment, the staff psychiatrist reported as follows:

> [Majors] is no longer exhibiting psychiatric symptoms that would require further stay. Findings during his stay indicate that he is competent to participate in judicial proceedings. . . . A review of his history and available data surrounding the activities in question would indicate that Mr. Majors understood the nature and quality of the behavior in which he was allegedly involved. That information would indicate that at the time he had sufficient capacity to distinguish right from wrong. It is equally this writer's opinion that at the time he had the capacity to form intent consistent with accountability.

Majors, 2013 WL 2637599, at *1–2; *accord* Exhibit 23 at 1, 3; CApp. 82, 84. Additional facts will be discussed when relevant.

ARGUMENT

I. The court did not abuse its discretion by re-imposing the 70% minimum before parole eligibility.

Preservation of Error

The defendant may challenge an illegal, void, unconstitutional, or procedurally defective sentence for the first time on direct appeal. *See*, *e.g.*, *State v. Hoeck*, 843 N.W.2d 67, 71 (Iowa 2014) (citing *Veal v. State*, 779 N.W.2d 63, 65 (Iowa 2010)) .

Standard of Review

This ruling, like all sentencing decisions within statutory limits, is reviewed for abuse of discretion. *See Roby*, 897 N.W.2d at 137–38.

> A discretionary sentencing ruling . . . may be [an abuse of discretion] if a sentencing court fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case.

Id. at 138 (quoting *People v. Hyatt*, 891 N.W.2d 549, 578 (Mich. Ct. App. 2016)); *cf. State v. Seats*, 865 N.W.2d 545, 552–53 (Iowa 2015) (quoting *State v. Formaro*, 638 N.W.2d 720, 724–25 (Iowa 2002)) (clarifying that appellate review of rulings for abuse of discretion "is not to second guess the decision made by the district court, but to determine if it was unreasonable or based on untenable grounds").

Merits

Lyle details the factors that must be considered before imposing a minimum before parole eligibility on a juvenile offender. They are:

> (1) the age of the offender and the features of youthful behavior, such as "immaturity, impetuosity, and failure to appreciate risks and consequences";
>
> (2) the particular "family and home environment" that surround the youth;
>
> (3) the circumstances of the particular crime and all circumstances relating to youth that may have played a role in the commission of the crime;
>
> (4) the challenges for youthful offenders in navigating through the criminal process; and
>
> (5) the possibility of rehabilitation and the capacity for change.

Lyle, 854 N.W.2d at 404, n.10 (quoting *Miller v. Alabama*, 567 U.S. 460, 477–78 (2012)) (other citations omitted). After that analysis, if the court still determines that incarceration before parole eligibility "is warranted, the district court shall impose the sentence provided for under the statute, as previously imposed." *See id.*

Roby clarified that "the factors must not normally be used to impose a minimum sentence of incarceration without parole unless expert evidence supports the use of the factors to reach such a result." *See Roby*, 897 N.W.2d at 147. But here, expert evidence supported the court's analysis of each factor, which the State will address in turn.

1. **Age:** The court noted that Majors was 15 days away from his 18th birthday when he committed these crimes—and, more importantly, it noted that his age did not undermine his "decisional capacity" relating to this specific crime.

Majors argues the resentencing court fell into a trap when it referenced his chronological age and stated that "it is reasonable to assume that he would have been more mature than a 15 or 16 year old defendant and not appreciably less mature than if he had committed the crime two weeks later, at which point he would have been treated as an adult without question." *See* Ruling (3/21/18) at 4–5; App. 90–91; Def's Br. at 34–38. But that statement is appropriate for three reasons.

First, it is proper to remark that 17-year-olds are generally more developmentally mature (and more culpable) than younger teens are. Majors seizes on *Roby*'s statement that *Miller* "did not suggest that a seventeen-year-old child is more deserving of adult punishment" than a younger child. *See* Def's Br. at 35 (quoting *Roby*, 897 N.W.2d at 145). But *Miller* complained that mandatory penalties "preclude a sentencer from taking account of an offender's age"—and specifically lamented that "the 17-year-old and the 14-year old" receive identical sentences. *See Miller*, 567 U.S. at 477. Nothing in Iowa's juvenile jurisprudence prohibits a court from remarking on the absence of mitigating weight or recognizing that a younger teen would be sentenced differently.

Second, it was correct to note that Majors would not have matured appreciably in the two weeks before his 18th birthday—especially if that observation is accompanied by a recognition that "age is not a sliding scale that necessarily weighs against mitigation the closer the offender is to turning eighteen years old at the time of the crime." *See* Ruling (3/21/18) at 4–5; App 90–91 (quoting *Roby*, 897 N.W.2d at 145). The court recognized the applicable law and situated facts about Majors's chronological age within that framework—which is different from finding a lack of mitigation. That critical finding of a lack of mitigating weight does not appear anywhere in that paragraph.

Third, while the court began with that baseline assumption and generalization that it viewed as "reasonable," its analysis transitioned to specific facts about Majors's contemporary psychiatric evaluations and the assessment from Dr. Clemmons. *See* Ruling (3/21/18) at 4–6; App. 90–92. It did not matter what was "reasonable to assume" because the court had access to concrete facts, rendering assumptions moot. *Roby* explained this particular factor "is most meaningfully applied when based on qualified professional assessments of the offender's decisional capacity"—and the court quoted that explanation when it adopted expert opinions on Majors's decisional capacity. *See id.* at 6;

App. 92 (quoting *Roby*, 897 N.W.2d at 145). The court specifically referenced and relied upon two different professional assessments: the contemporaneous records from Majors's competency evaluation, and the retroactive assessment in Dr. Clemmons's report/testimony. *See id.* 5–6; App. 91–92. No "assumption" forced the court to conclude that Majors's age had minimal weight as mitigating factor—instead, it based that determination on "the contemporaneous assessment and the current psychiatric testimony." *See id.* at 6; App. 92.

Majors attacks Dr. Clemmons's report and testimony because her assessment did not involve "validated assessment methods." *See* Def's Br. at 39–41 (citing Elizabeth Scott et al., *Juvenile Sentencing Reform in a Constitutional Framework*, 88 TEMP. L. REV. 675, 708 (2016)). But any diagnostic assessments performed in 2018 would be minimally probative as to Majors's decisional capacity in 2002, which is the critically relevant inquiry. *See* Scott et al., *Juvenile Sentencing Reform*, 88 TEMP. L. REV. at 702 ("Assessment of an adult prisoner's intellectual, cognitive, emotional, personality, or mental health functioning typically will be of limited value for inferring those characteristics in a juvenile offender; the utility declines as the time between the offense and the resentencing increases."). Apart from

identifying persistent disabilities, Dr. Clemmons needed to find and analyze "evaluations [that] may have been performed on [Majors] at or near the time of the offense"—so she was correct to rely on records of his "competence to stand trial evaluations." *See id.*; *cf.* Exhibit 25 at 3–4, 9–11; CApp. 165–72; *Roby*, 897 N.W.2d at 145 (endorsing use of "contemporaneous medical records" to fulfill need for "[o]bjective indicia of a juvenile's relevant characteristics" at resentencing).

Majors attacks Dr. Clemmons's remarks on the age factor. *See* Def's Br. at 41–42 (quoting Resent.Tr. 83:3–84:21). But she brought nuance to this discussion, noting that juvenile culpability vis-à-vis brain maturity is "a question that both neuroscientists and policy makers have been grappling with for over 2 decades." *See* Exhibit 25 at 10–11; CApp. 172. And she incorporated scientific research showing that "the brain is gradually changing over time and there is no clear set-point at which we can currently identify full maturation." *See id.*; App. 172. No court can fault her for that observation. *See Roby*, 897 N.W.2d at 831 ("The qualities that distinguish juveniles from adults do not disappear when an individual turns eighteen, but society has generally drawn the line at eighteen for the purposes of distinguishing juveniles from adults."). She correctly identified the relevant science:

> But looking at his age, from 17 years and 50 weeks to 18 years is a very small change. It's not a switch. It's not on an 18th birthday you flip a switch and the brain is fully mature. It actually takes much longer than the 18th birthday to reach the full maturity, and some people say your brain is ever changing during your lifetime, and we have no mark for full brain maturity.
>
> So looking at kind of those ideas, there would have been minimal brain change or brain growth or brain development within those two weeks. So it wouldn't have necessarily changed his ability to make decisions, his ability to control emotions better or worse, his ability to have impulse control, that sort of thing.

See ReSentTr. 82:8–84:11. All of that is true; it is not error to say so.

The heart of Majors's challenge to the findings on the age factor is his claim that the record "demonstrated that [his] age and features of youthful offender is a mitigating factor" because of his self-reports during his 2002 psychiatric evaluation. *See* Def's Br. at 45–48 (citing Exhibit 23 at 43; CApp. 124). But neither Dr. Clemmons nor the court were required to credit his self-serving and inconsistent statements, especially when he admitted that he falsely reported suicidal thoughts to get transferred out of jail. *See* Exhibit 23 at 3; CApp. 84 (noting Majors "admits that he asked to come for psychiatric evaluations so that he could get out of the jail and possibly help with his defense"); *see also* Exhibit 23 at 19; CApp. 101 ("It wasn't for suicidal thoughts."); *Majors*, 2013 WL 2637599, at *2; *but see* Exhibit 23 at 68; CApp. 149

("I want to fucking go to [C]larinda treatment center because I have thoughts of killing myself."). And this deceitful manipulation was no isolated event—it was a defining trait. *See* Exhibit 23 at 43; CApp. 124 (describing low test scores but noting that Majors was malingering and that "it's clear that he should score higher than this"); Exhibit 25 at 10; CApp. 172 (assessing interview in light of prior evaluations and noting "there are several inconsistencies throughout his history and reports of new psychiatric concerns which suggests deceitfulness"). And the list of infirmities that Majors attempts to leverage into a finding of diminished culpability—like his intermittent insomnia, his concern that his peers were teasing him, and his below average IQ—are only helpful in demonstrating that he still has no real interest in comprehending the sheer depravity of his offense and the magnitude of the harms he inflicted on the Peckhams. *See* Def's Br. at 45–47.

Majors's scattershot list of woes is tangential to the real inquiry: did his age meaningfully mitigate his culpability for this specific crime? This analysis will overlap with analysis of the third *Miller* factor, so it will be discussed later. At this juncture, the critical takeaway is that a court may observe that Majors was 15 days away from adulthood and state that it diminishes any mitigation, relative to younger offenders.

Miller "requires factfinders to attend to exactly such circumstances—to take into account the differences among defendants and crimes." *See Miller*, 132 S. Ct. at 2469 n.8. And this was not speculation or assumption—the State presented expert analysis to establish that Majors's chronological age would not have significantly impaired his "behavioral or cognitive abilities" relative to young adult offenders, and did not meaningfully mitigate his culpability for this offense. *See* Exhibit 25 at 10–11; CApp. 172–73; *accord* ReSentTr. 82:8–84:21.

2. Family and Home Environment: The court was correct to note that nothing about Majors's background provided meaningful mitigation. He was raised in a stable two-parent household and he faced very few risk factors.

The second *Lyle*/*Roby* factor "seeks to identify any familial dependency and negative influences of family circumstances that can be ingrained on children." *See Roby*, 897 N.W.2d at 144. This analysis "does not rely on general perceptions, but specific measures of the degree of functioning." *Id.* The court was correct when it noted that, other than Majors's allegations that his father physically abused him before sixth grade (which appeared to have no ongoing effect on their relationship after that point), there was no indication—nor any claim—of "any home environment facts that influenced [his] behavior." *See* Ruling (3/21/18) at 6–7; App. 92; *accord* Exhibit 25 at 11; CApp. 173

(noting Majors had reported "having supportive relationships with his parents and friends" and also "denies any physical abuse into his late adolescence"); PSI (2/16/18) at 7–8; CApp. 61–62 (noting Majors "reports he maintained a close relationship" with his father, Bruce, until Bruce passed away in 2017); Exhibit 23, at 5; CApp. 86 ("He denies any abuse issues other than being disciplined as a child."); Exhibit 23, at 54; CApp. 135 (noting multiple inquiries from Bruce regarding his son's well-being). As the State argued in 2014:

> In this case I think it's clear from the courtroom the defendant has ample family support, had ample family support at the time this happened, and isn't one of these kids who had to make it on his own and didn't have those kind of resources and that kind of support, and I think as you read those opinions since they use them as a mitigating factor, obviously it is not a mitigating factor in this case because the defendant has had family support, you know, throughout this situation.

See ReSent.Tr. (2014) 34:7–24; *accord* ReSentTr. 84:22–87:25 ("At the time of the offense, there didn't appear to be anything going on within the family that would have mitigated anything."). Indeed, his family was uncommonly supportive throughout the proceedings. *See* PSI Report (2/16/18) at 8, 14; App. 62, 68; Exhibit 25, at 6; CApp. 168; ReSentTr. 40:20–41:12. There is no basis for finding any impairment of functioning or any meaningful mitigation from these circumstances.

3. **Circumstances of the Offense:** Majors committed this offense under circumstances that minimized the impacts of youth on his culpability—he planned and prepared for this offense in advance, he acted alone and in secret, and he sought a "reward" that shocks the conscience.

The third *Lyle*/*Roby* factor considers the circumstances of the offense and specifically considers "all circumstances relating to youth that may have played a role in the commission of the crime." *See Lyle*, 854 N.W.2d at 404 n.10. This is similar to evaluating the first factor, but applied to the specific circumstances of this offense: it assesses any interaction between an offender's chronological/developmental age and relevant circumstances. This sometimes offers circumstance-specific and offense-specific mitigation—but the circumstances of *this* offense establish culpability that is not meaningfully mitigated by youth.

The mitigation weight of this factor "is particularly important in cases of group participation in a crime." *See Roby*, 897 N.W.2d at 146. But Majors committed this crime alone. Majors argues the court did not properly consider this factor under *Roby* because he initially told law enforcement that "his friends dared him to do it and offered him a hundred dollars to do it." *See* Def's Br. at 54–58 (citing ReSent.Tr. 17:8–28:25); *see also* ReSent.Tr. (2014) 15:16–22 ("Mr. Majors was talking to his mother and made a statement that somebody paid him

$100 to tie them up as a prank."). But Majors admitted this was a lie. Exhibit 25, at 11; CApp. 173 ("[H]e reports that this was not the case"); ReSentTr. 56:8–17. Majors also points back to his statements during the 2002 competency evaluation, where he "blamed it on a blackout that is associated when people made fun of him." *See* Def's Br. at 56 (citing Exhibit 23, at 43; App. 205). But there were no indications that Majors had been "made fun of" before committing this crime. And if Majors really did "black out," then he would not have been able to describe his actions to Dr. Clemmons; his narrative account proves that "blackout" claim was also a lie. *See* Exhibit 25, at 1–2; CApp. 163; ReSentTr. 53:5–54:7. While *Roby* clarified that "the prominence of peer pressure in the analysis of this factor does not mean the factor cannot support mitigation for crimes committed alone," the lack of peer influence means that particular form of circumstance-related mitigation is not present in this case. *See Roby*, 897 N.W.2d at 146.

Another way for the circumstances of the crime to mitigate culpability is when they "reveal a juvenile offender to be wildly immature and impetuous." *See id.* Majors argues that "this crime could have been impulsive and was put together by [him] in a short period of time prior to him committing it." *See* Def's Br. at 57. But

Majors armed himself with weapons and other materials that showed extensive preparation for violence. Also, the week-to-week observation that helped Majors identify his opportunity to infiltrate the home and lie in wait to catch Hollie Peckham alone when she returned (and after Jamie left with the twins, as he always did) established that Majors had spent *weeks* planning and preparing for this crime. *See* ReSentTr. 20:2–21:6; Ruling (3/21/18) at 8; App. 94; *accord* Ruling (9/26/14) at 11; App. 56 (noting facts that showed Majors "had fully considered the nature, risks, and potential consequences of his actions").

Finally, "[o]ne of the circumstances the sentencing judge needs to consider is whether substance abuse played a role in the juvenile's commission of the crime." *See Seats*, 865 N.W.2d at 556 (citing *Miller*, 567 U.S. at 478). At some point after the 2002 competency evaluation, Majors began alleging that his crime was the product of a continuous methamphetamine binge that had lasted for multiple days and had deprived him of sleep for the duration. *See*, *e.g.*, PSI Report (2/16/18) at 17–18; CApp. 71–72 (containing his statement from November 2002, before initial sentencing hearing, describing ten-day binge); *id.* at 19; CApp. 73 (containing his statement from February 2018, describing a four-day binge); Exhibit 25, at 1–2; CApp. 163–64 (noting statement to

Dr. Clemmons in February 2018, which matched the newer version in the PSI report that described a four-day binge). But, during the 2002 competency evaluation, he "denied significant alcohol or drug use." *See* Exhibit 25, at 5; CApp. 167; *see also* Exhibit 23, at 6; CApp. 87. ("He denies alcohol or drug use other than minor experimental use."); Exhibit 23, at 16; CApp. 97 ("Use of drugs and/or alcohol, when and how much: Like back in April alcohol and a little bit of pot."); *accord* Ruling (3/21/18) at 12; App. 98 (noting skepticism of drug-binge narrative because of "his lack of mentioning methamphetamine use during his evaluation in 2002"); *Majors*, 2013 WL 2637599, at *2 (observing "Majors had not disclosed any drug use to counsel" before his initial sentencing hearing, "[n]or did Majors disclose any drug use to medical providers during his previous mental health evaluation—despite reportedly asking other inmates how he could appear more psychiatrically ill to help his defense"). Additionally, his claims about a methamphetamine binge simply do not match the objective facts:

> Methamphetamine intoxication can present with rambling speech, ideas of reference, paranoid ideation, auditory hallucinations, and tactile hallucinations. Threats or acting out aggressively may also occur. When Mr. Majors was arrested, he was not noted to have rambling speech, ideas of reference, paranoid ideations, auditory hallucinations, or bizarre or aggressive behavior based on statements by Deputy Bucher and Officer Dickey, the responding officers.

> He was also able to plan the offense such that he masked his identity, obtained the aforementioned items, and enter the victims' home when no one was present (which was regularly scheduled event per statements from Mr. and Mrs. Peckham.) It is this writer's opinion that it would be extremely unlikely that Mr. Majors methamphetamine use, growing paranoia, and odd behavior (e.g., sitting on his porch for several nights and receiving messages from his dog) would have been able to go unnoticed in his home with his parents and brother present or while attending school (per his original statement from 2002.) Had these changes gone unnoticed or unreported in his home or at school, the arresting officers would have likely noted symptoms such as alterations in speech, paranoia, bizarre or aggressive behavior, or the inability to follow commands. Additionally, the planning of the offense would have also been significantly affected in a methamphetamine-induced psychosis such that these details (identity protection, multiple and altered weapons, and timing of entering the home) would not have been quite as methodical.

Exhibit 25 at 9; CApp. 171; ReSentTr. 25:14–27:1; ReSentTr. 72:23–73:20; PSI Report (1/6/03) at 13, 15; CApp. 26. The court was right to doubt that story, and it was correct not to assign mitigating weight to false claims of marathon drug binges. *See* Ruling (3/21/18) at 11–12.

The State must return to the central question: did Majors's age meaningfully mitigate his culpability for this specific crime, under these specific circumstances? This is not a case where the harmful effects of the crime were a potentially unforeseen consequence of the original plan, *see Miller*, 567 U.S. at 465–66, or where the gravity of

the intended harm would have been something a juvenile might view as "inane juvenile schoolyard conduct." *See Lyle*, 854 N.W.2d at 401. Majors waited for Hollie Peckham in her bedroom closet, and he did not emerge until she returned—and the ski mask, the duct tape, the single-shot silencer, and his apparent belief that "Jamie wasn't home" make it clear that he had some specific plan for Hollie that involved revealing his presence to her, threatening her with force, restraining her with duct tape, and leaving her alive afterwards (hence the mask). *See* ReSentTr. 22:20–23:15. And Hollie later discovered "a pair of her underwear had been moved" while Majors was there—which bolsters the inference that Majors acted for sexual gratification. *See* ReSentTr. 25:1–5; *see also* ReSentTr. (2014) 25:13–26:4 (Jamie Peckham giving descriptions of prior "pattern of voyeurism" from Majors, in which he repeatedly attempted to view Hollie through bathroom windows); ReSentTr. 30:14–33:10 (same). Jamie Peckham emphasized the facts showing Majors made a careful plan to accomplish a craven objective:

> [W]hen you go through a pattern like that for two years, you study the routine. You know which night to come in. You have a duct tape ready for what we all believe, without saying it maybe, what was intended towards my wife. Duct tape is usually used to bind someone. The silencer is also used to minimize the sound if collateral damage needs to take place, and there were bullets in the gun to take place. Believe all that speaks to planning.

ReSentTr. 43:6–16; *accord* ReSentTr. 88:23–90:14 (discussing the evidence of careful planning that weighed against finding mitigation from juvenile impulsivity). Thus, the court was correct to note the "deliberate nature of the crime." *See* Ruling (3/21/18) at 8; App. 94.

That finding has a uniquely significant effect in the context of juvenile sentencing because juvenile decision-making capabilities are context-dependent. Failure to emphasize (or recognize) this distinction can result in false equivalence in juvenile-related jurisprudence, so it is important to emphasize that older juveniles will generally function just as well as adults in decision-making tasks performed in conditions where there is ample time to engage higher-level cognitive functions. Those juveniles struggle with decisions that require snap judgments or decisions made with knowledge that their peers are watching—but in situations where those pressures are not present, older juveniles are functionally on par with adults. In his dissent in *Roper v. Simmons*, Justice Scalia excoriated the American Psychological Association for claiming "in this case that scientific evidence shows persons under 18 lack the ability to take moral responsibility for their decisions," when it had previously claimed that "juveniles are mature enough to decide whether to obtain an abortion without parental involvement." *See*

Roper v. Simmons, 543 U.S. 551, 617 (2005) (Scalia, J., dissenting). Leading scholars on juvenile psychological/neurological development have responded by explaining that any apparent contradiction results from a failure to distinguish between "structured situation" decisions, where older juveniles do well, and more spontaneous decisions, where older juveniles are still developmentally disadvantaged and where some level of youth-related mitigation will usually be appropriate:

> Studies that have examined logical reasoning abilities in structured situations and basic information-processing skills, for instance, have found no appreciable differences between adolescents age 16 and older and adults; any gains that take place in these domains during adolescence occur very early in the adolescent decade, and improvements after this age are very small. . . .
>
> . . . [I]n contrast to the pattern of age differences seen in the information-processing, logical reasoning, and informed consent literatures, studies of age differences in the sorts of risky behavior likely to be influenced by the psychosocial factors listed above—such as reckless driving, binge drinking, crime, and spontaneous unprotected sex—indicate that risky behavior is significantly more common during late adolescence and early adulthood than after.

Laurence Steinberg et al., *Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop"*, 64 AM. PSYCHOLOGIST 583, 586–87 (2009). Although "crime" was broadly categorized as one of the spontaneous risky behaviors that would be influenced by cognition-undermining

psychosocial factors, the authors also noted they were not describing crimes that were "strategic, planned in advance, and executed alone." *See id.* at 586. They clarified the importance of that critical distinction:

> [T]he legal treatment of adolescents should at the very least be informed by the most accurate and timely scientific evidence on the nature and course of psychological development. On the basis of the present study, as well as previous research, it seems reasonable to distinguish between two very different decision-making contexts in this regard: those that allow for unhurried, logical reflection and those that do not. This distinction is also in keeping with our emerging understanding of adolescent brain maturation, which suggests that brain systems responsible for logical reasoning and basic information processing mature earlier than those that undergird more advanced executive functions and the coordination of affect and cognition necessary for psychosocial maturity.

Id. at 592; *see also* LAURENCE STEINBERG, AGE OF OPPORTUNITY; LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE 91–92 (2015) ("Studies of people's intellectual capabilities and their ability to reason logically show that by the time they're sixteen, teenagers are just as good at those things as adults."). Here, Majors acted alone and after "unhurried, logical reflection"—and those specific circumstances establish that his chronological/developmental age does not carry the same culpability-mitigating weight that it otherwise would have, if he had acted within a group or without careful planning and preparation.

Furthermore, Majors was old enough to know the difference between right and wrong, especially concerning the forcible rape that he planned to commit and the contingent murder that he prepared for and subsequently attempted. Majors cannot contend that he lacked capacity to know that rape and murder are abhorrent criminal acts.

> It is also humbling to try to infer a killer's state of mind — that is, his motives and understanding of right and wrong. Here, the immature brain strategy loses much of its force: still developing or not, teens' basic moral schema are formed well before age 19. . . . Any nine year-old who is not intellectually deficient grasps the finality of death and understands that killing innocent people is wrong. Although many teens might impulsively go on a joy ride or two with older friends or foolishly stay out late the night before a morning exam, virtually none seriously consider murdering others, let alone undertake the act of doing so.

Sally Satel & Scott O. Lilienfeld, *Neuro-Expert Testifies for Tsarnaev*, WASH. POST (May 11, 2015), https://perma.cc/32WW-C3FW. This is specifically mentioned because scientific research tends to show that juveniles are often more sensitive to potential rewards than to risks—but that cannot absolve Majors of culpability for placing gratification to be gained from committing rape on the "reward" side of the scale and crafting a plan to accomplish it. "[W]hile youth is a mitigating factor in sentencing, it is not an excuse." *See Lyle*, 854 N.W.2d at 398 (quoting *State v. Null*, 836 N.W.2d 41, 75 (Iowa 2013)).

This is not a situation where peer pressure or peer influence exacerbated juvenile foolishness in the heat of the moment. Majors decided to commit this heinous crime after careful planning, without pressure or influence exerted by any peer or by anyone else. Under the circumstances of this offense, the resentencing court was correct to find that his developmental age does not mitigate his culpability. Ruling (3/21/18) at 8; App. 94; *accord* Exhibit 25, at 11; CApp. 173.

4. Legal incompetency: The court was correct that Majors understood and attempted to manipulate the legal system in ways that are inconsistent with mitigated culpability.

The fourth *Lyle/Roby* factor considers "the legal incompetency associated with youth," which may militate towards finding that a juvenile offender faced greater punishment because he or she did not navigate the criminal justice system as well as an adult would have. *See Roby*, 897 N.W.2d at 146–47. But it does not impact culpability for the offense itself—which is the focus of proportionality inquiries.

Majors argues that the court erred in focusing on his ability to manipulate the legal system. *See* Def's Br. at 59–60 (citing Ruling (3/21/18) at 9–10; App. 95–96). Majors argues that those findings are undermined because he was "being treated for psychiatric illness when those things were observed." *See* Def's Br. at 60–62. But that

was because he faked suicidal thoughts to get out of the county jail—another manipulation. *See* Exhibit 23 at 3, 19; CApp. 84, 100; *see also Majors*, 2013 WL 2637599, at *2. He had asked other inmates "how to appear more mentally ill," to manipulate the legal system even further. *See* Exhibit 23, at 24; CApp. 105; *see also* ReSentTr. 56:18–57:15. All of Majors's claims about hearing voices and other psychiatric symptoms—most of which never recurred—are therefore rendered suspect. *See* Def's Br. at 60–62. Most importantly, Majors was able to secure a plea deal that reduced his exposure from 90 years to 25 years, with 10 years added back on when he decided to renege and appeal. *See* ReSentTr. 41:13–42:25. While it is true that many (but not all) adult offenders would not have reneged on the deal and would have avoided that extra 10-year term, the fact remains that Majors secured a favorable outcome relative to his initial exposure. Majors has offered no reason to believe that any of his difficulties in navigating the criminal justice system resulted in this exposure to a minimum sentence before parole eligibility, or that an adult offender would be likely to avoid facing this sentence—so the concerns that he identifies from *Graham v. Florida* are inapposite. *See* Def's Br. at 63 (quoting *Graham v. Florida*, 560 U.S. 48, 78–79 (2010)).

Whatever disadvantages Majors faced because of his youth, they did not result in his conviction on this particular offense that involves a minimum sentence before parole eligibility—so there is no basis for any argument that his youth-related legal incompetency had caused the court to "erroneously conclude that [he] is sufficiently culpable" to be convicted on that charge or to face that minimum sentence. *See Graham*, 560 U.S. at 78–79. To the contrary, Majors avoided far more exposure by accepting the plea deal—even after he reneged, the level of legal competency Majors exhibited by accepting the modified deal ultimately saved him from facing an aggregated 90-year term if he had been found guilty on all counts. The court was correct to find Majors was not entitled to mitigation based on any sort of legal incompetency.

5. Rehabilitation: The court was correct to find that Majors had some potential for rehabilitation, but not enough to significantly mitigate his culpability.

The fifth *Lyle*/*Roby* factor considers "the possibility of rehabilitation and the capacity for change." *Roby*, 897 N.W.2d at 147. The court found that potential for rehabilitation weighed in favor of mitigation, "albeit somewhat weakly." *See* Ruling (3/21/18) at 10–11; App. 96–97. It analyzed this factor retrospectively (assessing Majors's prospects for rehabilitation in 2003), and gave alternative findings on

an analysis that incorporated Majors's subsequently limited progress and his prison disciplinary reports, which demonstrated that Majors's "willingness to both obey the rules and take responsibility when he is caught not obeying the rules continues to be a work in progress." *See* Ruling (3/21/18) at 10–12; App. 96; *accord* PSI Addendum (3/7/18); CApp. 175; PSI Addendum (3/9/18); CApp. 178; Exhibit 26; XApp. 3.

It is unclear which of those alternatives is the correct analysis under *Roby* and *Lyle*. Majors seems to adopt the view that potential for rehabilitation is considered in light of subsequent development. *See* Def's Br. at 68–70 (arguing the court erred on this *Lyle* factor by failing to recognize that he was not offered programming and "has shown a capacity to change since 2014"). The State shares that view. The Iowa Supreme Court has remarked that evidence of subsequent progress or stagnation may be considered in assessing the potential for rehabilitation, when it is shown to be relevant. *See State v. White*, 903 N.W.2d 331, 334 (Iowa 2017) ("[M]ore evidence was needed to conclude White's discipline record in prison made him less amenable to rehabilitation."). And here, Dr. Clemmons explained that Majors's disciplinary issues were clearly not attributable to his youth because he kept accruing violations as an adult. *See* ReSentTr. 64:18–69:10.

Majors argues that "since the time the *Lyle* decision was rendered, [he] has shown maturity and he has not had any major disciplinary issues since that time." Def's Br. at 70 (citing ReSentTr. 114:18–115:5). Indeed, the court noted that, and it "agree[d] that this presents some positive evidence in [his] favor." *See* Ruling (3/21/18) at 12; App. 98. But that was undermined by a new major infraction on the same day as the resentencing hearing, for attempting to submit a fake urine sample to fool a urinalysis. *See* PSI Addendum (3/7/18); CApp. 175; PSI Addendum (3/9/18); CApp. 178. The court was right to view this as a continuation of his "history of prison discipline that involves repeatedly lying to try to avoid consequences." *See* Ruling (3/21/18) at 11–12; App. 97–98. The fact that such behavior persisted while the possibility of parole eligibility was on the table illustrates that, even today, no incentive is powerful enough to help Majors follow the rules, accept responsibility, or change his behavior.

A powerful explanation lurks beneath the surface: antisocial personality disorder, or at least antisocial personality traits. *See* Exhibit 25, at 3–4; CApp. 165 ("[T]he symptoms noted most consistent with [mixed personality disorder] include suspiciousness, constricted affect, unusual perceptual experiences, social impairment, suspecting

others are harming or deceiving him, illegal activity including illicit substance use, deceitfulness, irritability or aggressive behavior, reckless disregard for the safety of others, and lack of remorse."). That initial impression of mixed personality disorder with traits of paranoid and/or schizophrenal disorders was the result of crediting Majors's self-reports, which Majors had intentionally fabricated to manipulate his doctors, lawyers, and judges. *See* Exhibit 23, at 24; CApp. 105; ReSentTr. 56:18–57:15; *Majors*, 2013 WL 2637599, at *2. But the availability of factual material over a period of years enabled Dr. Clemmons to identify underlying antisocial traits more clearly:

> Objectively, he appears to lack of remorse for his offense as noted by attempts to reduce the charges and by his lack of recognition to his effect on the lives of the Peckhams. Additionally, there are several inconsistencies throughout his history and reports of new psychiatric concerns which suggests deceitfulness. These factors support continued antisocial personality traits. He does not appear to have on-going paranoid or schizotypal traits.
>
> [. . .]
>
> [W]ith regard to underlying personality traits, he does continue to have antisocial traits such as lack of remorse for his actions and deceitfulness as noted from inconsistencies throughout his history, unfounded allegations, and disciplinary reports. This factor has the ability to negatively impact rehabilitation as he does not appear to have accepted responsibility for his actions.

See Exhibit 25, at 10, 12; CApp. 172, 174. Personality traits are stable and would undermine rehabilitation arguments on any timeframe.

Majors criticizes Dr. Clemmons for concluding that he showed no remorse for his criminal acts because she "did not know that [he] apologized to the victims when he was originally sentenced in 2003 and during the original resentencing in 2014." Def's Br. at 43–44; *see also* Def's Br. at 69. But Majors did not apologize to the Peckhams during his 2003 sentencing. He said "I'm just sorry this all happened" but insisted: "I didn't mean to do anything." *See* Exhibit B, at 59:7–20. And his single-sentence apology at the resentencing hearing in 2014 was all Majors had to say to the Peckham family, before a lengthier discussion of the impact his crime had on his own life. *See* ReSent.Tr. (2014) at 49:6–17; *Majors*, No. 14–1670, oral argument, 34:47–35:14 (Justice Mansfield noting that Majors's apology "was not a particularly remorseful or lengthy statement" and was "unimpressive"). And both of those minor expressions of remorse came at sentencing, where the potential consequences loomed large. Performative remorse that only emerges at sentencing is *consistent* with antisocial personality traits. Dr. Clemmons was right to be more concerned with Majors's responses during her evaluation, which evinced a disturbing lack of true remorse.

> **DEFENSE**: If you had known that he had at least provided some apology at both of those sentences, would that have affected your opinion in regard to whether or not he has expressed any remorse for this?

> **DR. CLEMMONS**: Not specifically. Looking at antisocial personality disorder and kind of the guidelines, which obviously the Diagnostic and Statistical Manual, when it defines lack of remorse within that context, it specifically does state that if an evaluator or a patient specifically mentions feelings of remorse or feeling sorry within that context of facing consequences, that's not always to be taken into consideration, because there may be some concerns for secondary gain based on that admission of remorse or empathy.
>
> So it is good to take it into consideration but maybe with a grain of salt. Usually where I would ask about lack of remorse or lack of empathy when I'm questioning a person, evaluating, and I specifically ask them what did you think at that time, what were the thoughts going through your head, what did you do next, how do you think the victim felt, and when I have a feeling that every sentence points back to the person, whoever, the defendant essentially, that does show some lack of remorse or lack of empathy.
>
> They're worried about themselves. They're worried about what happened to them, not necessarily how their actions affected the people that were hurt by what they did. You have to take that also into consideration as well.

See ReSentTr. 108:23–110:10; *accord* Exhibit 25, at 4; CApp. 166 ("During today's evaluation, when discussing the offense, he frequently reports that he was worried what was going to happen to him; little is mentioned about the victims unless specifically asked."); ReSentTr. 80:11–82:7 ("His biggest concern was what was going to happen to him, the result or the effects of his actions specifically as it related to him and not necessarily how it related to other people."); ReSentTr. 94:5–95:6. Any sudden acceptance of responsibility at resentencing

must be viewed with suspicion that it represents the same pursuit of secondary gain—especially considering that, as recently as 2013, the Iowa Court of Appeals noted that "[d]espite overwhelming evidence of guilt and nearly a decade behind bars, Majors has yet to accept responsibility for a home invasion that terrorized a young family." *See Majors*, 2013 WL 2637599, at *5.

To be sure, if his allocution at this most recent resentencing was genuine, then it represented an important step forward. *See* ReSentTr. 132:15–134:25. But it was still mostly focused on his own life, and it did not grapple with the intent that animated his actions—his words stated that he took "full responsibility" for his actions, but he only admitted to surprising the Peckhams and pointing weapons at them. *See* ReSentTr. 133:1–6; ReSentTr. 134:9–12. He did not admit to any of the other conduct or profess any motive or intent, and he specifically avoided qualifying or retracting his methamphetamine-binge claims. This indicates that Majors, even now, does not truly understand the depraved nature of his conduct and only pantomimes true remorse—and without remorse, prospects for meaningful rehabilitation are slim. *See*, *e.g.*, *State v. Knight*, 701 N.W.2d 83, 87 (Iowa 2005) (quoting *State v. Sims*, 608 A.2d 1149, 1158 (Vt. 1991)).

Majors argues that he "has not been given a meaningful opportunity for rehabilitation" in prison. *See* Def's Br. at 68–70. But, as the court remarked, "his lack of empathy was a trait he brought to prison with him." *See* Ruling (3/21/18) at 9–10; App. 95–96. That was a reference to testimony from Dr. Clemmons:

> [O]bviously I wasn't there in 2002 to evaluate him. But looking at the reports there in detail, the report from Dr. Hartman and also the presentence investigation, there are already notes that he had lack of empathy at that point in time or lack of remorse at that point in time. So there were those elements there prior to coming into the prison system.
>
> The fact that they continued into the prison system I suppose is not surprising because there are already present and probably did not improve after being in the environment of hardened criminals. There was already kind of a trajectory for that trait. That personality trait was already present as mentioned in several sources back in 2002.

See ReSentTr. 113:19–114:17; *accord* PSI Report (1/6/03) at 15; CApp. 28 (remarking that PSI report author "did not observe any type of remorse or victim empathy" and that Majors exhibited "attitudes that could potentially precipitate antisocial behavior"). All of the evidence of development since his initial sentencing only confirms observations made contemporaneously: Majors had developed personality traits that limited his capacity to feel any actual empathy for his victims or true remorse for his crimes—along with his potential for rehabilitation.

Majors ultimately argues that Dr. Clemmons and the State did not establish that he had truly exhibited "a stunting of the ordinary maturation process." *See* Def's Br. at 72 (quoting *Roby*, 897 N.W.2d at 150 (Appel, J., specially concurring)). But that is not what the State set out to prove. This crime is not heinous because Majors lacked the capacity and maturity to know his conduct was wrong. To the contrary, it is heinous because he *did* have that capacity and maturity to know that attacking and raping his neighbor would be wrong (especially in a "cold cognition" context where he had time for deliberate thought)—and he simply did not care. *See* ReSentTr. 79:17–82:7. That unique callousness towards his victims, which persisted well into adulthood, establishes two distinct propositions. First, it limits his capacity for experiencing remorse and limits his potential for rehabilitation, and it sustains the court's finding that his possibility of future rehabilitation only weighs "somewhat weakly" in the *Lyle*/*Roby* analysis. *See* Ruling (3/21/18) at 10–12; App. 96–98. Second, it forecloses any argument that Majors might make about proportionality and constitutionality, more generally. While the *Lyle*/*Roby* factors are never aggravating, it is not surprising that they offer no significant mitigation in this case. This is the sentence that Majors deserves, and it should be affirmed.

II. Majors cannot prove his counsel was ineffective for declining to retain an expert for resentencing.

Preservation of Error

Iowa appellate courts may address ineffective-assistance claims on direct appeal "when the record is sufficient to permit a ruling." *See State v. Wills*, 696 N.W.2d 20, 22 (Iowa 2005). The State believes the record is sufficient to resolve this claim, except on prejudice.

Standard of Review

Claims of ineffective assistance of counsel are reviewed de novo. *Thorndike v. State*, 860 N.W.2d 316, 319 (Iowa 2015).

Merits

To establish ineffective assistance of counsel, "a defendant must typically show that (1) counsel failed to perform an essential duty and (2) prejudice resulted." *State v. Keller*, 760 N.W.2d 451, 452 (Iowa 2009) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Majors's claim fails for three reasons.

First, *Majors* made the decision not to seek any sort of expert for resentencing. *See* ReSent.Tr. 5:12–8:17. He cannot ascribe that choice to counsel and he cannot attack that decision as an instance of ineffective assistance, because Majors made that decision himself. *See, e.g.*, *Schertz v. State*, 380 N.W.2d 404, 413 (Iowa 1985) (noting

that "appellant cannot now assert a claim of ineffectiveness of counsel based primarily on appellant's own decisions"); *State v. Lemburg*, 257 N.W.2d 39, 46 (Iowa 1977) (rejecting claim that counsel was ineffective for failing to litigate certain defenses because "[i]t was Lemburg's own decision to reject the possibilities of these defenses").

Second, because this was a reasonable strategic decision, Majors cannot prove breach. It makes sense that Majors and counsel did not decide to retain an expert because *Roby* presumes mitigation is warranted and only requires expert testimony to *overcome* that presumption for each of the five *Lyle*/*Roby* factors. *See Roby*, 897 N.W.2d at 147 ("[T]he factors must not normally be used to impose a minimum sentence of incarceration without parole unless expert evidence supports the use of the factors to reach such a result."). And any expert that Majors retained could be cross-examined by the State; that would give the State another opportunity to elicit expert testimony that it would need to support its sentencing recommendation, which Majors did *not* need to support his own sentencing recommendation. And Majors's counsel affirmed that he did not expect that retaining an expert would provide more useful information than he already elicited on cross-examination of Dr. Clemmons.

> [W]ith respect as indicated in my cross-examination, Your Honor, I believe that I was able to glean the information that I might otherwise be able to obtain through the State's witness, Your Honor, and in my personal opinion and my professional opinion, I believe that that should be sufficient, Your Honor. I'm not sure that an independent evaluation would provide the same or similar opportunity to present information.

See ReSentTr. 131:15–132:9. That was reasonable trial strategy, and Majors cannot prove breach. *See State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992); *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989).

Finally, Majors cannot prove prejudice. He does not appear to be alleging structural error—he explains the *Strickland* standard for assessing prejudice and purports to prove that "the outcome of the resentencing hearing would likely have been different" absent breach. *See* Def's Br. at 74–75, 78–79. But his proof of prejudice is limited to an assertion that "[i]f Majors' attorney had offered expert testimony to properly educate the district court about sentencing factors," the resentencing court would have reached a different conclusion. *See* Def's Br. at 78–79. Yet Majors has the burden of proving prejudice, which means he must prove the contents of that as-yet-hypothetical defense expert testimony—which he cannot do. *See*, *e.g.*, *Lamasters v. State*, 821 N.W.2d 856, 868–69 (Iowa 2012) (finding claimant failed to establish that his counsel was ineffective for not raising

diminished-capacity defense because claimant "offered no expert opinion relating to diminished responsibility"); *Brown v. State*, No. 14–1646, 2016 WL 351459, at *2 (Iowa Ct. App. Jan. 27, 2016) (citing *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994)) (noting that applicant alleging ineffective assistance for failing to retain expert could not prevail because he did not prove "what the expert testimony would have been"); *Gear v. State*, No. 08–1150, 2009 WL 1886839, at *3 (Iowa Ct. App. July 2, 2009) (rejecting failure-to-investigate claim and explaining that "Gear has presented no evidence—expert or otherwise—in support of his assertion" that investigation would have found favorable evidence).

Majors cannot prove any reasonable probability that, but for his own decision to concur in his counsel's reasonable strategic decision not to retain an expert, he would have been able to present evidence that would have changed the ultimate outcome of his resentencing. Therefore, his ineffective-assistance claim fails.

CONCLUSION

The State respectfully requests that this Court affirm the ruling that reimposed the 70% minimum before parole eligibility.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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