IN THE SUPREME COURT FOR THE STATE OF IOWA
NO. 19-1917

JAMES DORSEY,
Applicant-Appellant

vs.

STATE OF IOWA
Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY,
HONORABLE ROBERT HANSON

APPLICANT-APPELLANT'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

Alexander Smith
Parrish Kruidenier
Gentry Brown Bergmann
& Messamer L.L.P.
2910 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 284-5737
Facsimile: (515) 284-1704
Email:asmith@parrishlaw.com
ATTORNEY FOR APPELLANT

Louie S. Sloven
Office of Attorney General
Criminal Appeals Division
Hoover State Office Building,
2nd Floor
Des Moines, Iowa 50319
Telephone: (515) 281-5976
Facsimile: (515) 281-8894
Email: louie.sloven@ag.iowa.gov
ATTORNEY FOR APPELLEE

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I e-filed the Applicant-Appellant's Final Brief with the Electronic Document Management System with the Appellate Court on the 12th day of April 2021.

The following counsel will be served by Electronic Document Management System.

Louie Sloven
Office of Attorney General
Criminal Appeals Division
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
Telephone: (515) 281-5976
Facsimile: (515) 281-8894
Email: louie.sloven@ag.iowa.gov
ATTORNEY FOR APPELLEE

I hereby certify that on the 12th day of April 2021, I did serve the Applicant-Appellant's Final Brief on Appellant, listed below, by mailing one copy thereof to the following Applicant-Appellant:

James Dorsey
Applicant-Appellant /S/ Alexander Smith

PARRISH KRUIDENIER DUNN GENTRY
BROWN BERGMANN & MESSAMER, L.L.P.

By: /S/ Alexander Smith
Alexander Smith AT0011363
2910 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 284-5737
Facsimile: (515) 284-1704
Email: asmith@parrishlaw.com
ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

I. THE COURT WAS WRONG TO DISMISS ON SUMMARY JUDGMENT, AS COUNSEL HAD NOT BEEN APPOINTED ON MR. DORSEY'S PRIOR MOTION TO CORRECT ILLEGAL SENTENCE

Jefferson v. Iowa Dist. Ct., 926 N.W.2d 519 (Iowa 2019)
Ghost Player, LLC v. Iowa Dep't of Econ. Dev., 906 N.W.2d 454 (Iowa 2018)
State v. Propps, 897 N.W.2d 91 (Iowa 2017)

II. NOT ALLOWING INDIVIDUALIZED SENTENCING HEARINGS FOR 18 YEAR OLDS VIOLATES THE IOWA CONSTITUTION'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT

Atkins v. Virginia, 536 U.S. 304 (2002)

Miller v. Alabama, 132 S. Ct. 2455 (2012)
Roper v. Simmons, 543 U.S. 551 (2005)
State v. Lyle, 854 N.W.2d 378 (Iowa 2014)
State v. Sweet, No. 14-0455 (Iowa May 27, 2016)

III. MR. DORSEY'S SENTENCE IS GROSSLY DISPROPORTIONATE

Ewing v. California, 538 U.S. 11 (2003)
Solem v. Helm, 463 U.S. 277 (1983)
State v. Bruegger, 773 N.W.2d 862 (Iowa 2009)
State v. Lyle, 854 N.W.2d 378 (Iowa 2014)
State v. Oliver, 812 N.W.2d 636 (Iowa 2012)

ROUTING STATEMENT

This appeal should be retained by the Iowa Supreme Court. It is a case presenting substantial constitutional questions regarding the cruel and unusual punishment clause of the Iowa Constitution. The case also involves fundamental and urgent issues of broad public importance, requiring prompt or ultimate determination by the supreme court in accordance with Iowa R. App. P. 6.1101(2)(d). Finally, this appeal entails substantial questions regarding changing legal principles, in accordance with 6.1101(2)(f).

CASE STATEMENT

The district court erred on multiple grounds. First, the court should not have granted the state's motion for summary judgment on res judicata grounds: the court did not appoint counsel in Mr. Dorsey's prior Motion to Correct Illegal Sentence, so the issue was not fully and fairly adjudicated on the merits. Second, the district court incorrectly concluded that the Iowa Supreme Court's holding in Lyle did not apply

to 18-year-olds. This arbitrary holding violates the Iowa Constitution's prohibition against cruel and unusual punishment. Finally, due to his age and background, Mr. Dorsey's sentence is grossly disproportionate.

FACTUAL BACKGROUND

James Dorsey was born on August 29, 1966. (FECR26425.PSI.Page3). He grew up in a home subsiding on welfare and did not receive the normal care and support a child receives in a more stable environment. (App. 20). As a youth, he had several referrals to juvenile Court, including a burglary adjudication and placement at the YMCA Boy's Home. (FECR26425.PSI.Page5). He had issues with both alcohol and drugs as a juvenile. (App. 20-21). He needed firm structure and limits to maintain his behavior, with officers opining that his problems were a result of unresolved issues with his parents' divorce. (FECR26425.PSI.Page5). He had a lot of trouble with school. (FECR26425.PSI.Page39). He masked his fears about his parents with depression and had trouble verbalizing these concerns. (FECR26425.PSI.Page33). During a psychological evaluation from before the offense, a psychologist said Mr. Dorsey was socially immature and had little insight. (FECR26425.PSI.Page57). His general knowledge, language skills, and social judgment were inadequate for his age group. (FECR26425.PSI.Page57). His personality assessment showed he was impulsive and tended towards immediate, short-term gratification, and had few resources for planning for long-term goals.

(FECR26425.PSI.Page57). He had difficulty in recognizing the needs of others. (FECR26425.PSI.Page57). His functional ability to meet the demands of everyday living was poor, and his biggest need was to learn to accept external discipline and structure. (FECR26425.PSI.Page57). He was diagnosed with socialized conduct disorder. (FECR26425.PSI.Page55). He reported personal struggles with alcohol and drugs, even as a teenager. (FECR26425.PSI.Page55). By his teenage years, he had already experienced severe psychological stressors and his level of adaptive functioning was described as poor. (FECR26425.PSI.Page56). Mr. Dorsey was never able to graduate from high school because he was kicked out of two different schools. (App. 20).

Mr. Dorsey was eventually required to stay at the Boy's Training School in April 1982. (FECR26425.PSI.Page5). He was released from the Boy's State Training School on February 6, 1984. (FECR26425.PSI.Page5). A report from the school said that he was "ast a turning point in his life where he seems to be choosing between being a productive member of society or a delinquent one." (FECR26425.PSI.Page28). The report also said that his "goals and objectives should be met on 8-29-84, which is the day he reaches majority age, and we will ask the Court to terminate and close." (FECR26425.PSI.Page28). Mr. Dorsey was terminated from the juvenile court's jurisdiction but it is obvious he did not meet his goals.

On September 3, 1984, 5 days after Mr. Dorsey turned 18, he became intoxicated at a party during the morning hours. (App. 11). “Defendant and two others, Todd Hoffer and Bill Lane, left the party and borrowed a 20-gauge shotgun from David Bailey. The trio entered the home of Juanita Weaver, the victim, with the gun and shots were fired. They returned to the party and made comments about a woman being dead.” (App. 11).

A witness in Weaver's home on the morning testified that Mr. Dorsey was searching for someone and Weaver saw Mr. Dorsey with a shotgun. (App. 11). Juanita’s son Kenny Weaver, along with Mr. Dorsey, had stolen a gun from Mr. Dorsey’s uncle. (App. 11). Kenny Weaver testified that Mr. Dorsey had previously threatened him to try to get the gun back. (App. 11). The State’s theory was that Mr. Dorsey had been looking for Kenny Weaver but when he could not find him, took out his frustrations on Juanita Weaver. (App. 11). Mr. Dorsey’s statement on the incident in the PSI was “[a]ll I gotta say is it was an accident.” (FECR26425.PSI.Page4).

COURSE OF PROCEEDINGS

A jury found Mr. Dorsey guilty of Murder in the First Degree and the court sentenced him to life in prison. (App. 9). His appeal was denied and procedendo issued on March 26, 1986. (App. 16). His first and second applications for postconviction relief were filed in February 1986. (App. 65; 72). These applications

were dismissed in September 1994 when Mr. Dorsey's own attorney called them meritless and motioned to dismiss, at a hearing where Mr. Dorsey was not present. (App. 65; 72). Mr. Dorsey filed another postconviction relief application in November 1994 which the court dismissed as time barred in August 1996. (App. 72). His next application for postconviction relief was filed in January of 1999 and was dismissed on the same grounds in July 2000. (App. 75). His penultimate application for postconviction relief was filed in October 2008 and dismissed in April 2010. (App. 77).

Mr. Dorsey also filed a Motion to Correct Illegal Sentence on January 24, 2014, citing the United States Supreme Court's decisions in Graham v. Florida, 560 U.S. 48, 59 (2010) and Miller v. Alabama, 567 U.S. 460, 465 (2012) as well as the referencing the decisions of the Iowa Supreme Court and the Iowa Constitution. (App. 18-19). He asked the court to rule that his life-without-parole sentence was cruel and unusual because he was only 18 years and 5 days old when he committed his offense and that the court should review his sentence independently on a case by case basis. (App. 18-19). He asked that the court allow him to "have at his disposal the necessary means to obtain all of the relevant information in regards to" the mitigating factors in relation to his case. (App. 21). He also asked that the court appoint counsel. (App. 21). Less than a month later, the district court denied the motion without hearing and without appointing counsel for Mr. Dorsey. (App. 26).

Later that year, the Iowa Supreme Court decided State v. Lyle, 854 N.W.2d 378 (Iowa 2014).

Mr. Dorsey filed the instant application for postconviction relief in October 2018, alleging that his "conviction or sentence was in violation of the Constitution of the United States or the Constitution or laws of this state" and that the "court was without jurisdiction to impose sentence". (App. 29). In his attached pro se brief, he repeated his argument that it was cruel and unusual under the United States Constitution and the Iowa Constitution to sentence him to life without parole because he was 18 years and 5 days old when he committed the offense, and requesting an individualized hearing on whether he should be forever denied parole. (App. 33). He cited State v. Lyle, 854 N.W.2d 378 (Iowa 2014), State v. Seats, 865 N.W.2d 545 (Iowa 2015), and State v. Sweet, 879 N.W.2d 811 (Iowa 2016), and asked that those decisions be applied to him. (App. 33).

The State motioned for summary judgment, arguing that it had been 32 years since procedendo issued on his direct appeal, that Allison v. State, 914 N.W.2d 866, 891 (Iowa 2018) was not an applicable exception to the time bar, and that Lyle applied only to juveniles, not adult offenders. (App. 57). The State also argued that any illegal sentence claim was precluded by the doctrine of res judicata. (App. 111).

Mr. Dorsey filed a resistance, asking the court to consider his postconviction relief application as a motion to correct illegal sentence, which can be raised at any

time. (App. 84). He also argued that there was an issue of material fact, as federal district court case Cruz v. United States, 2018 WL 1541898 (D. Conn. March 29, 2018) supported his illegal sentence claim due to the developments in neuroscience discussed within and a change in national sentencing trends to extend Miller to 18 year-olds. (App. 82-83). Mr. Dorsey also asked to develop his claim in the form of expert testimony addressing to the specific neurological differences, factoring in Dorsey's young age at the time of the offense and biographical background. (App. 82-83). Mr. Dorsey argued against the court finding that the issue was foreclosed due to res judicata, because the district court did not afford Mr. Dorsey a hearing on his motion, an opportunity to present evidence and argument in support of his motion, or even an attorney to litigate his claims. (App. 109).

The court granted summary disposition, overruling the illegal sentence claim because State v. Lyle, 854 N.W.2d 378, 403 (Iowa 2014) does not apply to young adult offenders. (App. 116). The court also ruled that the illegal sentence claim was barred by principles of *res judicata*. (App. 116). Mr. Dorsey filed a timely notice of appeal. (App. 118).

ISSUES

I. MR. DORSEY'S ILLEGAL SENTENCE CLAIM SHOULD NOT HAVE BEEN DISMISSED ON RES JUDICATA PRINCIPLES BECAUSE HE WAS NEVER GIVEN AN ATTORNEY FOR HIS FIRST MOTION TO CORRECT ILLEGAL SENTENCE

A. Error Preservation

Mr. Dorsey preserved error by arguing against the district court's finding that his legal issue was foreclosed due to res judicata, because the district court did not afford Mr. Dorsey 1) a hearing on his motion, 2) an opportunity to present evidence and argument in support of his motion, or 3) an attorney to litigate his claims. (App. 109). The district court overruled that argument by granting summary disposition, incorrectly ruling that the illegal sentence claim was barred by principles of *res judicata*. (App. 116).

B. Standard of Review

Iowa Code § 822.6 allows for summary disposition of a postconviction relief action when "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." A motion for summary disposition is comparable to a motion for summary judgment under Iowa R. Civ. P. 1.981(3). Manning v. State, 654 N.W.2d 555, 559 (Iowa 2002). The goal of summary disposition is to allow a case that has been fully developed by both sides to be properly disposed of, before an actual trial. Linn v. State, 929 N.W.2d 717, 730 (Iowa 2019).

Review of a summary judgment ruling is for correction of errors at law. Kiesau v. Bantz, 686 N.W.2d 164, 171 (Iowa 2004). Summary judgment is only appropriate when there is no genuine issue as to any material fact. Iowa R. Civ. P 1.981(3). A question of fact exists "if reasonable minds can differ on how the issue should be resolved." Walderbach v. Archdiocese of Dubuque, Inc., 730 N.W.2d 198, 199 (Iowa 2007). An issue of fact is material when the dispute is over facts that might affect the outcome of the case. Varnum v. Brien, 763 N.W.2d 862, 874 (Iowa 2009). In comparison, an issue of fact is "genuine" when the evidence is such that a reasonable factfinder could return a verdict for the party resisting the motion for summary judgment. Baratta v. Polk County Health Servs., 588 N.W.2d 107, 109 (Iowa 1999).

To obtain a grant of summary judgment on some issue in an action, the moving party must affirmatively establish the existence of undisputed facts entitling that party to a particular result under controlling law. Interstate Power Co. v. Ins. Co. of N. Am., 603 N.W.2d 751, 756 (Iowa 1999). The burden is upon the moving party to demonstrate that no genuine issue of material fact exists, with the court affording all reasonable inferences to the non-moving party. Brien, 763 N.W.2d at 874; Pecenka v. Fareway Stores, Inc., 672 N.W.2d 800, 802 (Iowa 2003). The party resisting summary judgment must offer admissible evidence showing the existence of a genuine issue of material fact and that the moving party is not entitled to

judgment as a matter of law. See Evans v. McComas-Lacina Constr. Co., 641 N.W.2d 841, 843 (Iowa 2002).

C. Argument

The State must establish the following to establish *res judicata*:

> (1) "the parties in the first and second action were the same"; (2) "the claim in the second suit could have been fully and fairly adjudicated in the prior case"; and (3) "there was a final judgment on the merits in the first action."

Spiker v. Spiker, 708 N.W.2d 347, 353 (Iowa 2006). To establish issue preclusion, or collateral estoppel, the State must establish the following

> (1) the issue concluded must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment.

Iowa Elec. Light & Power Co. v. Lagle, 430 N.W.2d 393, 397 (Iowa 1988)

Mr. Dorsey previously filed a Motion to Correct Illegal Sentence in his criminal case on January 24, 2014, citing the United States Supreme Court's decisions in Graham v. Florida, 560 U.S. 48, 59 (2010) and Miller v. Alabama, 567 U.S. 460, 465 (2012). (App. 18-19). Mr. Dorsey did not and could not cite State v. Lyle, 854 N.W.2d 378, 403 (Iowa 2014) in his 2014 motion, as that case had not yet been decided. (App. 18-19). He asked the court to rule that his life-without-parole sentence was cruel and unusual because he was only 18 years and 5 days old when he committed his offense, and that the court review his sentence independently on a

case by case basis. (App. 18-19).The district court denied the motion without hearing and without appointing counsel for Mr. Dorsey. (App. 26).

The court was in error when it denied Mr. Dorsey's Motion to Correct Illegal Sentence all those years ago without appointing counsel. "Iowa Rule of Criminal Procedure 2.28(1) requires the court to appoint counsel when an indigent defendant files a motion to correct illegal sentence under Iowa Rule of Criminal Procedure 2.24(1)." Jefferson v. Iowa Dist. Ct., 926 N.W.2d 519, 519 (Iowa 2019). Frivolous motions include claims that a routine sentence was cruel and unusual or that two convictions should have merged when it is abundantly clear they do not. Id. at 525. However, even in those frivolous motions, "counsel should be appointed, but may ask to withdraw employing a procedure similar to that authorized by rule 6.1005 for frivolous appeals." Id. When the Iowa Supreme Court has previously come across a claim where the defendant made a motion to correct illegal sentence, but counsel was not appointed and the court overruled the motion without hearing, they remanded the motion to the district court for appointment of counsel and consideration of the motion. Id. at 526.

By analogy, in a case involving administrative law, the Iowa Supreme Court has found that "[t]he lack of procedural rights and trial-type opportunities to present evidence and argument strongly weighs against applying res judicata in this case on behalf" of either party. Ghost Player, LLC v. Iowa Dep't of Econ. Dev., 906 N.W.2d

454, 466 (Iowa 2018). The court found that due to the "actual conduct and relationship of the parties, we do not find much resemblance to an adjudication" and did not find the prior proceeding to have a preclusive effect. Id.

The lack of appointment of counsel and the other circumstances of the motion to correct illegal sentence prevent res judicata from applying. A claim has not " been fully and fairly adjudicated in the prior case" if the pro se defendant asked for counsel to be appointed, had the right to have counsel appointed, and the court refused to appoint counsel. There also could not have been a final judgment on the merits, because an order denying a motion to correct illegal sentence is not a final judgment. See State v. Propps, 897 N.W.2d 91, 96 (Iowa 2017). This court must reverse the district court's ruling.

II. NOT ALLOWING INDIVIDUALIZED SENTENCING HEARINGS FOR 18 YEAR OLDS VIOLATES THE IOWA CONSTITUTION'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT

A. Error Preservation

Error preservation is not at issue, because illegal sentence claims may be brought at any time, even for the first time on appeal. See State v. Bruegger, 773 N.W.2d 862, 871 (Iowa 2009). Even when not labeled as such, the court treats applications for postconviction relief that bring illegal sentence claims as challenges to an illegal sentence that are not subject to the three-year time bar. Veal v. State, 779 N.W.2d 63, 65 (Iowa 2010). However, even if error preservation was required,

the court denied Mr. Dorsey's cruel and unusual punishment claim on the merits and preserved error then. Mr. Dorsey alleged that the "conviction or sentence was in violation of the Constitution of the United States or the Constitution or laws of this state" and that the "court was without jurisdiction to impose sentence". (App. 29). In his attached pro se brief, he repeated his argument that it was cruel and unusual under the United States Constitution and the Iowa Constitution to sentence him to life without parole because he was 18 years and 5 days old when he committed the offense, and requested an individualized hearing on whether he should be forever denied parole. (App. 33). He cited State v. Lyle, 854 N.W.2d 378 (Iowa 2014), State v. Seats, 865 N.W.2d 545 (Iowa 2015), and State v. Sweet, 879 N.W.2d 811 (Iowa 2016), and asked that those decisions be applied to him. (App. 33). The court explicitly overruled that claim when it granted the motion for summary disposition, explaining that State v. Lyle, 854 N.W.2d 378, 403 (Iowa 2014) does not apply to even young adult offenders. (App. 116).

B. Standard of Review

The standard of review when a Defendant challenges his sentence as unconstitutional is de novo. State v. Lyle, 854 N.W.2d 378, 382 (Iowa 2014).

C. Argument

When the Iowa Supreme Court decided State v. Lyle, it ruled that "all mandatory minimum sentences of imprisonment for youthful offenders are

unconstitutional under the cruel and unusual punishment clause in article I, section 17 of [the Iowa] constitution." State v. Lyle, 854 N.W.2d 378, 400 (Iowa 2014). This decision applied to all juveniles currently serving mandatory minimum sentences, entitling each to a resentencing hearing. Id. at 403 (Iowa 2014).

In Lyle, the Iowa Supreme Court limited its holding to juvenile offenders:

> [O]ur holding today has no application to sentencing laws affecting adult offenders. Lines are drawn in our law by necessity and are incorporated into the jurisprudence we have developed to usher the Iowa Constitution through time. This case does not move any of the lines that currently exist in the sentencing of adult offenders.

Id.

In State v. Sweet, the court adopted "a categorical rule that juvenile offenders may not be sentenced to life without the possibility of parole under article I, section 17 of the Iowa Constitution." 879 N.W.2d 811, 839 (Iowa 2016). The argument that Mr. Dorsey advances, that Lyle should be extended to adult offenders, has been heard by the Iowa Court of Appeals before. The Iowa Court of Appeals, exercising its subsidiary appellate function, has declined to take the holding in Lyle to its logical conclusion. See State v. Vance, No. 15–0070, 2015 WL 4936328, at *2 (Iowa Ct. App. Aug. 19, 2015) (refusing to extend Lyle and listing the large number of unpublished decisions where the Iowa Court of Appeals has refused to extend Lyle). However, upon information and belief, the Iowa Supreme Court has never ruled on this particular issue before, as it was unnecessary to reach under Lyle. Mr. Dorsey's

good faith argument for the modification of existing law would be the first such case and is ripe for consideration.

i. Nature and purpose of individualized sentencing under Lyle

The nature of a qualifying offender's offense cannot overwhelm the court's analysis in juvenile sentencing. The general rule is that children are constitutionally different from adults and cannot be held to the same standard of culpability as adults in criminal sentencing. State v. Null, 836 N.W.2d 41, 75 (Iowa 2013). If a case is an exception to the generally applicable rule, the court must make findings on why the general rule does not apply. Id. The court must go beyond merely reciting the nature of the crime. Id. The nature of the crime cannot overwhelm the analysis in juvenile sentencing. Id.

The Iowa Supreme Court has said that "[t]he linchpin of the constitutional protection provided to juveniles is individualized sentencing." State v. Roby, 897 N.W.2d 127, 143 (Iowa 2017). Aggravating factors are due much less weight in juvenile sentencing and cannot overwhelm the mitigating factors. Typical aggravating factors, such as retribution, deterrence, and incapacitation are inherently and significantly weaker when sentencing juveniles. See State v. Lyle, 854 N.W.2d 378, 413-14 (Iowa 2014). Rehabilitation is a typical goal of sentencing, but life without the possibility of parole forecloses that possibility. Id. at 414.

The Iowa Supreme Court has identified five factors as guideposts for the court

to follow in recognition of the fundamental constitutional proposition that harsh criminal sentences are not appropriate for juveniles. Id. at 144. The court has some basic propositions that should guide the court in crafting a sentence. Id. First, the factors generally mitigate punishment, they do not aggravate punishment. Id. Second, hearings are not entirely adversarial. Id. The court's goal is to craft a sentence that will best serve the best interests of the child and society. Id. Third, the default rule is that juveniles are not subject to minimum periods of incarceration. Id.

ii. Lyle factors

The first factor, the age and features of youthful behavior, "is most meaningfully applied when based on qualified professional assessments of the offender's decisional capacity." Id. In addition, this factor includes the features expected of youth that support mitigation "and allows for the introduction of evidence at the sentencing hearing to show the offender had more or less maturity, deliberation of thought, and appreciation of risk-taking than normally exhibited by juveniles." Id.

The second factor, family and home environment, is best assessed with expert testimony on "how the family and home environment may have affected the functioning of the juvenile offender." Id. at 146. This factor tries to identify negative influences and family dependency issues that can be ingrained on children. It is not

limited to dysfunctional home environments, but all the circumstances that flow though this factor, including and income and social background. Id.

The third factor, the circumstances of the crime, is perhaps the trickiest factor to consider, or at least the most misleading. The Iowa Supreme Court has said that the circumstances do not weigh against mitigation merely because the crime caused grave harm or was especially brutal. Id. The individualized hearing and analysis is not "crime-specific" and mitigation will usually be warranted for all crimes. Id. (noting that circumstances that would indicate depravity for an adult offender may, when applied to a juvenile offender, show only wild immaturity and impetuousness.). There are other very significant factors to consider under the circumstances of the crime. Id. The court must examine the juvenile's role and the types of external pressure. Id. "Expert testimony will be helpful to understand the complexity behind the circumstances of a crime when influences such as peer pressure are not immediately evident and will aid the court in applying the factor properly." Id. Even crimes committed alone can be done as a result of peer pressure, such as juveniles trying to win peer approval or encouragement through group interaction. Id.

The fourth factor, legal incompetency, mitigates against punishment because juveniles are less capable of navigating through the criminal process. Therefore, juveniles are likely to be shortsighted in their understanding of the legal process. Id.

Whether a defendant is more capable to confront the legal process than most other offenders is normally a matter for expert testimony. Id.

The fifth factor, rehabilitation, supports mitigation because juveniles are more capable of change and reform. Id. The court cannot necessarily use the fact that the crime committed was brutal to conclude that the juvenile is not amenable to reform or would recidivate. Id. A different conclusion normally needs expert testimony to support it. Id.

iii. Failing to apply the Lyle factors to Mr. Dorsey constitutes cruel and unusual punishment

The conception of cruel and unusual punishment changes over time. State v. Lyle, 854 N.W.2d 378, 384 (citing Trop v. Dulles, 356 U.S. 86, 101 (1958)). The court considers cruel and unusual punishment claims "under the currently prevailing standards of whether a punishment is excessive or cruel and unusual." Id. (citing Atkins v. Virginia, 536 U.S. 304, 311 (2002) (internal punctuation removed). "The standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.'" Id. (quoting Furman v. Georgia, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting)). "[P]unishments once thought just and constitutional may later come to be seen as fundamentally repugnant to the core values contained in our State and Federal Constitutions as we grow in our understanding over time." Id. (citing Roper v. Simmons, 543 U.S. 551, 574-75

(2005)). The court interprets the cruel and unusual punishment clause "in light of our understanding of today, not by our past understanding." Id.

In deciding cruel and unusual punishment cases, the court should be aided by the principles that "the State must not arbitrarily inflict a severe punishment." Furman v. Georgia, 408 U.S. 238, 382 (1972). "This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others." Id.

Because it is difficult to determine maturity, the State often resorts to objective, yet arbitrary criteria such as age to determine maturity. Bellotti v. Baird, 443 U.S. 622, FN 23 (1979). However, "[t]he features of youth identified in Roper and Graham simply do not magically disappear at age seventeen — or eighteen for that matter." State v. Sweet, 879 N.W.2d 811, 834 (Iowa 2016). "[T]he adolescent brain continues to mature well into the 20s." Sara Johnson. *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. ADOLESCENT HEALTH 216, 216 (2009). In its juvenile sentencing cases, the Iowa Supreme Court has cited Laurence Steinberg in majority opinions multiple times. See, e.g., State v. Null, 836 N.W.2d 41, 54 (Iowa 2013); State v. Seats, 865 N.W.2d 545, 557 (Iowa 2015); State v. Sweet, 879 N.W.2d 811, 839 (Iowa 2016). In 2003, Dr. Steinberg wrote an article describing how adolescents were more impetuous, were more susceptible to peer pressure, and had

less fully formed personalities than adults. (App. 140). Dr. Steinberg testified that given scientific advancement, if he were to write the article today, he would say "the same things are true about people who are younger than 21." (App. 140). Dr. Steinberg testified that he considered adolescence to last through age 20 and that the brain continued to mature during that period. (App. 124-125). The consensus is that neurobiological and psychological maturity is not attained until 22-23 years old. (Ap. 130). Some researchers put the end of adolescence as late as age 25. L.P. Spear. *The adolescent brain and age-related behavioral manifestations*, 24 NEUROSCIENCE & BIOBEHAVIORAL REV. 417, 419 (2000).

Late adolescents "still show problems with impulse control and self-regulation and heightened sensation-seeking, which would make them in those respects more similar to somewhat younger people than to older people." (App. 137). Impulse control is still developing until the early 20s. (App. 138). The ability to resist peer pressure is still developing when someone turns 18. (App. 138-139). Therefore, susceptibility to peer pressure is higher in late adolescence than in adulthood. (App. 138-139). Finally, people in late adolescence up to their early 20s are more capable of change than are adults. (App. 139).

The distinction between the type of individuals contemplated by Lyle and the ones like Mr. Dorsey is an arbitrary one. There will be individuals that, through circumstances beyond their control, will reach age 18 before they have truly been

able to mature. They will still be victims of the typical characteristics of youth. The State of Iowa does not respect human dignity when it inflicts punishments with mandatory minimums on persons like Mr. Dorsey, while it allows individualized sentencing for an individual who was 17 years and 364 days old. That distinction of being above 18 or below 18 is ultimately arbitrary and does not take into account the reasons why mandatory minimums without individualized hearings are cruel and unusual punishment for juveniles.

The difference between Mr. Dorsey, who was sentenced to die in prison, and many other juvenile offenders who will one day be set free is 5 days. Mr. Dorsey was only 5 days above the age of 18 when he committed his offense. 5 days between the parole board being able to flexible assessments on rehabilitation and having absolutely no discretion to do so. Nobody actually believes that in those 5 days Mr. Dorsey fundamentally changed and that none of the reasons for treating juveniles differently no longer apply. That is just the arbitrary cutoff date.

The concern is that some age must be chosen. This is false. Individualized sentencing allows the court to take into account many of the factors of youth. However, the court can still conclude that the mandatory minimum should apply. State v. Lyle, 854 N.W.2d 378, 413-14 (Iowa 2014) ("It is important to be mindful that the holding in this case does not prohibit judges from sentencing juveniles to prison for the length of time identified by the legislature for the crime committed,

nor does it prohibit the legislature from imposing a minimum time that youthful offenders must serve in prison before being eligible for parole.") In Sweet, the court discussed whether they should place a categorical ban or life without parole sentences for juvenile, or if they should address it on a case-by-case basis. 879 N.W.2d 811, 834 (Iowa 2016). The court should adopt the case-by-case approach for defendants over the age of 18. Defendants just over the age of 18 should have the ability to argue that they were still affected by the typical characteristics of youth when they committed their offense. If defendants at age 18 do not have the typical characteristics of youth, the court will be free to give them mandatory minimum sentences, including life without the possibility of parole. But the court will finally have a way out for 18 year old's that do not deserve mandatory minimums.

III. MR. DORSEY'S SENTENCE IS GROSSLY DISPROPORTIONATE

A. Error Preservation

Error preservation is not at issue, because illegal sentence claims may be brought at any time, even for the first time on appeal. See State v. Bruegger, 773 N.W.2d 862, 871 (Iowa 2009). However, even if it were, error was preserved when the court ruled against this claim after trial. (App. 41)

B. Standard of Review

The standard of review when a Defendant challenges his sentence as unconstitutional is de novo. State v. Lyle, 854 N.W.2d 378, 382 (Iowa 2014).

C. Argument

Gross disproportionality is not a "toothless" review under the Iowa Constitution, and the review is more stringent than under the Federal Constitution. State v. Bruegger, 773 N.W.2d 862, 883 (Iowa 2009).

There are three steps to a gross disproportionality analysis. In step one, known as the "threshold step", the court compares "the severity of the punishment to the gravity of the crime to determine if the sentence leads to an inference of gross disproportionality." State v. Oliver, 812 N.W.2d 636, 640 (Iowa 2012) (citing State v. Bruegger, 773 N.W.2d 862, 873 (Iowa 2009). Step two is intrajurisdictional analysis, where the court compares the sentence "to sentences for other crimes within the jurisdiction." State v. Bruegger, 773 N.W.2d 862, 873 (Iowa 2009) (citing Solem v. Helm, 463 U.S. 277, 292 (1983)). Step three is interjurisdictional review, where the court compares "sentences in other jurisdictions for the same or similar crimes." Id.

In determining the first "threshold" step, the court keeps in mind four principles. State v. Oliver, 812 N.W.2d 636, 650 (Iowa 2012). The first is that the court gives substantial deference to the legislature's statutory punishments. Id. "The second principle is that it is rare that a sentence will be so grossly disproportionate to the crime as to satisfy the threshold inquiry and warrant further review." Id. (citing State v. Musser, 721 N.W.2d 734, 749 (Iowa 2006)). The third principle is that repeat

offenders are more culpable and deserving of longer sentences than first-time offenders. Id. at 650-1 ("Lengthy sentences are more likely to be constitutional when imposed on offenders with lengthy criminal histories.") (citing Ewing v. California, 538 U.S. 11, 29-30 (2003)). The fourth principle is that unique features of a case can create potential gross disproportionality. Id. at 651. Either a broadly framed crime or a dramatic sentence enhancement, standing alone, potentially makes the sentence disproportionate. Id.

The first two principles do not fall in Mr. Dorsey's favor. This is not uncommon and occurs in virtually all cases: the court should not let these principles overwhelm the analysis so that review again becomes "toothless." The last two principles both fall in Mr. Dorsey's favor. This was Mr. Dorsey's first criminal offense as an adult. In addition, he had many of the characteristics of youth that would justify a sentence below the mandatory minimum, if he were only a juvenile.

The first factor in juvenile sentencing, the age and features of youthful behavior, "is most meaningfully applied when based on qualified professional assessments of the offender's decisional capacity." State v. Roby, 897 N.W.2d 127, 143 (Iowa 2017). In addition, this factor includes the features expected of youth that support mitigation, "and allows for the introduction of evidence at the sentencing hearing to show the offender had more or less maturity, deliberation of thought, and appreciation of risk-taking than normally exhibited by juveniles." Id. Mr. Dorsey

was immature and impulsive. He needed firm structure and limits to maintain his behavior, and officers thought his problems were a result of unresolved issues with his parents' divorce. (FECR26425.PSI.Page5). He had a lot of trouble with school. (FECR26425.PSI.Page39). He masked his fears about his parents with depression and he had trouble verbalizing these concerns. (FECR26425.PSI.Page33). During a psychological evaluation, a psychologist said Mr. Dorsey was socially immature and had little insight. (FECR26425.PSI.Page57). His general knowledge, language skills, and social judgment were inadequate. (FECR26425.PSI.Page57). His personality assessment showed he was impulsive and tended towards immediate, short-term gratification with few resources for planning for long-term goals. (FECR26425.PSI.Page57). He had difficulty in recognizing the needs of others. (FECR26425.PSI.Page57). His functional ability to meet the demands of everyday living was poor, and his biggest need was to learn to accept external discipline and structure. (FECR26425.PSI.Page57). He was diagnosed with socialized conduct disorder. (FECR26425.PSI.Page55). He struggled with addiction to alcohol and drugs, even as a teenager. (FECR26425.PSI.Page55). He was given severe psychological stressors and his level of adaptive functioning was described as poor. (FECR26425.PSI.Page56). Mr. Dorsey was never able to graduate from high school because he was kicked out of two different schools. (App. 20).

The second factor, family and home environment, is best assessed with expert testimony on "how the family and home environment may have affected the functioning of the juvenile offender." Id. at 146. The factor tries to identify negative influences and family dependency issues that can be ingrained on children. It is not limited to only dysfunctional home environments, but all circumstances and all income and social backgrounds. Id. Mr. Dorsey also had a troubled home environment and had to be placed outside of the home several times. He grew up in a home subsiding on welfare and did not receive the normal items a child receives. (App. 20). As a youth, he had he had several referrals to juvenile Court, including a burglary adjudication and placement at the YMCA Boy's Home. (FECR26425.PSI.Page5). He had issues with both alcohol and drugs as a juvenile. (App. 20-21).

The third factor, the circumstances of the crime, is perhaps the trickiest factor to consider, or at least, the most misleading. The Iowa Supreme Court has said that the circumstances do not weigh against mitigation only because the crime caused grave harm or was especially brutal. Id. The individualized hearing and analysis is not "crime-specific" and usually mitigation will be warranted for all crimes. Id. Circumstances that reveal that an adult offender is depraved may reveal only that a juvenile offender is actually wildly immature and impetuous. Id.

There are other very significant factors to consider under the circumstances of the crime. Id. The court must examine the juvenile's role and the types of external pressure. Id. "Expert testimony will be helpful to understand the complexity behind the circumstances of a crime when influences such as peer pressure are not immediately evident and will aid the court in applying the factor properly." Id. Even crimes committed alone can be done as a result of peer pressure in adolescent behavior, such as juveniles trying to win peer approval or encouragement through group interaction. Id.

The circumstances of the offense reveal that what led Mr. Dorsey to commit it were the features of youth. Those include immaturity, poor risk calculus, and peer pressure. He became intoxicated at a party during the morning hours and left with his peers, indicating that he was feeling the effect of his peers on his actions. (App. 11). The fact that they left a party to go do this shows recklessness and impulsive thinking. According to the State's theory, they were searching for a gun that Mr. Dorsey and Kenny Weaver had stolen from Mr. Dorsey's uncle so that Mr. Dorsey could return it. (App. 11). That this was their plan, but Mr. Dorsey ended up shooting Juanita Weaver out of frustration shows impulsiveness, poor problem solving skills, and poor risk assessment.

The fourth factor, legal incompetency, mitigates against punishment because juveniles are less capable of navigating through the criminal process. Therefore,

juveniles are likely to be shortsighted in the legal process as well. Id. If a defendant is more capable to confront the legal process than most other offenders is normally a matter for expert testimony. Id. This is an area where a remand on the basis that the court improperly denied the petition on summary judgment would be appropriate, as there is little in the record either way on this factor.

The fifth factor, rehabilitation, supports mitigation because juveniles are more capable of change and reform. Id. The court cannot necessarily use the fact that the crime committed was brutal to conclude that the juvenile is not amenable to reform or would recidivate. Id. A different conclusion normally needs expert testimony to support it. Id. A report from the Boy's State Training School, written a few months before Mr. Dorsey shot Juanita Weaver, said that he was "at a turning point in his life where he seems to be choosing between being a productive member of society or a delinquent one." (FECR26425.PSI.Page28). The report also said that his "goals and objectives should be met on 8-29-84, which is the day he reaches majority age, and we will ask the Court to terminate and close." (FECR26425.PSI.Page28). Mr. Dorsey always was and is amenable to change. He has changed, even if the record could not be properly supplemented due to the early dismissal. The only thing that kept him from showing it in the real world is those 5 extra days after he reached the age of majority.

The court should determine whether all these factors contribute to "an unusual combination of features that converge to generate a high risk of potential gross disproportionality." State v. Bruegger, 773 N.W.2d 862, 884 (Iowa 2009). These factors lead to an inference of gross disproportionality, passing the threshold step. The sentence is both higher than sentences for other crimes within Iowa, as well as sentences in other jurisdictions for the same or similar crimes. The court should vacate the sentence and remand to the district court for further proceedings.

CONCLUSION

The court should vacate the sentence of the trial court, and remand for further proceedings for a sentence that comports with the cruel and unusual punishment clauses of the Iowa and U.S. Constitution.

ORAL ARGUMENT NOTICE

Counsel requests oral argument.

PARRISH KRUIDENIER DUNN GENTRY BROWN BERGMANN & MESSAMER L.L.P.

BY: /S/ Alexander Smith
Alexander Smith AT0011363
2910 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 284-5737
Facsimile: (515) 284-1704
Email: asmith@parrishlaw.com
ATTORNEY FOR APPELLANT

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) (no more than 14,000 words) because this brief contains 6,803 words, excluding the parts of the brief exempted by Rule 6.903(1)(g)(1), which are the table of contents, table of authorities, statement of the issues, and certificates.

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P.6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in font size 14, Times New Roman.

/S/ Alexander Smith
Dated: April 12, 2021
Alexander Smith