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 PROOF REPLY BRIEF AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I e-filed the Applicant-Appellant's Page Proof Reply Brief with the Electronic Document Management System with the Appellate Court on the 22nd day of March 2021.

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

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I hereby certify that on the 22nd day of March 2021, I did serve the Applicant-Appellant's Page Proof Reply Brief on Appellant, listed below, by mailing one copy thereof to the following Plaintiff-Appellant:

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I. APPOINTMENT OF COUNSEL IS REQUIRED FOR CLAIM PRECLUSION TO APPLY

The State argues that "if Dorsey received appointed counsel who considered the claim and then withdrew before adjudication of the claim, that would not strengthen the case for preclusion—it would not make this *more* of an adjudication on the merits between opposing parties than it already was." Appellee's Br. at 19. The State does not need to stretch to imagine such a hypothetical, Mr. Dorsey has counsel now that is willing to ethically proceed on his illegal sentence claim.

The State argues that "Dorsey did not appeal, nor attempt to do anything that would resemble an appeal. To challenge that ruling (or the ruling that denied appointment of counsel), he needed to file a petition for a writ of certiorari (or seek review through some other route). But he did not, and that means that the ruling became final as to that issue—he cannot collaterally attack it now." Appellee's Br. at 20. Mr. Dorsey is not collaterally attacking that ruling. He does not need to. An illegal sentence can be corrected at any time. He is saying that it cannot be used for issue preclusion. The State is arguing that Mr. Dorsey should have known how to file an appeal or petition for a writ of certiorari for the failure of the court to appoint counsel, when he needed counsel in the first place to know how to do any of these things, and then saying he cannot make the argument again with the assistance of

counsel because he did not previously have counsel that could have assisted him with appealing the court's past failure to appoint counsel. The State is trying to use Mr. Dorsey's prior proceeding where he was unlawfully denied counsel to declare victory on a current proceeding where he was rightfully appointed counsel.

The State argues that "Dorsey's approach would permit defendants to re-raise any challenges that fall outside Jefferson's narrow definition, over and over—and no ruling on any such challenge would ever have a preclusive effect on the *next* challenge. That would be absurd." Appellee's Br. at 19. This is incorrect. Under Mr. Dorsey's approach, the court would first have to appoint counsel when counsel must be appointed for a prior proceeding to be used for claim preclusion. The rule is limited. The court can limit motions to correct illegal sentence in any other manner it wishes.

The State finally argues that Ghost Player, LLC v. Iowa Dep't of Econ. Dev., 906 N.W.2d 454, 466 (Iowa 2018) does not apply because that case involved an agency action that was imbued with informality and was not an "adversarial proceeding." Appellee's Br. at 21. The State insists that the prior proceeding "squarely adjudicated a disputed issue between two adversarial parties and formally rejected his challenge to the constitutionality of a mandatory LWOP sentence for committing a premeditated murder." Appllee's Br. at 21.

The formal adjudication is not a reason to apply or not apply issue preclusion, it is the fact that Dorsey, pro se and alone, against the State with the counsel of the State is not an adversarial proceeding. Complete deprivation of the right to legal counsel is a structural error in proceedings, that affects the framework within which the trial proceeds, rather than simply an error in the trial process itself. State v. Feregrino, 756 N.W.2d 700, 706-07 (Iowa 2008). Other structural errors are when counsel fails to subject the prosecution's case to meaningful adversarial testing or counsel is completely denied at a crucial stage of the proceeding. Id. Prejudice is presumed for these proceedings. Id. The complete lack of procedural safeguards, including appointing counsel for Mr. Dorsey, means that the court should not apply res judicata on behalf of the State. The court should remand for this reason alone.

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

The State argues for awhile about whether it is settled law that the line is drawn at age 18 for individualized sentencing hearings, which is ultimately irrelevant. If the Iowa Supreme Court has explicitly ruled that the line must be drawn at age 18, and nobody over the age of 18, even by a few days, should be entitled to an individualized sentencing hearing, then the Iowa Supreme Court should revisit that decision. If caselaw is challenged as incorrect, the Iowa Supreme Court has a duty to consider the claim. See State v. Williams, 895 N.W.2d 856, 859 (Iowa 2017).

The court revisits prior decisions if those decisions are flawed and incompatible with present conditions. State v. Thompson, 856 N.W.2d 915, 920 (Iowa 2014). The court has not been reluctant to overrule prior decisions when the court concludes they are wrong. See Kersten Co. v. Dep't of Soc. Servs., 207 N.W.2d 117, 121 (Iowa 1973). Past decisions should not "maintain a clearly erroneous result simply because that's the way it has been in the past." Id. Rules and cases "cannot live beyond the life of the justification responsible" for their existence. See State v. Gaskins, 866 N.W.2d 1, 17 (Iowa 2015) (Cady, C.J., concurring specially).

In addition, cruel and unusual punishment cases cannot rest on what has been decided before, as the conception of cruel and unusual punishment changes over time. State v. Lyle, 854 N.W.2d 378, 413-14 (Iowa 2014) (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 standards have changed since Lyle. "[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. The court's past

understanding was wrong and now should extend individualized sentencing to defendants slightly above the age of 18, like Mr. Dorsey.

The State complains that Mr. Dorsey's arguments are policy arguments. This is incorrect. Mr. Dorsey is arguing that the court's cutoff date of 18 is arbitrary. The principle that "the State must not arbitrarily inflict a severe punishment." Furman v. Georgia, 408 U.S. 238, 382 (1972). The "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 the court's cutoff is arbitrary, it makes the punishments that the court metes out because of it cruel and unusual, which are illegal. It is a legal argument. Although it is true that not inflicting cruel and unusual punishment is also good policy.

In addition, normative values about what should be done are always part of any cruel and unusual punishment legal analysis. "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)).

The State argues that "[i]t would be bizarre to declare that 18-year-olds are presumptively capable of serving as jurors in a murder trial, but are also too immature to recognize the depravity and illegality of murder." This is bizarre

because no one has claimed it. Not even the court opinions abolishing LWOP sentences for juveniles claim that they cannot recognize the depravity and illegality of murder. Rather, there are factors that juveniles have that means the court must individualize their sentencing. Many 18-year-olds have those same features. Giving a harsh punishment to one and not the other is arbitrary. The court can declare that juveniles and adults are "constitutionally different", but it is ultimately arbitrary, has no basis in the text or the history of the constitution, and only exists because a judge said it was so.

The State argues that retribution is not mentioned by Mr. Dorsey. Appellee's Br. at 28-29. That is because retribution is not part of the consideration of sentencing in Iowa. Iowa Code § 901.5 instructs the court to consider which sentence "in the discretion of the court, will provide maximum opportunity for the rehabilitation of the defendant, and for the protection of the community from further offenses by the defendant and others." It does not mention retribution, nor instruct the court to consider retribution, or consider how mad the court is at the defendant. Sentences are decided by law and for the best of the community and the defendant in Iowa, not to satisfy the urge to punish for the members of the community that most want to punish.

The State then argues that deterrence is an adequate reason for imposing severe sentences for deliberate killing. This is hardly relevant and also uses the

general failure of deterrence to argue, somehow, for more deterrence. The mandatory sentence is already a paper tiger. Reviews on the scientific literature on the effect of severe sentences on deterrence of crime have found that it is it very small, and that deterrence is more likely to be found due to the certainty of capture. Aaron Chalfin and Justin McCrary, Criminal Deterrence: A Review of the Literature, 55 Journal of Economic Literature 32 (2017). This deterrence rationale makes little sense then in determining whether the court needs to impose a particular sentence. See Thompson v. Oklahoma, 487 U.S. 815, 837 (1988) (discussing the deterrence rationale, saying it is an unconvincing rationale in juvenile death penalty cases because children under age 16 will not make a cost-benefit analysis of their behavior). Trying harder by giving out crueler and crueler and harsher and harsher sentences for a rationale that does not even work is part of the reason doing this to juveniles is cruel and unusual in the first instance. Including Mr. Dorsey in a group of defendants who must be given harsh sentences, whether that applies to him or not, is another reason why it is cruel and arbitrary. Punishing someone harshly that does not deserve it in order to teach some vague lesson to another is cruel to the very core. Typical aggravating factors, such as deterrence, and incapacitation are inherently and significantly weaker when sentencing juveniles, which is why they do not receive automatic mandatory minimum sentences. See State v. Lyle, 854 N.W.2d 378, 413-14 (Iowa 2014). Mr. Dorsey was five days removed from being a juvenile.

There is no real rationale why he must be given a mandatory life sentence in order to teach a lesson to others.

The State then criticizes Mr. Dorsey's case-by-case approach for treating 18-year-olds in the same manner as it treats juveniles, or to allow for individual sentencing. It does so first by noting that in practice, Dorsey's advocacy for individualized sentencing cannot work, because there are studies that show that black adolescents are judged as more adult-like than white adolescents who've committed the same crimes. See Appellee's Br. at 30 (citing LAURENCE STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE 196–97 (2015)). There are also things like the clothing of defendants that can make them seem more adult-like. See Appellee's Br. at 30. First, this is why the court uses objective factors to determine sentences rather than biases, like the age and features of youthful behavior, family and home environment, circumstances of the crime, legal incompetency, and capacity for rehabilitation to decide sentences and not the clothes a defendant is wearing or their race. See State v. Roby, 897 N.W.2d 127, 143 (Iowa 2017). Second, treating all defendants equally harshly in order to protect them from possible judicial discrimination because of their race is in no sense a criminal justice system at all. The legislature and the court already trust judges to pick from a wide variety of sentences for misdemeanors, with nary an objection from the State that this may cause disparity in outcomes because

some defendants receive probation and some receive prison.

The State's defense of the brightline rule comes down to a dubious deterrence theory and a desire to treat all defendants harshly so that a court can never use it's discretion to be lenient to some defendants and not others on the basis of race. These are arbitrary justifications that do little to answer the question of why Mr. Dorsey must spend the rest of his life in prison when if he committed the same crime six days before, he would not. It is not a denial the punishment is not arbitrary, and can barely be called a defense of arbitrary punishment. The brightline does not need to exist. The perpetuation of the brightline rule is the perpetuation of unjust punishments for the sake of judicial ease. It can only be called cruel.

III. A LIFETIME IN PRISON FOR BEING 5 DAYS OVER 18 IS GROSSLY DISPROPORTIONATE

Mr. Dorsey maintains that error was preserved but also argues that it is unnecessary for the court to decide the issue as again, illegal sentence and gross disproportionality 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). The State's argument on this issue is that the record is not sufficient for the court to decide the issue (Appellee's Br. at 35), but also that Mr. Dorsey should be foreclosed from making this argument to the district court in the future (Appellee's Br. at 38) in the future, and also that the court should not just refuse to rule on the issue but also that the court should deny the claim on the existing record. (Appellee's Br. at 39). The

State should pick one. The State is not really arguing that the record is insufficient to address the issue, it just wants to make an "error preservation" argument when one is obviously not available.

In State v. Bruegger, 773 N.W.2d 862, 885 (Iowa 2009), the appellant brought a gross disproportionality claim for the first time on appeal. The court thought that the record was inadequate to decide the claim, so the court remanded for both parties to develop the record. Id. at 886. If the court decides that the record is inadequate to decide the claim brought for the first time on appeal, then it should remand like it has done in the past, not create a new rule whole cloth to please the State.

The State then argues that there are not any unique factors that create an inference of gross disproportionality between the underlying crime and Mr. Dorsey's sentence. Appellee's Br. at 40. The State claims "that each murderer's first killing must be punished with harsh retribution and zero margin for error on incapacitation" and that "[t]his is settled law." This is obviously not settled law as LWOP sentences are not only not mandatory for "each murderer", but completely illegal and unconstitutional for certain classes of defendants. See State v. Sweet, 879 N.W.2d 811 (Iowa 2016) (banning LWOP for juveniles convicted of First Degree Murder).

The State argues that Mr. Dorsey was not punished for vicarious liability or for enhancements he received as juvenile, which is only a partial gross

disproportionality analysis. While what the State says is true, it is not the analysis, and reducing the analysis to solely the factors that were there in Brugger threatens to make the analysis "toothless", which it is not. See State v. Bruegger, 773 N.W.2d 862, 883 (Iowa 2009). One of the principles in analyzing gross disproportionality is that unique features of a case can create potential gross disproportionality. See State v. Oliver, 812 N.W.2d 636, 650 (Iowa 2012). Solely looking to the past factors ignores all the ways that the unique features of a case can create potential gross disproportionality. It does not require a broadly framed crime or a dramatic sentence enhancement.

In Mr. Dorsey's case, the unique features of the case are that he was only 5 days over the age of 18 when he committed the offense. Less than a week is the difference between life with the possibility of parole and life without the possibility of parole for Mr. Dorsey. All of the other factors that make a LWOP not just not mandatory, but illegal, were present for Mr. Dorsey. He was impetuous, immature, was subject to peer pressure, and had a less than fully developed brain like all the other juveniles. While it is "the sentence that awaits any adult who commits premeditated murder", Mr. Dorsey was close enough to not being an adult and had sufficient features that distinguished him from other adults, and more towards juveniles, that his LWOP sentence is grossly disproportionate. A difference of LWOP versus possible freedom is grossly disproportionate to a week's time.

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.

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/S/ Alexander Smith
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Alexander Smith