

IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 22-1062
Cerro Gordo County No. FECR030451

STATE OF IOWA,
Plaintiff-Appellee,

v.

DAVID DANIEL GORDON,
Appellant.

APPEAL FROM
THE DISTRICT COURT OF POLK COUNTY
THE HONORABLE
DISTRICT COURT JUDGE JAMES M. DREW

FINAL BRIEF FOR APPELLANT

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CERTIFICATE OF SERVICE

On the 1st day of August, 2023, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant Appellant David Daniel Gordon by placing one copy thereof in the United States mail, proper postage attached, addressed to said Appellant at 2811 105th Street, Belmond, IA 50421.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

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II. WHETHER THE COURT ERRED WHEN IT DETERMINED THAT IT COULD NOT SENTENCE GORDON TO A DEFERRED JUDGMENT AFTER A “SHOCK” SENTENCE TO PRISON?

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ROUTING STATEMENT

Pursuant to Iowa Rule of Appellate Procedure 6.1101(2), it is appropriate for this case to be retained by the Iowa Supreme Court. This appeal is from the granting of a Writ of Certiorari on November 3, 2022. This involves a legal principle not yet decided by any published opinion in the Court of Appeals or any opinion in the Supreme Court. Further, it involves cases presenting substantial questions of enunciating or changing legal principles.

STATEMENT OF THE CASE

NATURE OF THE CASE, THE PROCEEDINGS AND DISPOSITION OF THE CASE IN DISTRICT COURT

This is an appeal by Defendant-appellant David Gordon, from his conviction, judgment and sentence following his plea to Theft in the First Degree in violation of Iowa Code Section 714.2(1) and Willful Injury in violation of Iowa Code Section 708.4(2).

On May 20, 2021, criminal complaints were filed charging Gordon with two counts of Robbery in the First Degree in violation of Iowa Code Section 711.2. (Criminal Complaints; App. 21). A Trial Information was filed on June 1, 2021, charging Gordon with only one count of Robbery in the First Degree in violation of Iowa Code Sections 711.2, 711.1(1)(b), and 703.2 as well as a second count of Willful Injury Resulting in Serious Injury in violation of Iowa Code Section 708.4(1), 703.1 and 703.2. (Trial Information; App. 25).

A plea agreement was reached in which Gordon plead guilty to the amended charges of Theft in the First Degree and Willful Injury, no serious injury. (Guilty Plea; App. 28). The agreement left the parties free to argue the sentence itself. (Guilty Plea; App. 28).

Sentencing was scheduled and a presentence investigation was conducted. On May 23, 2022, Gordon was sentenced to a term of incarceration not to exceed 10 years on Count I. On Count II he received an indeterminate sentence not to exceed 5 years which was set to run concurrent to the first count. (Order of Disposition; App. 32).

On June 21, 2022, Gordon filed a timely notice of appeal. (Notice of Appeal; App. 36). Shortly following this, Gordon filed a Motion for Reconsideration of Sentence on June 28, 2022. (Motion for Reconsideration; App. 38). On September 27, 2022, a hearing was held on the motion in which the Defendant argued for a deferred judgment. The State did not resist this option and the Court ultimately agreed to a deferred judgment. However, after the judgment had been pronounced, the State argued that a deferred judgment could not be granted under a reconsideration action. (Reconsideration Trans. pg. 17; ln. 22-25; App. 17). The Court concluded as such and endorsed the Court of Appeals as the appropriate venue for the issue. (Petition; App. 45).

The Court then issued an order suspending the imposed sentences and placed Gordon on probation for a period of up to five years. (Order 09/27/2022; App. 43). Pursuant to the Court's advisement, the defendant

filed a Petition for Writ of Certiorari on October 27, 2022. (Petition; App. 45). The state filed their Resistance on October 31, 2022. (Resistance; App. 53).

The Court granted Gordon's request for Certiorari on November 30, 2022.

On November 30, 2022, Gordon filed an application to extend the deadline to file the proof brief in the pending appeal. The application also offered an alternative to stay the proceedings pending the resolution of the writ of certiorari. (App. to Ext.; App. 58). On December 9, 2022, the Court decided to consolidate the cases, and collapsed the certiorari case (22-1773) into the instant appeal at hand. (Order 12/09/2022; App. 60).

STATEMENT OF THE FACTS

On May 20, 2021, criminal complaints were filed charging Gordon with two counts of Robbery in the First Degree in violation of Iowa Code Section 711.2. (Criminal Complaints; App. 21). The allegation was that Gordon had stolen a cell phone from the alleged victim following a serious altercation.

Due to the injuries sustained during that altercation, the State filed a trial information which amended the second count to Willful Injury

Resulting in Serious Injury in violation of Iowa Code Section 708.4(1), 703.1 and 703.2. (Trial Information; App. 25).

A plea agreement was reached and on March 24, 2022, Gordon plead guilty to the amended charges of Theft in the First Degree and Willful Injury. Pursuant to the plea agreement, parties were free to argue the sentence. (Guilty; App. 28). In the plea, Gordon admitted as the factual basis the following:

- 1) I was with Jaden Edel and Dominic Fogarty on April 1st, 2021. We had a disagreement with L.S. and M.S. To clear the air, the five of us decided to meet in the woods near 15th St NE, Mason City in Cerro Gordo, Iowa. L.S. and Dominic engaged in a fist fight while there and after a few words. I saw Dominic losing the fight and M.S. getting involved, so I stepped in.
I cut L.S. with a knife to assault him. I intended to cause him pain, and I also intended and knew that being cut by a blade could result in serious injury, either by causing permanent disfigurement (scarring) or by endangering his life. I had the apparent ability to commit the act as I completed the act.
Despite the fact that I intervened to assist Dominick, I waive any claims of self-defense. I have lengthy discussions with my attorney, and I recognize that there were numerous other options that could have helped Dominick or avoided the situation entirely. I also recognize that the force I used was excessive due to the fact that I was wielding a knife.
- 2) During the same date and events described in paragraph 12, and after the fight between the five of us had ended, I went to M.S. and took his cellular phone out of his pocket, thereby removing the phone from his person. I knew his phone was in M.S.'s possession and belonged to him when I took it. My intention was to make certain that M.S. no longer had possession or control of

his phone. I threw the phone into a ditch to ensure that his M.S. would be without his phone permanently.

The Plea advised Gordon that he could not appeal a defect in the plea proceeding unless he filed a Motion in Arrest of Judgment alleging a defect. During the sentencing proceeding the Court advised Gordon that he had the right to appeal his sentence within thirty days of its Order. (Sent. Trans. pg 25; Ll 1-4; App. 12). The Defense argued for a deferred judgment, while the State argued for a 10-year indeterminate sentence. (Sent. Trans. pg. 17; ln. 9-14 & pg. 5; ln. 23-25; App. 9 & App. 8).

The Court sentenced Gordon to a ten-year term of prison. (Dispo Order; App. 32).

A motion to reconsider was subsequently filed. (Motion; App. 38). On reconsideration, the court initially granted the deferred judgment originally requested. (Reconsideration Trans. pg. 14; ln. 7-8; App. 16). However, the State cited *State v. Giunta* that established that the Court of Appeals could not grant a deferred judgment on a reconsideration. *Id.* 884 N.W.2d 226 (Iowa Ct. App. 2016). The court sided with the State and placed Gordon on probation, but declined a deferred judgment. (Reconsideration Trans. pg. 19; ln. 21-22; App. 18).

Any additional relevant facts will be discussed below.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN NOT GRANTING GORDON A DEFERRED JUDGMENT

Standard of Review and Preservation of Error:

This Court reviews challenges to sentences on an abuse of discretion standard. *State v. Cason*, 532 N.W.2d 755, 756 (Iowa 1995).

“If the sentence imposed is within the statutory limits, as it is here, we review for an abuse of discretion.” *State v. Majors*, 940 N.W.2d 372, 385–86 (Iowa 2020).

Error was preserved in this case when Defense Counsel advocated for a lesser sentence and subsequent filing of a Motion to Reconsider.

Law:

“A sentencing court's decision to impose a specific sentence that falls within the statutory limits “is cloaked with a strong presumption in its favor, and will only be overturned for an abuse of discretion or the consideration of inappropriate matters.” Our task on appeal is not to second-guess the sentencing court's decision. Rather, we must determine that its decision “was exercised on grounds or for reasons that were clearly untenable or unreasonable.” We afford sentencing judges a significant amount of latitude because of the “discretionary nature of judging and the source of respect

afforded by the appellate process.” *Id.* at 105–06 (citations omitted).” *State v. Martin*, No. 22-0021, (Iowa Ct. App. Jan. 25, 2023).

“A discretionary sentencing ruling, similarly, 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 (alteration in original) (quoting *People v. Hyatt*, 316 Mich. App. 368, 891 N.W.2d 549, 578 (2016), *judgment affirmed in part and reversed in part by People v. Skinner*, 502 Mich. 89, 917 N.W.2d 292, 295 (2018)). “Sentencing decisions of the district court are cloaked with a strong presumption in their favor.” *State v. Crooks*, 911 N.W.2d 153, 171 (Iowa 2018); *see also State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002).” *State v. Majors*, 940 N.W.2d 372, 385–86 (Iowa 2020).

“But if the court follows our outlined sentencing procedure by conducting an individualized hearing, applies the *Miller/Lyle/Roby* factors, and imposes a sentence authorized by statute and supported by the evidence, then we affirm the sentence. *Goodwin v. Iowa Dist. Ct.*, 936 N.W.2d 634,

637 (Iowa 2019); *see also* *Seats*, 865 N.W.2d at 552–53 (explaining our review for abuse of discretion and emphasizing the discretionary nature of judges). As we stated in *Formaro*, Judicial discretion imparts the power to act within legal parameters according to the dictates of a judge's own conscience, uncontrolled by the judgment of others. It is essential to judging because judicial decisions frequently are not colored in black and white. Instead, they deal in differing shades of gray, and discretion is needed to give the necessary latitude to the decision-making process. This inherent latitude in the process properly limits our review. Thus, our task on appeal is not to second guess the decision made by the district court, but to determine if it was unreasonable or based on untenable grounds.” *Id.*

““In applying the abuse of discretion standard to sentencing decisions, it is important to consider the societal goals of sentencing criminal offenders, which focus on rehabilitation of the offender and the protection of the community from further offenses.” *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002). Sentencing courts in Iowa generally have broad discretion to rely on information presented to them at sentencing. *See State v. Pappas*, 337 N.W.2d 490, 494 (Iowa 1983) (“[W]hatever Iowa statutes leave to the courts in matters of sentencing should be the responsibility of the sentencing

judge.”); *State v. Gartin*, 271 N.W.2d 902, 910 (Iowa 1978) (“[T]he decisions of the trial court are cloaked with ‘a strong presumption in [their] favor,’ and ‘[u]ntil the contrary appears, the presumption is that the discretion of the [trial] court was rightfully exercised.’ ” (Alterations in original.) (quoting Kermit L. Dunahoo, *The Scope of Judicial Discretion in the Iowa Criminal Trial Process*, 58 Iowa L. Rev. 1023, 1024 (1973))); *State v. Delano*, 161 N.W.2d 66, 71 (Iowa 1968) (holding the sentencing court may rely on any information to which the defendant did not object). A court “should weigh and consider all pertinent matters in determining proper sentence, including the nature of the offense, the attending circumstances, defendant’s age, character and propensities[,] and chances of his reform.” *State v. Cupples*, 260 Iowa 1192, 1197, 152 N.W.2d 277, 280 (1967).” *State v. Headley*, 926 N.W.2d 545, 550 (Iowa 2019).

Analysis:

On May 23, 2022, the Honorable James M. Drew entered a Sentencing Order sentencing Defendant to a ten-year prison term for the crime of Theft in the First Degree in violation of Iowa Code 714.1(1) and 714.2(1) (a Class C Felony); and Willful Injury in violation of Iowa Code 708.4(2) (a Class D Felony). (Order 5/23/2022; App. 32).

Gordon was initially charged on May 20, 2021. He was sentenced on May 23, 2022 – one year after the initial charges.

At the time of the offense, Gordon was only seventeen years of age. At the time of sentencing, he was a mere eighteen years of age.

The parties reached an agreement in this case as to the plea, but not the sentencing.

As part of the written plea of guilty, both parties were free to argue for any legal sentence. The State requested incarceration, while the Defense requested a deferred judgment and suspended sentence. The State's argument relied solely on the report and recommendations from the PSI. No additional evidence was presented.

The Court also referenced the PSI and the recommendation of the writer. However, there is absolutely no information as to why the writer made the recommendation for incarceration. It appears to be solely based on the violent nature of the offense and nothing more. Further, the PSI writer references a variety of needs for Gordon, such as, education, mental health, peer association, anger/hostility, etc. There is absolutely no reference as to how these needs were determined or if any evaluations were conducted on

Defendant to ascertain whether he in fact had these needs. (PSI, Conf App. 5).

Defense counsel offered and entered eight exhibits to corroborate their argument. (Def. Exhibits A, B, C, D, E, F, G, H; App. 63-92).

This Court must consider all pertinent information in determining which sentencing option “will provide maximum opportunity for the rehabilitation of the defendant, and for the protection of the community from this offense by the defendant and others.” Iowa Code §901.5; *accord State v. Robbins*, 257 N.W.2d 63, 70 (Iowa 1977) (“The duty of a sentencing judge in every case is to consider the available options, to give due consideration to all circumstances in the particular case, and to exercise that option which will best accomplish justice both for society and for the individual defendant.”). The relevant information, explained below, supports a deferred judgment in this case.

The court's decision in this case while referenced Gordon’s age at the time of the offense, did not give it the significant weight it should have been afforded. Additionally, it should have taken Gordon's maturity into account.

In 2014, the Iowa Supreme Court determined 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 our constitution." *State v. Lyle*, 854 N.W.2d 378, 400 (Iowa 2014), as amended (Sept. 30, 2014). While this case does not involve a mandatory minimum, the court's guidance on factors to consider is very relevant to a case like this.

The Iowa Supreme Court remanded the *Lyle* case to the district court to determine whether the mandatory minimum should apply with the following guidance:

The factors to be used by the district court to make this determination on resentencing include: (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.

State v. Lyle, 854 N.W.2d 378, 404 fn. 10 (Iowa 2014), as amended (Sept. 30, 2014) (citations omitted). In this case, the Court had a full range of options available from granting a deferred judgment, to conviction with a suspended sentence, to conviction and imprisonment, with all but a specified term of years suspended due to Gordon being only seventeen at the time he was sentenced.

The District Court did not consider any of the *Lyle* factors when doling out punishment in this case.

Many factors were relevant to Gordon, including whether the offenders' youth played a role in the crime's commission. The incident itself involved a brawl between several juveniles over a botched vape transaction. This in and of itself demonstrates "immaturity, impetuosity, and a failure to appreciate risks and consequences." Everyone involved agreed to meet in a wooded area to "discuss" a disputed transaction. Both the co-defendants and the victims were high school students. Interacting with other juveniles and making immature and stupid decisions were examples of this behavior.

In this case, it's critical to take the defendant's family life into account, which it does not appear the District Court did. Gordon tragically lost his father shortly before the commission of this offense.

According to research, while exposure to negative nonparental adult behavior is associated with negative youth outcomes, adolescents who have a strong parent role model may avoid the negative outcomes associated with negative adult behavior. *See*, “Negative adult influences and the protective effects of role models: A study with urban adolescents” N. M. Hurd, M. A. Zimmerman, and Y. Xue, *J Youth Adolesc.* 2009 Jul; 38(6): 777–789. It was discovered, specifically, that having a role model had protective effects on the externalizing behavior of adolescents (i.e., diminished the relationship between negative adult behavior and externalizing behavior). *Id.* The loss that Gordon has suffered clearly had a negative impact on his life as evidenced by the downward spiral he went on immediately following the death of his father. (Exh E; App. 67).

According to the PSI writer, there was no evidence that Gordon has a prior history of violence and he had not exhibited this reckless, dangerous behavior previously. *See* Scott & Steinberg, *Rethinking Juvenile Justice* at 60; *see also* Scott et al., *Transitional Legal Category*, 85 *Fordham L. Rev.* at 647 (“[B]ecause development of brain systems that regulate impulse control is more protracted, continuing into the early twenties, a period of vulnerability to risky behavior results ... [and may be likened to an]

‘accelerator’ [being] pressed to the floor, [while] a good ‘braking system’ is not yet in place.” (Footnote omitted.)). Further, the majority fails to recognize that our caselaw, and that of the United States Supreme Court, embraces the work of Steinberg and his colleagues for precisely the opposite proposition advanced by the majority and supported by the footnote. *See Roper*, 543 U.S. at 570, 125 S. Ct. at 1196; *Seats*, 865 N.W.2d at 557.

Gordon made good choices pending sentencing on this incident. He was having issues with a gang in his neighborhood. Rather than continue involvement/interactions with them, he began focusing on his future. He graduated from Belmon-Klemme High School, as well as held a steady job. He did not have any behavior issues at the school and was getting decent grades.

David was released on bond for twelve months while the case was pending. He appeared for his court cases and did not get into any trouble. This is indicative that he will do well on probation and that he has learned from his mistakes. Juveniles also have more of a propensity to rehabilitate than adult offenders. *See State v. Majors*, 940 N.W.2d 372, 387 (Iowa 2020).

The Court has recently delineated the standards for determining juvenile capability. The dissent in *Major*, quoting *State v. Lyle*, states,

“‘*First and foremost*, the time when a seventeen-year-old could seriously be considered to have adult-like culpability has passed.’ 854 N.W.2d at 398 (emphasis added). The first-and-foremost principle is entirely absent from the testimony of the expert and from the district court's opinion. First and foremost, lessened culpability for all juveniles under eighteen is the norm, not the exception. First and foremost, because “children are constitutionally different than adults,” they ordinarily cannot be held to the same standard of culpability as adults in criminal sentencing. *Miller*, 567 U.S. at 470–72, 132 S. Ct. at 2464–65. First and foremost, the default rule is that children are not subject to mandatory minimums of incarceration. *Roby*, 897 N.W.2d at 144 (citing *Null*, 836 N.W.2d at 74). First and foremost, “[m]itigation normally is warranted in all crimes.” *Id.* At 146.” *State v. Majors*, 940 N.W.2d 372, 396–97 (Iowa 2020).

The District Court put little emphasis on Gordon’s youth, which is illustrated by its determination that prison was the most appropriate sentence for Gordon initially. The Court certainly did not take the position that Gordon should have a lessened culpability due to his youth as many adult offenders would not have seen a prison sentence for this crime. The Court also failed to consider the attending circumstances. In this case, there was an

altercation between multiple teens, Gordon stepped in to defend his friend. This was not a crime out of malice, but a situation that due to his youth, Gordon did not recognize that there were better ways to handle the altercation then resort to significant violence. (Guilty Plea; App. 28).

“A “basic proposition” regarding this process is that “juvenile sentencing hearings are not entirely adversarial. The goal is to craft a ‘punishment that serves the best interests of the child and of society.’ ” *Roby*, 897 N.W.2d at 144 (quoting *Lyle*, 854 N.W.2d at 402).” *State v. Majors*, 940 N.W.2d 372, 393 (Iowa 2020). This sentence did not further the goal of rehabilitating Gordon. It was merely punitive.

In evaluating the best option to promote Gordon’s rehabilitation, this Court may properly consider whether Gordon is remorseful for his actions. *See State v. Knight*, 701 N.W.2d 83, 87 (Iowa 2005) (“A defendant’s acceptance of responsibility for the offense, and a sincere demonstration of remorse, are proper considerations in sentencing. They constitute important steps toward rehabilitation.”).

Gordon showed considerable guilt and remorse for his bad acts. During his allocution statement, he made a sincere apology to not only the victim in this case, but one of the other individuals present recognizing that

what he did to the victim also caused trauma to this other individual. Gordon recognized that it was stupid, immature and that when he was going down the path he went down thinking it was cool, he was wrong.

Gordon spoke about thinking he needed to be a tough guy and thinking that was how he was supposed to act. And without a strong role model to set him straight, he got involved with the wrong people, started using drugs and lost direction in his life. (Sent. T. pg 18; App. 10).

Gordon did not try to deflect the blame for his actions by stating it was because he was using that he committed this act. In fact, he specifically stated that they did not control his behavior. (Sent. T. pg 18; App. 10).

Gordon also had the insight to recognize that he did not make changes to his life alone, but with the help of his supports. He spoke about spending only 11 days in jail and it feeling like months. (Sent. T. pg 19; App. 11). This is indicative of someone who has learned from their mistakes and remembers what it was like to spend those 11 days in custody instead of just pushing the consequences aside. The jail time was impactful to Gordon.

The Court discounted Gordon's sincerity, basically saying that Gordon was doing and saying all the right things, but based on past

experience with other defendant's the court was skeptical. (Sent. T. pg 19; App. 11).

The Court put undue emphasis on other Defendants to come before it, versus that of Gordon specifically and what he had been doing pending sentencing in this case. This is not treating Gordon as an individual and essentially states that not only does Gordon have to do and say all the right things, but he also has to overcome the court's experience with other Defendant's who might have sounded sincere, but were not. This is an impossible task.

Gordon demonstrated his remorse by seizing the opportunities that were available to him. Gordon did not just play lip service to the Court. Gordon actually took real, tangible steps to change his life around. Gordon was charged in the spring of 2021. Gordon went back to school and has since received his high school diploma, even graduating early, worked, and worked to repair his relationships with his family. (Exh A; App. 63). Gordon did not commit any criminal offenses while this case was pending. (PSI, Conf App. 5).

Labeling Gordon a convicted felon at such a young age will not deter recidivism and in fact will have to opposite effect.

Employment helps formerly incarcerated people gain economic stability after release and reduces the likelihood that they return to prison, promoting greater public safety to the benefit of everyone. But despite the overwhelming benefits of employment, people who have been to prison are largely shut out of the labor market. “Out of Prison & Out of Work, Unemployment among formerly incarcerated people” *Prison Policy Initiative* <https://www.prisonpolicy.org/reports/outofwork.html>. The unemployment rate for formerly incarcerated people is nearly five times higher than the unemployment rate for the general United States population, and substantially higher than even the worst years of the Great Depression. *Id.* The rate of unemployment of formerly incarcerated is 27%. *Id.*

This is not because formerly incarcerated are not looking for work. Among 25–44-year-old formerly incarcerated people, 93.3% are either employed or actively looking for work, compared to 83.8% among their general population peers of similar ages. Though unemployment among formerly incarcerated people is five times higher than among the general public, these results show that formerly incarcerated people want to work. “Out of Prison & Out of Work, Unemployment among formerly incarcerated

people. *Id.* Incarceration, and a felony conviction of David will only serve as barrier to rehabilitation.

Giving a deferred judgment to Gordon is not just a slap on the wrist.

The probationer is not a free man, but is subject to surveillance, and to such restrictions as the court may impose. *State v. Jepsen*, 907 N.W.2d 495, 501 (Iowa 2018) (internal quotation marks and citations omitted).

A deferred judgment is not a benefit unless if and when it is earned by Gordon. The Court had the freedom to require up to five years of probation in this case. If the court was skeptical based on past experience, then the answer would be to give the deferred judgment, but then require a longer period of supervision to ensure that Gordon proves himself worthy. It is an abuse of discretion to not give it because others before Gordon have squandered the opportunity away or misled the court.

The Sentencing Court in this case failed to consider less restrictive options to rehabilitate Gordon.

“A sentencing court's mission is to consider all pertinent information before deciding which option “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.” Iowa Code §901.5. When

exercising its sentencing discretion, the court must weigh relevant factors such as the nature of the offense and attending circumstances; the defendant's age; and the defendant's character, propensities, and chances of reform. Iowa Code § 907.5; *State v. Leckington*, 713 N.W.2d 208, 216 (Iowa 2006).” *State v. Deschepper*, 946 N.W.2d 767 (Iowa Ct. App. 2020).

When Gordon committed this offense, he was seventeen years old. He also was not the only defendant in this matter. Gordon had codefendants of which have been sentenced and have received deferred judgements (Case No. FECR030450 and FECR0304052). Gordon understands that sentencing is determined on a case-by-case basis. However, the court cannot ignore this pertinent information. A conviction for this type of charge without the ability to expunge it would have dire, lifelong consequences for Gordon.

Gordon will face financial challenges as he begins his journey into adulthood. He does not have a significant skill set and no advanced education. With a conviction, and no chance of expunging his record, Gordon would be required taking menial jobs with limited pay and benefits, which is a major contributor to recidivism. Gordon participated in special education classes while in high school, receiving mostly B’s and C’s. (PSI, Conf App. 5).

A conviction will not only punish Gordon, but punish society in having a citizen limited in his ability to self-reliant. The State has an interest in not creating convicted felons at eighteen years of age.

Further, Gordon will not be living off his family, nor does he come from a wealthy family. Gordon's mother is a single mom who cannot afford to care for Gordon throughout his adulthood. Our youth face a growing crisis, with the rise in costs of education, and housing making it already difficult to sustain oneself with a college degree and decent paying job. Gordon is also Hispanic, which can have its own set of challenges. By labeling Gordon a felon, it creates additional barriers that increases the risk of Gordon becoming a reoffender. Society has an interest in ensuring that our youth get the best chances of success possible. This does not further those goals.

Gordon has a strong capacity for change as evidenced by not only what he has already accomplished, but as outlined below, how he responded when the Court ordered prison in this case.

To give due consideration to all circumstances in the particular case, and to exercise that option which will best accomplish justice both for

society and for the individual defendant would be to sentence Gordon to probation with a deferred judgment.

II. WHETHER THE COURT ERRED WHEN IT DETERMINED THAT IT COULD NOT SENTENCE GORDON TO A DEFERRED JUDGMENT AFTER A “SHOCK” SENTENCE TO PRISON?

Standard of Review and Preservation of Error:

The standard of review for this matter is abuse of discretion. *State v. Pappas*, 337 N.W.2d 490, 493-494 (Iowa, 1983), ([w]here a court fails to exercise the discretion granted to it by law because it erroneously believes it has no discretion, a remand for resentencing is required”). *State v. Washington*, 356 N.W.2d 192, 197 (Iowa 1984).

Our standard of review for rulings on questions of statutory interpretation is for correction of errors at law. *State v. Iowa Dist. Ct.*, 889 N.W.2d 467, 470 (Iowa 2017).

“We consider the court's failure to exercise its discretion a defective sentencing procedure to which our error preservation rules do not apply.” *See State v. Wilson*, 294 N.W.2d 824, 825 (Iowa 1980).

Nonetheless, error was preserved in this case as the issue was challenged and litigated at the reconsideration hearing. (Reconsideration Hrg. Pg 7; 13, 14, 21; App. 14-16, 19).

Law:

The District Court asserted that it did not have the authority to grant a deferred judgment based on its reading of *State v. Giunta*, 884 N.W.2d 226 (Iowa Ct. App. 2016) on a Motion to Reconsider a previously imposed sentence.

For a period of one year from the date when a person convicted of a felony, other than a class “A” or class “B” felony, begins to serve a sentence of confinement, the court, on its own motion or on the recommendation of the director of the Iowa department of corrections, may order the person to be returned to the court, at which time the court may review its previous action and reaffirm it or substitute for it any sentence permitted by law. Iowa Code Ann. § 902.4 (West).

Analysis:

On May 23, 2022, a judgement and sentence was filed in which the court sentenced the Defendant to a term of incarceration not to exceed ten years. (Dispo Order; App. 32).

On September 27, 2022, the District Court reconsidered defendant’s sentence and placed him on probation for a period of ten years. (9/27/22 Order; App. 43). In said Motion hearing, Defendant urged the Court to grant

the Defendant a deferred judgment arguing that Defendant was seventeen at the time the offense was committed, had no prior criminal history and was rehabilitated. The State did not dispute that this option was available to the court. The Court ultimately agreed to defer sentence in this matter.

(Reconsideration Hrg; pg 14; App. 16).

After the court had pronounced that as the judgment, and stated it intended to grant the deferred judgment, but before the record closed, the State cited to *State v. Giunta*, 884 N.W.2d 226 (Iowa Ct. App. 2016), an unpublished court of appeals opinion. The Court reviewed this case and determined that it was not allowed to impose a deferred judgement on a reconsideration of judgment, thus overturning its prior ruling. The Court further indicated that if the Appellate Court says that the Court has the authority to grant the deferred judgment, then it will be remanded and the court will (happily) grant the deferred if that option is available.

(Reconsideration Hrg; pg 24; App. 20).

The Defendant sought a Petition for Writ of Certiorari asserting that the Court could grant a deferred judgment and that its belief that it did not have the option to do so was in error. The Court granted the Writ on

November 2022 and subsequently consolidated it with the previous filed appeal in Gordon's case.

“The question becomes how we can review a trial court action where no appeal is provided. The answer, steeped in centuries of tradition, is to issue a writ of certiorari. Certiorari was developed to serve this very purpose. Its function is to correct substantial errors of law committed by a judicial or quasi-judicial tribunal which are not otherwise subject to review. 14 Am.Jur.2d *Certiorari* § 2, at 779 (1964). Certiorari is appropriate to challenge the authority of a trial court acting under Iowa Code section 902.4. *Sullivan*, 326 N.W.2d at 363.” *Tindell v. Iowa Dist. Ct. for Scott Cnty.*, 600 N.W.2d 308, 310 (Iowa 1999).

Cases that have previously been before this court do not appear to foreclose on the possibility that a deferred judgment can be granted on a Motion to Reconsider. In *State v. Broten*, the court considered whether reconsideration would allow for a deferred sentence and did not indicate that a deferred sentence was not allowed when a sentence is reconsidered, but rather opined that it was not applicable to Broten's specific case as he was convicted of a forcible felony. *State v. Broten*, 295 N.W.2d 453, 455 (Iowa, 1980).

“The phrase ‘or substitute for it any sentence permitted by law,’ constrains the type of sentence that may be imposed in place of the original sentence in cases in which reconsideration is permitted. This interpretation gives effect to both phrases in the section. It means in Broten's situation, however, that the court could not grant deferral or probation on reconsideration, because the sentencing court could not have done so originally.” *Id.*

This issue is not applicable in Gordon’s case as a deferred judgment was not statutorily unavailable.

In *State v. Iowa Dist. Court for Polk County*, the trial court granted the defendant a deferred judgment pursuant to Iowa Code 902.4 when it reconsidered the sentence originally imposed. The Court overturned the reconsidered sentence because the defendant had never been incarcerated, an element required for reconsideration, but made no indication in its ruling that the trial judge’s order to defer judgment after a motion to reconsider was otherwise improper. The Court stated:

The defendant relies on *State v. Wrage*, 279 N.W.2d 4 (Iowa 1979), to support its argument that reconsideration of a sentence is proper even without actual confinement. *Wrage* held that an application for reconsideration could be *filed* before commencement of the confinement ordered by the court, but it did not hold that reconsideration could be ordered in the absence of a judgment of

confinement. That case must therefore be distinguished. *State v. Iowa Dist. Ct. for Polk Cnty.*, 572 N.W.2d 587, 589 (Iowa 1997).

When legislative intent is considered, the Court makes it clear in *State v. Hildebrand* that "the legislature has demonstrated its ability to express its intent to eliminate sentencing options." 280 N.W.2d 393, 397 (Iowa 1979).

There are many situations where reconsideration of a sentence is not allowed, and many cases where deferred judgments are specifically disallowed. Prohibitions for deferred judgments are explicitly barred as it relates to both certain defendants as well as certain cases. *See* Iowa Code Section 901.5, 907.3. Had the legislature intended to disallow defendants such as Gordon from receiving a deferred judgment upon reconsideration of a sentence, or to disavow deferred judgments on reconsideration completely, it could have easily done so, just as it has done for many other situations.

Iowa Code 902.4 does not indicate that certain sentencing provisions are not on the table. In fact, it states the opposite when it uses the word "any" unequivocally. It is inarguable that a deferred judgment was a lawful sentencing option for the court on May 23, 2022 when the court imposed its original sentence.

The sentence and subsequent reconsideration in this case were equivalent to a "shock probation" sentence. The Courts have said: "As we

stated in *Sullivan*, 326 N.W.2d at 364, “[t]he concept of ‘shock probation’ which [section 902.4] embodies will ordinarily be an extension of the original sentencing process and, as such, will either be within the contemplation of the court well before the ninety days has expired, or, not at all.” *State ex rel. Johnston v. Dist. Ct.*, 362 N.W.2d 205, 208 (Iowa 1985). The Courts framed this concept as merely an extension of the original sentencing process and not a wholly new sentence.

The Appellate Courts should not foreclose this idea that the District Court can impose a sentence of incarceration to wake the Defendant up, especially for a young person who has committed a serious crime, and still grant a deferred judgment thereby allowing the Defendant to avoid the life-long consequences of certain convictions, to include the stigma of being a convicted felon very early on in life.

The outcome in *Guinta* is contradictory to the language of the statute and its own logic in the ruling.

““ ‘Deferred judgment’ means a sentencing option whereby both the adjudication of guilt and the imposition of a sentence are deferred by the court.” Iowa Code § 907.1(1).” *State v. Giunta*, 884 N.W.2d 226 (Iowa Ct. App. 2016). The *Guinta* court conceded that a deferred judgment is a

“sentencing option’.” There is no difference, semantics or otherwise, that indicate a difference between “sentencing option” and “any legal sentence.

A deferred judgment is a conviction – at least until it is expunged, upon successful completion of conditions precedent. Recent caselaw has been consistent with that characterization, thereby failing to differentiate it from just a probation sentence and placing it in the same category as any other sentence allowed by law.

“The district court, as did the court of appeals, properly applied the *Schilling* four-factor test to conclude Johnston's deferred judgment for eluding police was a “final conviction” for purposes of section 321.555(1) and supported the IDOT's revocation of Johnston's license.” *Johnston v. Iowa Dep't of Transportation*, 958 N.W.2d 180, 185 (Iowa 2021).

“We have on occasion adopted the compromise view that a deferred judgment remains a conviction until the defendant successfully completes his or her term of probation. *See State v. Birth*, 604 N.W.2d 664, 665 (Iowa 2000) (holding that “[u]ntil probation was completed[] and the deferred judgment expunged,” a guilty plea could be used for impeachment purposes under the Iowa Rule of Evidence requiring the witness to have been “convicted” of a crime).

For these reasons, we hold a deferred judgment constitutes a conviction for purposes of section 724.26 where the defendant (as here) has not completed his term of probation.” *State v. Deng Kon Tong*, 805 N.W.2d 599, 603 (Iowa 2011).

A deferred judgment is a method of expunging the conviction from one’s record upon successful completion of probationary requirements. It is not removing the adjudication of guilt. ““Expunged” means the court’s criminal record with reference to a deferred judgment or any other criminal record that has been segregated in a secure area or database which is exempted from public access.” Iowa Code Ann. § 907.1 (West).

A court certainly has to accept a guilty plea and find that one is in fact guilty of committing a crime prior to sentencing where a court may or may not grant a deferred judgment. Once expunged, the criminal record is merely removed from public view.

While it is rarely discussed or utilized, the option of a deferred sentence would too have been before the court, but was not acknowledged as a sentencing option. A deferred sentence is certainly a sentencing option before the court, which does not implicate a deferred judgment. The court should answer this question as well, can the court, on reconsideration, order

a deferred sentence as a legal sentencing option as it is certainly defined as one under the code?

This case is unique in that it is not a question of whether the District Court failed to consider a deferred judgment or that it is unknown if the Court would be inclined to grant the said Deferred Judgment. The Court unequivocally stated that it intended to grant the Defense request to do so. The Court even indicated on the record that it hopes that the Appellate Courts overturn the ruling to not do so in this case.

This court should sustain the writ, and remand the case to District Court with instructions that the court can grant a deferred judgement or deferred sentence should it be inclined.

CONCLUSION

For the reasons stated above, David Gordon respectfully requests this Court to vacate the sentence imposed and remand to the district court for resentencing.

REQUEST FOR ORAL SUBMISSION

Appellant David Gordon does request that his counsel be heard orally by the court regarding all matters addressed herein.



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CERTIFICATE OF COST

I certify that the cost of printing this brief was \$2.50.

/s/Karmen Anderson _____

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because the brief contains 6,972 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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 proportionately spaced typeface using Microsoft Word in Times New Roman 14 pt. font.

/s/ Karmen Anderson
Karmen Anderson

08/01/2023
Date