IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. CAMERON JAMES HESS, Defendant-Appellant.	SUPREME COURT NO. 21-0079

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
HONORABLE SARAH CRANE, JUDGE

APPELLANT'S REPLY BRIEF AND ARGUMENT

MARTHA J. LUCEY
State Appellate Defender

JOSH IRWIN
Assistant Appellate Defender
jirwin@spd.state.ia.us
appellatedefender@spd.state.ia.us

STATE APPELLATE DEFENDER'S OFFICE
Fourth Floor Lucas Building
Des Moines, Iowa 50319
(515) 281-8841 / (515) 281-7281 FAX

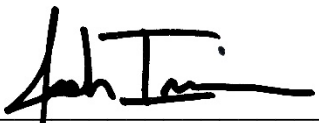
ATTORNEYS FOR DEFENDANT-APPELLANT

FINAL

CERTIFICATE OF SERVICE

On the 22nd day of December, 2021, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Cameron Hess, 9011 S 44th Ave. E, Newton, IA 50208.

APPELLATE DEFENDER'S OFFICE



Josh Irwin
Assistant Appellate Defender

JI/lr/12/21

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STATEMENT OF THE CASE

COMES NOW the Defendant-Appellant, pursuant to Iowa R. App. P. 6.903(4), and hereby submits the following argument in reply to the State's proof brief filed on or about December 1, 2021. While the defendant's brief adequately addresses the issues presented for review, a short reply is necessary to address certain contentions raised by the State.

ARGUMENT

I. Iowa Code section 901.5(13) is not solely applicable to mandatory terms of incarceration.

Iowa Code section 901.5(13) gives district courts substantial discretion in sentencing juvenile offenders. The broad, plain language of this section reaches more than just terms of mandatory incarceration. This is made apparent by the statement that "the court may suspend the sentence in whole or in part, including any mandatory minimum sentence, or with the consent of the defendant, defer judgment and sentence . . . ." Iowa Code § 901.5(13). The language "including any mandatory minimum sentence," referring back

to the more general word "sentence," reveals that the term sentence is being used broadly to cover *more* than just mandatory sentences of incarceration. While the section addresses the constitutional juvenile sentencing concerns of Miller v. Alabama and its progeny, the language permitting the court to defer judgment and sentence notwithstanding section 907.3 shows that section 901.5(13) goes further and grants courts dispositional options similar to those which exist in juvenile court but which are not constitutionally mandated. See In re O.P., No. 15-0239, 2015 WL 6508688, at *3 (Iowa Ct. App. Oct. 28, 2015) (unpublished table decision) ("Consent decrees in juvenile court are similar to deferred judgments in the criminal context" and "[a]s with deferred judgments and suspended sentences, the granting of a consent decree is a 'matter of grace, favor, or forbearance' not a matter of right.") (citations omitted).

The legislature easily could have restricted application of section 901.5(13) to sentences of incarceration by using that

word, but chose not to. An interpretation restricting application of section 901.5(13) to sentences of incarceration would ignore the plain language of the statute and substantially reduce its intended scope. While section 901.5(13) does give sentencing courts options to avoid unconstitutional sentences for juvenile offenders, the plain language of the section reveals that is not the sole purpose which it serves.

Conclusion

The plain language of Iowa Code section 901.5(13) permits deferring or suspending "the sentence," without limitation to only sentences of incarceration. While section 901.5(13) does play a role in preventing imposition of unconstitutional sentences on juvenile offenders, the statutory language demonstrates that it is not solely meant to address that issue.

II. Hess has sufficiently challenged the district court's conclusion that In re T.H. is inapplicable to his circumstances.

In concluding that In re. T.H. does not apply to juveniles being sentenced in criminal court, the district court relied on State v. Aschbrenner, 926 N.W.2d 240 (Iowa 2019). (Sentencing Tr. p. 145 L. 10–20). In his brief, Hess contends that In re T.H. does apply to juveniles being sentenced in criminal court, because the factors which led the Court to conclude that the registry is punishment when applied to juveniles lead to the same conclusion regardless of whether the adjudication takes place in juvenile or criminal court. Appellant's Brief pp. 40–47. It is inherent in that argument that the district court erred in reaching its conclusion to the contrary, and Hess cited authority to support his argument. See Iowa R. App. P. 6.903(2)(g). Hess has sufficiently challenged the district court's determination that In re T.H. does not apply to juvenile offenders adjudicated in criminal court.

Conclusion

Hess has not waived his challenge to the district court's determination that In re T.H. does not apply in his case. He presented argument that the district court erred and supported that argument with citations to authority.

III. In re T.H. was correctly decided and should not be overruled.

Only three years ago, after full litigation of the issue, the Iowa Supreme Court held that placing juveniles on the sex offender registry constitutes punishment, but was not cruel and unusual punishment for those adjudicated in juvenile court because of particular procedures that apply in that system. In re T.H., 913 N.W.2d 578, 596–97 (Iowa 2018). That decision was correct, and should not be overruled.

It is important to keep in mind that no single Mendoza-Martinez factor is dispositive—for instance, when the Court found that the many restrictions and requirements of the registry scheme make it "strikingly similar to probation," that in itself did not mean the scheme was punishment, but was

only one factor in the analysis that "weigh[ed] in favor of finding the statute punitive." See In re T.H., 913 N.W.2d at 589. It was only after balancing of all the Mendoza-Martinez factors that the T.H. Court correctly concluded the sex offender registry is punishment as applied to juveniles. See id. at 588–96.

The T.H. Court is not an outlier in its conclusions that the sex offender registry creates an affirmative disability or restraint, that it is similar to concepts historically regarded as punishment, and that it is excessive in relation to the legislative purpose. The Sixth Circuit, like the T.H. Court, discussed the registry's similarity to probation or parole, despite registration not being completely identical to those systems:

> [R]egistrants are subject to numerous restrictions on where they can live and work and, much like parolees, they must report in person, rather than by phone or mail. Failure to comply can be punished by imprisonment, not unlike a revocation of parole. And while the level of individual supervision is less than is typical of parole or probation, the basic mechanism and effects have a great deal in common. In fact,

> many of the plaintiffs have averred that SORA's requirements are more intrusive and more difficult to comply with than those they faced when on probation.

Does #1-5 v. Snyder, 834 F.3d 696, 703 (6th Cir. 2016); see also Starkey v. Oklahoma Dep't of Corr., 2013 OK 43, ¶ 49, 305 P.3d 1004, 1022–23 (Okla. 2013) (duty to report in person every 90 days, and to report changes in circumstances, "are similar to the treatment received by probationers subject to continued supervision"). The Sixth Circuit rejected the government's argument that the registry merely imposed "minor and indirect" restraints: "surely something is not 'minor and indirect' just because no one is actually being lugged off in cold irons bound. Indeed, those irons are always in the background since failure to comply with these restrictions carries with it the threat of serious punishment, including imprisonment." Does #1-5, 834 F.3d at 703.

The concern voiced in In re T.H. about dissemination of registrant information online, and particularly that the

information exceeds that contained in a court record, was also addressed by the Oklahoma Supreme Court:

> Although some of the information, such as conviction information, may otherwise be available, the internet has increased the unrestricted dissemination of personal information of sex offenders. The Department's website provides the sex offender registry in a searchable format. Anyone at any time and for any reason can find the address and picture of a registered sex offender along with the statute under which the offender was convicted and the level assigned. Other relevant information concerning the facts surrounding the conviction is not provided.

Starkey v. Oklahoma Dep't of Corr., 2013 OK 43, ¶ 54, 305 P.3d 1004, 1023–24 (Okla. 2013); see also Smith v. Doe, 538 U.S. 84, 109, (2003) (Souter, J., concurring) ("Widespread dissemination of offenders' names, photographs, addresses, and criminal history serves not only to inform the public but also to humiliate and ostracize the convicts. It thus bears some resemblance to shaming punishments that were used earlier in our history to disable offenders from living normally in the community.").

Finally, the T.H. Court found that, applied to juveniles,

mandatory sex offender registration is excessive in light of the nonpunitive purpose—preventing sex offense recidivism. In re T.H., 913 N.W.2d at 594–96. This year, the Colorado Supreme Court similarly concluded that the registry's poor impact on recidivism renders excessive its blanket, strict-liability application to juveniles. See In re T.B., 2021 CO 59, ¶¶ 56–57, 489 P.3d 752, 768–69 (Colo. 2021) ("Mandatory lifetime registration for juveniles . . . lacks a rational connection to, and is excessive in relation to, CSORA's nonpunitive purposes of protecting the community and aiding law enforcement in light of the low baseline recidivism rate for juvenile offenders and the narrow window during which juvenile offenders are likely to reoffend at all. Moreover, a number of studies indicate that registration requirements have no statistically significant effect on reducing recidivism rates among offenders.") (citing Molly J. Walker Wilson, *The Expansion of Criminal Registries and the Illusion of Control,* 73 La. L. Rev. 509, 523, 523 n.93 (2013)).

The conclusions of In re T.H. were correct at the time it was decided, and remain correct today. While not identical to probation or parole, the sex offender registry bears many similarities which are sufficient to conclude it imposes an affirmative disability or restraint. The publication of registrant information which exceeds that contained in a record of conviction, which is easily accessible to any person in the world at any time and could be preserved forever by a screenshot (and thus persist even in cases where the person is no longer required to register), weighs in favor of finding the scheme punitive. And most significantly, the burdens imposed on juvenile offender registrants are vastly excessive in light of the low rate of recidivism among juvenile offenders. In re T.H. correctly balanced the Mendoza-Martinez factors to conclude that the registry is punitive when applied to juvenile offenders, and nothing has changed since that decision to justify overruling it.

Conclusion

In re T.H. was correctly decided. Other courts conducting the Martinez-Mendoza analysis to determine whether the registry constitutes punishment have reached similar conclusions to those reached in T.H., and those factors continue to weigh in favor of the conclusion that the sex offender registry is punitive when applied to juvenile offenders. In re T.H. should not be overruled.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $2.18, and that amount has been paid in full by the Office of the Appellate Defender.

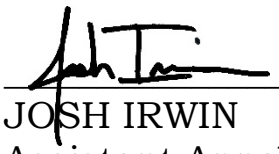
MARTHA J. LUCEY
State Appellate Defender

JOSH IRWIN
Assistant Appellate Defender

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

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

> [X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 1,679 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).



Dated: *12/22/21*

JOSH IRWIN
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
jirwin@spd.state.ia.us
appellatedefender@spd.state.ia.us