

IN THE IOWA SUPREME COURT

NO. 15-0829

STATE OF IOWA,

PLAINTIFF-APPELLEE,

vs.

KHASIF RASHEED WHITE,

RESPONDENT-APPELLANT.

**POLK COUNTY FECR230747; FECR232323; FECR235343
HONORABLE DISTRICT COURT JUDGE JEFFREY D. FARRELL**

**APPELLANT – KHASIF RASHEED WHITE FILES APPLICATION FOR
FURTHER REVIEW PURSUANT TO IOWA RULE
OF APPELLATE PROCEDURE 6.1103 FROM A RULING BY THE
IOWA COURT OF APPEALS FILED SEPTEMBER 16, 2016.**

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CERTIFICATE OF SERVICE and FILING

I certify that I served a copy of this Application for Further Review and Brief on October 4, 2016 by E-filing it with the Clerk of the Iowa Supreme Court and mailing a copy to:

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. DID THE SENTENCING COURT ERR IN DETERMINING THAT THE LYLE FACTORS WERE CORRECTLY APPLIED TO THE DEFENDANT?

II. DID THE SENTENCING COURT ERR IN DETERMINING THAT SO LONG AS A SENTENCING COURT APPLIES THE LYLE SENTENCING PARAMETERS WHEN IMOPOSING A JUDICIALLY MANDATED MINIMUM SENTENCE FOR A JUVENILE, THE SENTENCE DOES NOT VIOLATE THE JUVENILE’S CONSTITUTIONAL PROTECTIONS FROM CRUEL AND UNUSUAL PUNISHMENT UNDER THE STATE AND U.S. CONSTITUTION?

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STATEMENT OF SUPPORT FOR FURTHER REVIEW

(1) This case presents a case of broad public importance that the Iowa Supreme Court should ultimately determine.

(2) The court of appeals has somewhat addressed, but left unresolved, an important questions of law should be specifically addressed by the supreme court as to whether or not there is judicial discretion in imposing mandatory minimum prison terms for juveniles.

See Iowa R. App. P. 6.1103(b)(1), (2), (4).

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an appeal from a re-sentencing order which confirmed an original sentence for a juvenile who was 17 years old when the crimes were committed. He entered a plea to three counts of Robbery 2nd degree, each of which carry a 10 year sentence with a 70% mandatory minimum of 7 years. See Iowa Code §711.3 and §902.12. All counts were run concurrent to each other.

B. COURSE OF PROCEEDINGS

On September 11, 2009, the State filed a Trial Information charging the Defendant, Khasif White, (“Khasif”) with Robbery in the second degree in violation of Iowa Code §711.1 and 711.3. (TI FECR230747; App. Pg. 1). On November 13, 2009 the State filed a second Trial Information charging Khasif, with Robbery in the second degree in violation of Iowa Code §711.1 and 711.3. (TI FECR232323; App. Pg. 4). On March 16, 2010, the State filed a third Trial Information charging Robbery in the first degree in violation of Iowa Code §711.1 and 711.2 and Burglary in the first degree in violation of Iowa Code §713.1 and 713.3. (TI FECR235343; App. Pg. 8). The charges stemmed from three separate incidents and Khasif was 17 years old when the crimes occurred.

Khasif entered an Alford plea on June 7, 2010 pursuant to a plea agreement and was sentenced on July 27, 2010. He was sentenced on three counts of Robbery in the second degree, each a 10 year sentence with a mandatory 7 year minimum, each to run concurrent with the others. (Original Sentencing Order; App. Pg. 19). On, September 22, 2014 Khasif caused to be filed a Motion to Correct Illegal Sentence pursuant to *State v.*

Lyle, 854 NW2d 378 (Iowa 2014). (Motion to Correct Illegal Sentence; App. Pg. 22).

In light of the recent Supreme Court decision in *Miller v. Alabama*, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), and *State v. Lyle*, Khasif made application on September 22, 2014 to correct an illegal sentence alleging his sentence violated Iowa Const. art. I, §17 and U.S. Const. Amend VIII provisions for being cruel and unusual as applied to juveniles convicted of crimes which result in mandatory minimum sentences. The trial court heard this motion on May 1, 2015 and then entered an order on May 4, 2015 which confirmed the original sentence with the mandatory minimum term of 7 years. (Re-Sentencing Order; App. Pg. 25).

STATEMENT OF RELEVANT FACTS

Mr. Khasif White was 17 years old when he was convicted of Second Degree Robbery in violation of Iowa Code §711.2 and 711.3 in 2009. He was then sentenced to the 10 years in prison with a mandatory minimum sentence of seven years before he would be eligible for parole under the Iowa Code §902.12.

Testimony at the sentencing hearing revealed that Khasif has experienced significant trauma in his childhood as presented through the

testimony of his mother, Diyonda Avant White. Ms. Avant White testified that young Khasif never had the advantage of having a father figure in the home because when Khasif was very young, his father was absent. (App. Pg. 33). When his father returned to the family home when Khasif was high school age, his father was very abusive to his mother. The experience of being in a home where his mother was physically abused right in front of him, had a profound effect on him. (App. Pg. 36, 37). It was at this time that he fell in with the wrong crowd and started acting out, engaging in shoplifting and other crimes. (App. Pg. 33).

Prior to the time when Khasif's father returned to the home and disrupted the home by physically abusing his mother, Khasif had a positive group of friends, he was a leader at school and had a strong parental figure in his mother. (App. Pg. 33-35). Many of those friends were at the court hearing to support him and continue to encourage him. (App. Pg. 33). Additionally, Ms. Avant White testified as to the changes that she has seen in her son since he has been incarcerated. She stays in contact with his counselor and is aware that he has been selected to present a talk to other juveniles about choices and consequences, he has obtained employment in receiving, he has also learned skills as a plumber which he hopes to use

when is released as well as obtain his commercial drivers license. (App. Pg. 35, 38, 41).

Testimony about his progress was in contrast to evidence that life in prison has been a struggle for Khasif and that he did not initially want to be seen as soft so he got into fights. (Prison progress report; App. Pg. 23). Khasif testified on his own behalf about how difficult the transition was and what he needed to do to keep himself safe. He has goals and plans and wants to move forward. (App. Pg. 40, 42).

I. DID THE SENTENCING COURT ERR IN DETERMINING THAT SO LONG AS A SENTENCING COURT APPLIES THE LYLE SENTENCING PARAMETERS WHEN IMPOSING A JUDICIALLY MANDATED MINIMUM SENTENCE FOR A JUVENILE, THE SENTENCE DOES NOT VIOLATE THE JUVENILE’S CONSTITUTIONAL PROTECTIONS FROM CRUEL AND UNUSUAL PUNISHMENT UNDER THE STATE AND U.S. CONSTITUTION?

In *State v. Lyle*, 853 N.W.2d 378 (Iowa 2014), the Iowa Supreme Court held that the Iowa constitutional protection against cruel and unusual punishment categorically prohibited statutorily mandated minimum sentences because such mandatory minimums fail to serve the legitimate penological goals and “pose to great a risk of disproportionate punishment.” *State v. Lyle* 853 N.W.2d 378, 395 (Iowa 2014) (quoting

Miller v. Alabama, 132 S.Ct. 2455, 2479, 183 L.Ed. 424 (2012).¹ The imposition of a minimum sentence for a juvenile, for any reason, fails to serve a legitimate purpose because by its imposition it deems a juvenile unamenable to rehabilitation, at least for a specified period of time. If the juvenile does demonstrate rehabilitative actions during the period mandatory incarceration, and is denied access to parole, then how can that extended period of time, without access to parole, be anything but disproportionately punitive? This court should take the *Lyle* rationale that found statutory mandatory minimum terms of incarceration for juveniles constitute cruel and unusual punishment under the State of Iowa Const. art. I, §17 and US Const. Amend VIII.

Mandatory minimum sentences may actually inhibit rehabilitation rather than facilitate it because certain programs are not available until parole is imminent. Khasif was very much aware of this and stated so at his resentencing hearing when he asked the judge to drop the mandatory so he “could get everything completed and be able to go to the world and just to live my life.” (App. Pg. 42). Due to the mandatory minimum being imposed, Khasif isn’t even eligible to participate in much of the programming, which, obviously, does not help him demonstrate change

¹In *Lyle*, the court specifically did not address whether or not the imposition of a judicially mandated minimum sentence would be deemed unconstitutional for the same reasons a statutorily mandated minimum term of incarceration is unconstitutional.

and growth. The mandatory minimum then serves as a further penalty by preventing him from being able to participate in the very programming that will help him mature. (App. Pg. 39).

Once a juvenile demonstrates that his period of incarceration has led to his rehabilitation, then continued incarceration serves no legitimate purposes other than to carry out the terms that were imposed at the outset. If there is no legitimate goal of rehabilitation, and the continued incarceration does not promote any legitimate goal of protecting society, it is merely punitive and especially harsh on young offenders. On the other hand, if further rehabilitation is deemed necessary to provide for the safety of the community and the successful transition of the juvenile into that community, the parole board can utilize all the tools at their disposal in making that determination as the situation evolves. The sentencing court cannot be in a position to determine, at the time of sentencing, how or when the juvenile will respond to rehabilitative programming such as educational training, employment training, individual or group therapy, or any other programs that the juvenile may access while incarcerated. The parole board, however, will have all of that information and be in a much better position to determine whether or not to grant parole based upon what has been accomplished by the juvenile, rather than parole being

available on a predetermined date established by a sentencing court. Iowa Code §906.5(3) mandates that the parole board take into consideration all of those factors, and several others. Failure to allow release of juvenile through the parole process when the legitimate purpose of incarceration, rehabilitation, has been met, violates the constitutional proscription against cruel and unusual punishment. *State v. Louisell*, 865 N.W.2d 590, 598 (Iowa 2015). See also *Greiman v. Hodges*, 79 F.Supp.3d 933 (S.D. Iowa 2015)

Iowa Code §901.5(14)(2015) was amended since this juvenile's case began to provide sentencing courts with discretion in sentencing juveniles such that a statutory minimum term may be waived in whole or in part:

Notwithstanding any provision in §907.3 or any other provision of law prescribing a mandatory minimum sentence for the offense, if the defendant, other than a child being prosecuted as a youthful offender, is guilty of a public offense other than a class "A" felony, and was under the age of eighteen at the time the offense was committed, 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 or sentence, and place the defendant on probation upon such conditions as the court may require.

The amended statute does not specifically prohibit the sentencing court from imposing a mandatory term in excess of the statutory minimum term. Giving a sentencing court discretion to impose any mandatory minimum

term on a juvenile, is completely contrary to the sweeping changes occurring in the sentencing of juveniles both in Iowa and nationwide. It is time to recognize that any mandatory minimum, whether statutory or discretionary, is unacceptable to this society. This court has previously indicated as much:

“Overall, it is becoming clear that society is now beginning to recognize a growing understanding that mandatory sentences of imprisonment for crimes committed by children are undesirable in society. If there is not yet a consensus against mandatory minimum sentencing for juveniles, a consensus is certainly building in Iowa in the direction of eliminating mandatory minimum sentencing.” *State v. Lyle*, 853 N.W.2d 378, 389 (Iowa 2014).

Further support for the instant case is found in the fact that two of the three charges which Khasif White plead guilty to, 2nd Degree Robbery, which carried the mandatory minimum sentence of 7 years, could not even be charged as 2nd Degree Robberies at the time he was resentenced on remand. If the crimes were committed later, he could only be charged with Aggravated Theft under Iowa Code §714.3A(1), an aggravated misdemeanor with no minimum term of incarceration. Both the sentencing court and the appellate court failed to give any weight to this fact in affirming the

sentence imposing a mandatory minimum on Khasif White. Presumably, this change in the law was enacted to allow for a level of punishment more fitting the actions of an individual because the Robbery 2nd was simply too harsh. This fact should have been given much more weight upon resentencing and failure to do so by both the sentencing court and the court of appeals warrants further review.

Khasif White respectfully requests further review on this matter and that his sentence be vacated and that the matter be remanded for re-sentencing.

II. DID THE SENTENCING COURT ERR IN DETERMINING THAT THE LYLE FACTORS WERE CORRECTLY APPLIED TO THE DEFENDANT?

The court of appeals failed to consider how the sentencing court evaluated the five criteria that must be addressed when providing the now mandated individual sentencing hearing for juveniles convicted as adults:

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. See *Miller*, 132 S. Ct. at 2468, 183 L. Ed. 2d at 424; *Null*, 836 NW2d at 74-75; See also *Pearson*, 836 NW2d at 95-96; *Ragland*, 836 NW2d at 115.; *State v. Lyle*, 854 N.W.2d at 404 n. 10.

The appellate court determined that the sentencing court's cursory consideration of some factors, and significant emphasis on others, was sufficient to comply with the mandates required for individual sentencing established in *Miller* and further detailed in *Null*. However, the district court often considered the noted factors as aggravating rather than mitigating. This is reversible error under *Miller* and *Lyle*. *State v. Pearson*, 836 NW2d 88 (Iowa 2013).

The appellate court failed to give sufficient consideration to the sentencing courts emphasis on the crimes committed rather than the rehabilitative prospects and the other factors. If one factor is essentially ignored, so that other factors can overshadow that factor, then a detailed and meaningful individual sentencing cannot be accomplished. The appellate court stated that the emphasis to each factor is discretionary with the court and to limit the discussion of one, is not to say it has been considered an aggravating factor. But that approach fails to achieve the overriding goal of utilizing individual sentencing for juveniles to answer one basic question: why was the juvenile engaging in this criminal

behavior? If the sentencing court focuses almost entirely on the crime committed, and not the whole picture of what led up to that crime, and imposes a discretionary minimum term equivalent to the statutory mandatory minimum, then the court is simply engaging in the same process as would be for an adult. An adult's motivation or background matters not when the crime committed requires incarceration for a specific period of time. A juvenile's motivation *must* be considered, or there is no distinction.

If the sentencing court can be determined to have adequately considered all the factors, by simply stating they have considered the factors, and then impose a sentence almost entirely on only one factor, that is no different than considering some factors as aggravating rather than mitigating. The sentencing court specifically stated that they were imposing the minimum based upon the crimes committed. *The factors I really tend to focus on more than others is one which would refer to the nature of offenses.* Emphasis added. (App. Pg. 43). This would be factor 3 under the *Miller* and *Null* analysis.

The sentencing court stated "If you commit one and you do it again and then do it again, I think as you repeated offenses, the appreciation of

the risk and consequences becomes greater through the additional offenses.” (App. Pg. 44-45).

This statement fails to consider all that is now known about the impulsivity of juveniles and their absolute inability to appreciate the risks. A juvenile is focused on the immediate situation, which peers are there influencing them, what they can gain and not what they have to lose:

Adolescents differ from adults and children in three important ways that lead to differences in behavior. First, adolescents have less capacity for self-regulation in emotionally charged contexts, relative to adults. Second, adolescents have a heightened sensitivity to proximal external influences, such as peer pressure and immediate incentives, relative to children and adults. Third, adolescents show less ability than adults to make judgments and decisions that require future orientation. The combination of these three cognitive patterns accounts for the tendency of adolescents to prefer and engage in risky behaviors that have a high probability of immediate reward but can have harmful consequences.

National Research Council. (2013). *Reforming Juvenile Justice: A Developmental Approach*. Committee on Assessing Juvenile Justice Reform, Richard J. Bonnie, Robert L. Johnson, Betty M. Chemers, and Julie A. Schuck, Eds. Committee on Law and Justice, Division of Behavioral and Social Sciences and Education. Washington, DC: The National Academies Press. Further, the sentencing court failed to even consider that the juvenile could not have been convicted of the same level of crimes if he

were charged today because the law has changed. The court of appeals noted this, but did not find it significant.

Khasif White respectfully requests that his sentence be vacated and that the matter be remanded for re-sentencing.

CONCLUSION

For the reasons stated above, Khasif White respectfully requests that this court grant further review, vacate his sentence, and remand this matter for re-sentencing.

COST CERTIFICATE

I hereby certify that the cost of printing this document was the sum of \$2.30.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

Based on a word count from Microsoft Word 2007 this brief contains approximately 3423 words *including* 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 uses a proportionally spaced, 14-point Georgia font.

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IN THE COURT OF APPEALS OF IOWA

No. 15-0829
Filed September 14, 2016

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KHASIF RASHEED WHITE,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Jeffrey D. Farrell,
Judge.

A juvenile offender appeals his sentence claiming it was unconstitutional
and the district court lacked statutory authority to impose it. **AFFIRMED.**

Jane M. White of Jane White Law Office, Des Moines, for appellant.

Thomas J. Miller, Attorney General, and Timothy M. Hau, Assistant
Attorney General, for appellee.

Considered by Vogel, P.J., and Doyle and Bower, JJ.

VOGEL, Presiding Judge.

Khasif White appeals his sentence for three counts of robbery in the second degree—crimes committed as a juvenile—asserting the district court erred in its consideration of the relevant sentencing factors, which resulted in an unconstitutional sentence. He also claims the court lacked statutory authority to sentence him to a minimum term of imprisonment. Because we conclude the district court properly considered the *Miller/Lyle*¹ sentencing factors and had statutory authority to sentence White to a minimum sentence, we affirm.

I. Background Facts and Proceedings

White entered an *Alford* plea to three counts of second-degree robbery, in violation of Iowa Code sections 711.1 and 711.3 (2009). In conjunction with a plea agreement, White was sentenced to ten years on each count to be served concurrently. White's sentence also included a seven-year mandatory minimum. At the time the crimes occurred, White was seventeen years old.

Following our supreme court's decision in *Lyle*, White filed a motion to correct illegal sentence. White sought resentencing in accordance with the factors addressed by the United States Supreme Court in *Miller*, 132 S. Ct. at 2468, as synthesized in *Lyle*. Following a hearing, the district court denied White's motion and left all aspects of the prior sentencing order in place, including the seven-year mandatory minimum sentence. In both its pronouncement on the record and written order, the court discussed the *Miller/Lyle* sentencing factors. Ultimately, the court decided the original sentence

¹ See *Miller v. Alabama*, 132 S. Ct. 2455, 2468 (2012); *State v. Lyle*, 854 N.W.2d 378, 404 n.10 (Iowa 2014).

was appropriate stating, “Removal of the mandatory minimum sentence is neither justified by the *Lyle* factors nor the general interests of protection of the public and defendant’s rehabilitation.” White appeals.

II. Standard of Review

The applicable standard of review when a defendant challenges a sentence depends on the specific nature of the challenge. *State v. Seats*, 865 N.W.2d 545, 552–53 (Iowa 2015). When a defendant challenges the legality of the sentence on constitutional grounds, we review the sentence de novo. *Id.* at 553. However, when a defendant challenges the legality of a sentence on nonconstitutional grounds, such as a lack of statutory authority to impose a sentence, we review the sentence for correction of errors at law. *Id.*

III. Consideration of *Miller/Lyle* Factors

White argues the district court erred in its consideration of the *Miller/Lyle* factors. Specifically, White claims the district court failed to fully consider some of the factors and improperly considered other factors as aggravating rather than mitigating. The State asserts the district court properly weighed all the *Miller/Lyle* factors and imposed a sentence within constitutional parameters.

In *Miller*, the Supreme Court held mandatory life without parole sentences for juvenile offenders violated the Eighth Amendment. 132 S. Ct. at 2469. The Court mandated sentencing courts consider the differences between juvenile and adult offenders, including the individual distinctions in defendants and crimes. *Id.* at 2469. Specifically, the Court pointed to:

- (1) the age of the offender and the features of youthful behavior, such as ‘immaturity, impetuosity, and failure to appreciate risks and consequences’;
- (2) the particular ‘family and home environment’

that surround the youth; (3) the circumstances of the particular crime and all circumstances relating to youth that may have played a role in the commission of the crime; (4) the challenges for youthful offenders in navigating through the criminal process; and (5) the possibility of rehabilitation and the capacity for change.

Lyle, 854 N.W.2d at 404 n.10 (citation omitted) (listing the *Miller* factors). In *State v. Null*, 836 N.W.2d 41, 74–75 (Iowa 2013), our supreme court discussed the *Miller* factors in detail and adopted them as factors to be considered when sentencing juvenile offenders in our state.

In *Lyle*, our supreme court held all mandatory minimum sentences for juveniles unconstitutional under article I, section 17 of the Iowa Constitution. 854 N.W.2d at 400. The court focused primarily on the differences between adults and juveniles. *Id.* at 402 (“Mandatory minimum sentencing results in cruel and unusual punishment due to the differences between children and adults.”). While the court prohibited the mandatory imposition of a minimum sentence to juvenile offenders, the court did not preclude the possibility of a sentencing judge ordering a minimum period of incarceration for juvenile offenders. *Id.* at 402–03. In describing the parameters sentencing judges must consider in resentencing juveniles previously sentenced under the mandatory minimum statute, the *Lyle* court endorsed the factors outlined in *Miller*. *Id.* at 404 n.10.

Because White was a juvenile when the crimes he pled to were committed, the district court was required to consider the five *Miller/Lyle* factors in resentencing White. *See id.* The court acknowledged its duty to apply the *Miller/Lyle* factors and specifically weighed each factor in resentencing White. The court noted that: (1) the three separate and distinct robberies committed by White weighed against a finding of immaturity and impetuosity; (2) White’s home

and family life was difficult due to his father's negative influence; (3) White had committed three separate offenses—two which were described as shoplifting and one which was more of a “classic” robbery; (4) White faced some challenges in navigating the criminal justice system but was represented by “experienced and respected” counsel; and (5) White's disciplinary record in prison showed “an unwillingness to change and lack of rehabilitation.” Between the written order and the record from the hearing, it is clear the court specifically considered each of the *Miller/Lyle* factors in resentencing White.

Further, the district court did not improperly treat factors as aggravating rather than mitigating the punishment. *Lyle*, 854 N.W.2d at 402 n.8 (“Clearly, these are all *mitigating factors*, and they cannot be used to justify a harsher sentence.” (emphasis in original)). Nothing in the court's order indicates that the *Miller/Lyle* factors were used to impose a harsher sentence against White. Rather, the court determined that some factors did militate in favor of White, but the court explained that a majority of factors did not. Factors that do not mitigate the punishment are not necessarily factors that aggravate the punishment; the court simply concluded the factors did not mitigate in favor of a lesser sentence.

Because the court properly considered each of the *Miller/Lyle* factors and because it considered the factors as mitigating, rather than aggravating, we conclude White's sentence was constitutional.

IV. Statutory Authority to Impose a Minimum Sentence

White next claims the district court lacked statutory authority to impose a minimum sentence because he asserts section 902.12—the mandatory minimum statute—was declared unconstitutional in *Lyle* and is no longer available.

White's claim misconstrues *Lyle*. Section 902.12 was not declared categorically unconstitutional in *Lyle*; rather, the constitutional infirmity arose when the statute was applied mandatorily to juvenile offenders. *Id.* at 402. The *Lyle* court explicitly held a minimum sentence could still be imposed on juvenile offenders after an individualized sentencing hearing:

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. Article I, section 17 only prohibits the one-size-fits-all mandatory sentencing for juveniles.

Id. at 403. The district court followed the precise procedure outlined in *Lyle* and left White's minimum sentence in place. We conclude the court had statutory authority to impose a minimum sentence.

V. Conclusion

As we conclude the district court properly considered all of the *Miller/Lyle* factors in resentencing White and had authority to impose a minimum sentence, we affirm the district court's ruling and White's sentence.

AFFIRMED.