IN THE COURT OF APPEALS OF IOWA

No. 2-228 / 11-1020
Filed August 8, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

GABRIEL DETRACE TAYLOR,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Ian K. Thornhill, Judge.

Gabriel Taylor challenges his first-degree robbery sentence, arguing the seventy-percent mandatory minimum constitutes cruel and unusual punishment. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Jerry Vander Sanden, County Attorney, and Nicholas Maybanks and Jason A. Burns, Assistant County Attorneys, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

TABOR, J.

Gabriel Taylor asks us to decide if a mandatory minimum sentence of seventeen and one-half years for his first-degree robbery conviction is grossly disproportionate to his conduct as a seventeen-year-old who aided and abetted an armed invasion of an apartment where he and two companions intended to steal marijuana and ended up fatally shooting the occupant. Taylor challenges his sentence under the cruel-and-unusual-punishment prohibitions in both the federal and state constitutions.

Given the substantial deference we accord the legislature's choice of penalties for various crimes and Taylor's decision to participate in this serious offense, knowing his confederate was armed, we reject his claim of gross disproportionality under the more exacting standard in the Iowa constitution.

I. Background Facts and Proceedings

On January 11, 2010, Taylor accompanied his friends, Denum Null and Johven Lee, to rob an apartment on First Avenue in Cedar Rapids.[1] Taylor knew of their intent to steal drugs from the occupants of the apartment and knew that Null was carrying a firearm. The trio arrived at Kevin Bell's apartment around 9:20 p.m. and knocked on the door. Bell was inside with his girlfriend, Morgan Bender, and five other people. The couple was watching television in the living room, while the other five occupants were in a back bedroom with the door closed. Bell asked who was knocking but received no response.

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[1] We base our factual recitation on the minutes of testimony, which Taylor agreed to be substantially true; the transcripts of Taylor's guilty plea and sentencing hearings; and the presentence investigation report.

When Bell opened the door, Taylor, Null, and Lee forced their way inside. Null brandished a .22 caliber handgun and repeatedly yelled: "Where's the fucking PS?"[2] One of the guests in the bedroom heard someone say: "you're in the wrong house." Bell argued with Null and told the "young kids" to leave. Taylor later recalled Bell trying to disarm Null. Null fired at least two rounds at Bell from close range. Bell fell to the ground, bleeding from the head. Null then took aim at Bender, who feared that he would shoot her as well.

The commotion in the living room drew one of Bell's other guests to the bedroom door. Upon realizing more people were in the apartment, the three intruders left. Taylor knocked on the door of a neighboring apartment, telling the occupant about the shooting and asking to come in. The occupant did not let Taylor in and instead watched him descend the stairs to the parking lot. Taylor fled the apartment complex in a van with Null and Lee. Officers arrived at the apartment and detected a very faint pulse from an unconscious Bell, but medical personnel ultimately were not able to revive Bell.

Later that night, Taylor called his cousin to tell him about the robbery and Null's shooting of Bell. Taylor sounded upset. The following morning, Lee told his roommate about the shooting, echoing Taylor's statement that the group intended to commit a "drug robbery." On the same morning, Null told his mother the three had "done something wrong" the night before. He confessed to shooting Bell and told her he had already disposed of the gun.

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[2] A State's witness was prepared to testify that "PS" meant "pounds of marijuana."

On February 1, 2011, Taylor turned himself in. The State charged Taylor, Lee, and Null with first-degree murder, in violation of Iowa Code sections 707.1 and 707.2(2) (2009). Taylor reached a plea bargain with the State whereby he agreed to enter a guilty plea to first-degree robbery and testify against Null. In exchange, the State would dismiss the murder charge against Taylor.

On March 29, 2011, Taylor entered a plea of guilty to first-degree robbery, a class "B" felony, in violation of Iowa Code sections 711.1 and 711.2. On June 3, 2011, the district court dismissed the first-degree murder charge and sentenced Taylor to a term of imprisonment not to exceed twenty-five years. The applicable sentencing statutes mandate that he serve seventy percent of the maximum term. *See* Iowa Code §§ 902.1, 902.12(5). The sentencing court rejected the defendant's constitutional objection to the mandatory minimum provision. On appeal, Taylor claims the mandatory minimum term required by section 902.12(5) is cruel and unusual punishment, given his age and passive role in the crime.

II. Scope of Review and Preservation of Error

Because Taylor is challenging the constitutionality of his sentence, our review is de novo. *State v. Bruegger*, 773 N.W.2d 862, 869 (Iowa 2009). This form of review requires our independent evaluation based on the totality of the circumstances presented by the entire record. *State v. Ochoa*, 792 N.W.2d 260, 264 (Iowa 2010).

Our supreme court decided a cruel-and-unusual-punishment challenge may be raised at any time. *Bruegger*, 773 N.W.2d at 871–72 (overturning

precedent that distinguished between sentences that were illegal because they exceeded statutory limits and unconstitutional sentences). In this case, Taylor raised his constitutional challenge before his sentencing hearing, but did not present additional evidence in support of his claim of disproportionality.[3] The State argues on appeal that Taylor is asking for a "second hearing to litigate whether his sentence is cruel and unusual as applied to him." We do not read Taylor's brief as asking to remand his case to further develop the record. Accordingly, we do not reach the question whether such a request would be barred by the doctrine of collateral estoppel.

III. Discussion

A. Legal Framework for Cruel-and-Unusual-Punishment Analysis

The Eighth Amendment to the United States Constitution declares "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend VIII. Our state constitution similarly prohibits cruel and unusual punishment. *See* Iowa Const. Art. I, § 17. ("Excessive bail shall not be required; excessive fines shall not be imposed, and cruel and unusual punishment shall not be inflicted."). These provisions "embrace[] the bedrock rule of law that punishment should fit the crime" and also recognize "that even guilty people are entitled to protection from overreaching punishment meted out by the state." *Bruegger*, 773 N.W.2d at 872.

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[3] By contrast, Bruegger raised his cruel-and-unusual-punishment claim for the first time on appeal. *See Bruegger*, 773 N.W.2d at 870. As a result, the record was inadequate to resolve the proportionality question, and the supreme court remanded for an evidentiary hearing. *Id*. at 886.

Our supreme court recently clarified the terminology of cruel and unusual punishment case law. *State v. Oliver*, 812 N.W.2d 636, 639–40 (Iowa 2012). New nomenclature replaces the previous distinctions between facial and as-applied claims. *Id*. Now a defendant's challenge to his sentence follows either a categorical approach, questioning the general sentencing practice, or performs a "gross proportionality" comparison of a particular defendant's sentence with the seriousness of the particular crime. *See id*. at 640 (citing *Graham v. Florida*, 130 S. Ct. 2011, 2022 (2010)).

Because Taylor does not contest the constitutionality of all minimum sentences mandated by section 902.12(5), his challenge falls within the second classification. This approach allows us to consider the particular circumstances of a case to determine whether the sentence imposed is unconstitutionally excessive. *See Oliver*, 812 N.W.2d at 649–50 (observing that under both the state and federal constitution, a defendant may prove his sentence is cruel and unusual by "emphasizing the specific facts of the case").

To determine whether Taylor's punishment is disproportionate to his offense, we apply the three-step test developed in *Solem v. Helm*, 463 U.S. 277, 290–92 (1983) (outlining the objective criteria to consider as "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions"). The first factor acts as an initial barrier that is difficult to cross. *See Bruegger*, 773 N.W.2d at 873 (noting "it is a rare case in which a threshold comparison of the crime committed and the sentence

imposed leads to an inference of gross disproportionality"). Only if a challenge survives this threshold test do we progress to the second and third *Solem* prongs. Those steps involve an intrajurisdictional review, in which we compare the sentence to that of other crimes within our jurisdiction, and an interjurisdictional analysis, in which we look to other jurisdictions' sentences for the same crime. *Id.*

Before *Bruegger*, Iowa's case law construing the state constitution's cruel-and-unusual-punishment clause aligned with the United States Supreme Court's interpretation of the federal clause. *Id.* at 882. *Bruegger* continued to apply the guidelines from federal case law, but held that, at least in some circumstances, a defendant may challenge a sentence "as cruel and unusual as applied." *Id.* at 883–84.[4] By doing so, the Iowa Supreme Court recognized Article I, Section 17 to be more than a mere recitation of the Eighth Amendment, stating: "[W]e conclude that review of criminal sentences for 'gross disproportionality' under the Iowa Constitution should not be a 'toothless' review and adopt a more stringent review than would be available under the Federal Constitution." *Id.* at 883.

The circumstances of the *Bruegger* case compelled the court's more exacting scrutiny of sentencing statutes under the state constitution. Bruegger committed third-degree sexual abuse, under Iowa Code section 709.4(2)(c)(4) (2005) by engaging in sex with a fifteen-year-old girl, an offense commonly

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[4] The *Bruegger* court noted, "a majority of the Supreme Court in *Ewing [v. California*, 538 U.S. 11 (2003)] seems to approve of an as-applied challenge" because the author analyzes whether the underlying facts of the case—rather than the statute—caused a sentence to be unconstitutional, and a four-person dissent "explicitly embraces the fact-specific approach" of previous caselaw. *Id.* at 876.

referred to as "statutory rape." *See id.* at 867. Under Iowa Code section 901A.2(3), an enhancement statute for repeat sex offenders, Bruegger's sentence increased from ten years to twenty-five years, subject to no more than a fifteen percent reduction in imprisonment.[5] *Id.* at 885 (describing this increase in his sentence as "geometric"). Bruegger committed his prior offense when he was twelve years old; a Minnesota juvenile court adjudicated him as delinquent for sexual misconduct with a younger child he was babysitting. *Id.* at 867.

The *Bruegger* majority pointed to three particular features in the case which created an "unusual convergence" posing a substantial risk that the punishment could be grossly disproportionate as applied: (1) a broadly framed crime, (2) the permissible use of the defendant's preteen juvenile adjudications as prior convictions for enhancement purposes, and (3) a dramatic sentence enhancement for repeat offenders. *Id.* at 885. But the court stopped short of finding the punishment to be cruel and unusual because the record was factually inadequate and remanded the case to the district court with instructions to apply the *Solem* test. *Id.* at 886.

In *Oliver*, our supreme court cited *Graham* for the proposition that federal constitutional challenges to a particular defendant's sentence, non-categorical challenges, are now analyzed in the same manner as the "as-applied" challenges under our state constitution. 812 N.W.2d at 649–50. But notwithstanding this parity, the *Oliver* court reiterated that when a defendant challenges his sentence under the Iowa constitution, "we will apply our more stringent gross-

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[5] *See* Iowa Code § 901A.1(2) (including an "adjudication of delinquency" within the definition of "prior conviction").

disproportionality review to the facts of his case." *Id*. at 650. The *Oliver* court followed the framework established in *Bruegger* to decide whether a sentence of life without parole under the enhancement statute at Iowa Code section 902.14(1) was grossly disproportionate to the circumstances of his third-degree sexual abuse conviction. *Id.* at 651–53. Ultimately, the court found no gross disparity: "After reviewing Oliver's case and comparing the gravity of his crime to the penalty mandated by the statute, we do not feel that section 902.14 imposes an unconstitutional punishment on Oliver." *Id.* at 653.

During our proportionality review, we keep four principles in mind. *See id.* at 650. First, we treat legislative determinations of punishment with great deference and are mindful that a sentence need not adhere to strict proportionality to remain constitutional. *See Bruegger*, 773 N.W.2d at 872 (opining that "a reviewing court is not authorized to generally blue pencil criminal sentences to advance judicial perceptions of fairness"); *see also Ewing*, 538 U.S. at 28 (emphasizing that a reviewing court does not "sit as a 'superlegislature' to second-guess these policy choices)). We presume the constitutionality of sentencing statutes and require the challenger to prove their unconstitutionality beyond a reasonable doubt. *State v. Tripp*, 776 N.W.2d 855, 857 (Iowa 2010) (noting the defendant "bears a heavy burden").

Second, although we impose a more rigorous review under the Iowa constitution than the test required under its federal counterpart, it remains rare that a sentence is so grossly disproportionate to the offense that it satisfies the *Solem*-test's threshold inquiry and warrants further review. *See Oliver*, 812

N.W.2d at 650 (citing Iowa cases in which defendants failed to meet this preliminary standard).

Third, when evaluating enhancement statutes, we regard a recidivist offender as more culpable and, therefore, more deserving of a longer sentence. *See id*. But unlike the situation in *Bruegger* and *Oliver* where the sentencing enhancement was based on recidivism, the minimum term imposed by section 902.12 is based on the violent nature of certain felonies. Taylor's juvenile adjudications[6] did not factor into the mandatory minimum sentence required by statute. Accordingly, the concept of recidivism is not central to Taylor's case.

Fourth, the *Oliver* court repeated the determination from *Bruegger* that unique features of a case could potentially "'converge to generate a high risk of potential gross disproportionality.'" *Id.* at 651 (quoting *Bruegger*, 773 N.W.2d at 884). Equipped with these general principles of law, we turn to the present facts and consider whether Taylor's sentence violates his rights under Article I, section 17 of the Iowa constitution.[7]

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[6] Taylor was first adjudicated delinquent for committing an assault causing bodily injury when he was twelve years old. In June 2009, the juvenile court adjudicated him delinquent for criminal mischief in the fourth degree. He was enrolled in the State Training School for Boys until December 18, 2009 (less than one month before he committed the instant offense).

[7] As noted above, Iowa courts regard our state cruel-and-unusual-punishment clause as more protective than its federal counterpart. *See Bruegger*, 773 N.W.2d at 883; *Oliver*, 812 N.W.2d at 650. Accordingly, although Taylor cites both clauses, an unconstitutional sentence under our state constitution would violate his federal rights as well.

B. Application of Legal Principles to the Instant Facts

We begin our analysis with *Solem's* threshold inquiry: does the harshness of the sentence create an inference that it is grossly disproportionate to the underlying offense? *See id.* at 650.

The State initially charged Taylor with felony murder. *See* Iowa Code § 707.1, 707.2(2). After reaching a plea agreement with the State, Taylor pleaded guilty to first-degree robbery. Sections 711.1 and 711.2 define that offense:

> A person commits a robbery when, having the intent to commit a theft, the person does any of the following acts to assist or further the commission of the intended theft or the person's escape from the scene thereof with or without the stolen property:
>
> 1. Commits an assault upon another.
> 2. Threatens another with or purposely puts another in fear of immediate serious injury.
> 3. Threatens to commit immediately any forcible felony.
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> . . . .
>
> A person commits robbery in the first degree when, while perpetrating a robbery, the person purposely inflicts or attempts to inflict serious injury, or is armed with a dangerous weapon. Robbery in the first degree is a class "B" felony.

The district court imposed Taylor's sentence as mandated by Iowa Code sections 902.9 and 902.12. Section 902.9 sets an indeterminate twenty-five year sentence for class "B" felonies:

> The maximum sentence for any person convicted of a felony shall be that prescribed by statute or, if not prescribed by statute, if other than a class "A" felony shall be determined as follows:
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> . . . .
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> 2. A class "B" felon shall be confined for no more than twenty-five years.

Section 902.12 mandates that offenders convicted of certain felonies serve seventy percent of their maximum sentence:

> A person serving a sentence for conviction of the following felonies, including a person serving a sentence for conviction of the following felonies prior to July 1, 2003, shall be denied parole or work release unless the person has served at least seven-tenths of the maximum of the person's sentence:
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> . . . .
>
> 5. Robbery in the first or second degree in violation of section 711.2 or 711.3

Categorical challenges to this sentencing provision have failed. *See State v. Lara*, 580 N.W.2d 783, 785–86 (Iowa 1998) (affirming as constitutional a twenty-five year prison sentence for first-degree robbery, of which defendant was required to serve eighty-five percent); *see also State v. Phillips*, 610 N.W.2d 840, 844 (Iowa 2000) (upholding sentence for second-degree robbery); *State v. Hoskins*, 586 N.W.2d 707, 709 (Iowa 1998) (same). Taylor does not contest the overall validity of this sentencing statute and instead argues that features present in his particular case render the seventy-percent minimum sentence unconstitutional as applied to him.[8] No previous appeal has addressed this type of challenge to section 902.12.

Taylor argues a danger exists that the mandatory minimum sentence imposed here was grossly disproportionate to his crime based on the following combination of factors: (1) a broadly defined crime of robbery carrying a "severe" mandatory minimum sentence; (2) his age and immaturity at the time he

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[8] We note that the mandatory minimum term prescribed by section 902.12 does not lead to a "geometric increase" in Taylor's overall sentence, in contrast to the situation for Bruegger under section 901A.2(3). *See Bruegger*, 773 N.W.2d at 885. Our supreme court has held that a sentence did not violate the Eighth Amendment simply because a portion of it is "mandatory." *See State v. Cronkhite*, 613 N.W.2d 664, 669–70 (Iowa 2000) (finding "Cronkhite's right to be free from cruel and unusual punishment is not violated by the mere fact he must serve eighty-five percent of his sentence").

committed the offense; and (3) his minimal participation in the robbery carried out by his two codefendants.

Given Taylor's argument, we initially consider whether first-degree robbery is a broadly defined crime. *See Bruegger,* 773 N.W.2d at 884–85 (describing "breadth of the crime" as an important factor and finding statutory rape to cover a "wide variety of circumstances"). Then we examine the additional features identified by Taylor—factors not previously contemplated by our cruel-and-unusual-punishment case law—to decide if they cause his sentence to be constitutionally excessive.

1. Breadth of the Offense

Taylor first contends the underlying crime of robbery covers a wide array of circumstances from "the simple threat of a street corner bully or thug to the orchestrated and armed invasion of a bank." The State counters that the sentencing provision at section 902.12 applies only to serious felonies, and therefore does not "sweep the least culpable in with the more culpable"—as was the concern in *Bruegger*. *Compare* 773 N.W.2d at 884–85 (discussing breadth of underlying crime of statutory rape which was enhanced with a prior sexually predatory offense under section 901A.2) *with Oliver*, 812 N.W.2d at 652 (declaring that section 902.14 was "not as broadly framed as 901A.2"). The State argues alternatively that even if section 902.12(5) does embrace varying levels of culpability, Taylor's participation in an armed robbery resulting in the shooting death of one victim and the terrorizing of a second victim ranks him among the more culpable perpetrators.

Taylor follows *Bruegger* by analyzing only the statute defining the underlying offense, while the State analyzes the enhancement statute. The parties submitted their briefs before the decision in *Oliver*, which finds it appropriate to look at both statutes. *See* 812 N.W.2d at 651–52. While we agree with Taylor that a variety of conduct can satisfy the elements of robbery, we are persuaded by the State's argument that, regardless of the breadth of the underlying criminal statute, Taylor's willing agreement to joint two confederates, one of whom he know to be armed, in a "drug robbery" placed on the more blameworthy end of the spectrum. Taylor's argument that robbery is a broadly defined crime does not support an inference of disproportionality when his particular conduct cannot be classified as the more innocent variety. The same reasoning applies to the enhancement statute. Section 902.12 imposes a minimum sentence for crimes involving violence toward another person. Because Taylor participated in a crime resulting in the victim's death, he is more culpable than others who qualify for the mandatory minimum sentence.

2. Youthfulness of the Defendant

Taylor asserts his age of seventeen when he committed the offense is another circumstance that marks his sentence as cruel and unusual as applied. He notes *Bruegger* found the defendant's age to be a key concern when contemplating the constitutionality of a punishment, referencing *Roper v. Simmons*, 543 U.S. 551, 569 (2005). *Roper* held the execution of individuals younger than eighteen violated the Eighth and Fourteenth Amendments because juveniles' lack of maturity and underdeveloped sense of responsibility prohibited

them from being reliably classified among the worst offenders. 543 U.S. at 575–76. In *Graham*, the United States Supreme Court imposed a categorical ban on sentences of life without parole for nonhomicide crimes committed by juveniles, reiterating that developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. 130 S. Ct. at 2034. In *Miller v. Alabama*, 132 S. Ct. 244, 2464 (2012), the Court held "the confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violates the Eighth Amendment." *Miller* held a sentencing court must consider an offender's youth before imposing "the harshest possible penalty for juveniles." 132 S. Ct. at 2475.

The State agrees the offender's age should be considered in the proportionality analysis, but emphasizes age is just one of many factors when considering the constitutionality of a sentence other than death or life without parole. *See Bruegger*, 773 N.W.2d at 883–84. The State points out Taylor was within one year of being an adult and he did not offer any evidence at the sentencing hearing to document his particular level of maturity.

While Taylor's age of seventeen is material to our assessment of the constitutionality of his particular sentence, it is not determinative. Citizens entrust the legislature with the power to enact appropriate criminal penalties and procedures. Our legislature decided that juveniles who were sixteen and seventeen should be originally charged as adults when they commit certain serious offenses. *See State v. Terry*, 569 N.W.2d 364, 367 (Iowa 1997) ("Having placed certain designated crimes committed by juveniles who have reached the

age of sixteen within the criminal court jurisdiction, the legislature presumably thought the need for adult discipline and legal restraint was necessary in these cases."). In deference to the legislature's thinking, we do not find that Taylor's status as an older teenager by itself creates a situation where his mandatory minimum sentence is disproportionate to his crime.

Taylor contends the sentence is disproportionate because he will have spent nearly half his life in prison before he is eligible for parole. While the minimum sentence of seventeen and one-half years is an onerous punishment, it is not of a kind with the death penalty or life without parole. *See Graham*, 130 S. Ct. at 2027 (recognizing that "a death sentence is 'unique in its severity and irrevocability'" and that "life without parole is 'the second most severe penalty permitted by law'"). In *Graham*, the majority reasoned that life without parole was "an especially harsh punishment for a juvenile" because a juvenile offender would "on average serve more years and a greater percentage of his life in prison than an adult offender." *Id*. at 2028. That same reasoning does not hold for the mandatory minimum term of years at issue here. Both an adult and a juvenile offender would serve the same time—seventeen-and one-half years—just at different stages of their lives. Taylor has not established that it would be more cruel or unusual for him to be in prison from the time he was eighteen until he was thirty-five than for another offender to spend his mid-life or twilight years behind bars.

In *Miller*, the majority noted that "children are different" when it comes to imposing "society's harshest punishments." 132 S. Ct. at 2470. But the *Miller*

holding is limited to mandatory sentences of life without parole. It does not extend to the mandatory term of years at issue here.

3. Defendant's Level of Participation in the Crime

Taylor next argues his sentence is unconstitutional because of his "minimum participation in the offense commanded and carried out by his codefendants." He argues that this factor, coupled with his youth and the broad definition of robbery, results in a sentence grossly disproportionate to the crime.

The record shows co-defendant Null stole the murder weapon a few weeks before the robbery, threatened and argued with Bell, and eventually shot him at close range. Null also disposed of the weapon. But Taylor was not an innocent bystander. He accompanied Null and Lee for the avowed purpose of committing an armed robbery. In his own words: "I knew someone was gonna get robbed for marijuana." Taylor admitted at the guilty plea hearing he knew Null was carrying a firearm to facilitate the robbery. Before the shooting, Taylor did not heed Bell's call for the "kids" who barged into his apartment to leave. And after the shooting, Taylor left the scene of the crime with his codefendants.

Even if Taylor was not the ringleader, the minutes of testimony supported the original trial information charging him with felony murder, at least as an aider or abettor or joint criminal actor. *See* Iowa Code §§ 703.1, 703.2; *State v. Hearn*, 797 N.W.2d 577, 580 (Iowa 2011) (acknowledging legislature's expression that those who aid and abet the commission of a public offense are to be "charged, tried and punished as principals"). While Taylor may not have intended Bell's death, it was highly foreseeable that the forced entry into an occupied apartment

by him and his confederates, armed with a weapon and with the purpose of stealing illicit drugs, could result in serious injury or death. *See State v. Speaks*, 576 N.W.2d 629, 633 (Iowa Ct. App. 1998) (upholding first-degree murder conviction under joint criminal conduct theory, and observing: "A murder is a reasonably foreseeable crime when using a gun to threaten robbery victims."). As the State asserts on appeal, "[t]he plea bargain itself was likely recognition of Taylor's youth and the possibility that he might be less culpable than his codefendants."[9]

4. Other Relevant Circumstances

To fully address the proportionality question, we consider the totality of underlying circumstances, including the mitigating factors identified by Taylor, as well as other "potential factors that tend to aggravate the gravity of the offense and magnify the consequences on [the victim]." *See Bruegger*, 773 N.W.2d at 886 (discussing the evidentiary hearing contemplated in the remand order). These aggravating factors include the impact of the defendant's conduct on the victim and the victim's family, his lack of remorse, the nature of services offered to the defendant after a juvenile adjudication and his inability to respond to such services, and the need to incapacitate the defendant through long-term incarceration. *Id*.

The crushing effect of the robbery-turned-homicide on the victim's family was evident from the impact statements presented to the sentencing court. For

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[9] We recognize Taylor's plea bargain—presumably to avoid a potential life sentence without the possibility of parole for felony murder—may be considered less beneficial in light of *Miller*'s holding. But the parties have not had an opportunity to consider that consequence.

example, Bell's father wrote: "My family and myself will never enjoy Kevin's presence or well being. He's gone too soon from our lives." The fact Bell was killed in the course of the robbery is a weighty consideration. Homicides differ from nonhomicide crimes "in a moral sense" which bears on the cruel-and-unusual-punishment analysis. *Graham*, 130 S. Ct. at 2027.

Moreover, according to the minutes of testimony, Bell's girlfriend feared she too would be shot when Taylor's accomplice pointed the gun at her. The dire consequences of Taylor's crime on the victims and their families support the conclusion his punishment was not grossly disproportionate to the gravity of the offense.

In deciding whether the sentence was unconstitutionally harsh, we also consider whether Taylor expressed remorse or took responsibility for his role in the robbery. *See Bruegger*, 773 N.W.2d at 886. Taylor opted not to exercise his right of allocution at the sentencing hearing. The sentencing record reveals some dispute over the extent to which Taylor expressed regret for what he did when interviewed for the presentence investigation report. But it is clear from the report that he minimized his involvement: "I went somewhere with two people who were going to buy some weed and someone got shot. I was an innocent bistander [sic]." Taylor's refusal to accept responsibility for his complicity in the armed robbery indicates that a longer sentence may be appropriate to impress upon him the seriousness of his conduct and to deter him from future criminality.

Finally, we consider Taylor's juvenile adjudications and whether he responded to the services he received in the juvenile system. In 2005, the

juvenile court adjudicated Taylor as delinquent for committing an assault causing bodily injury; he was under juvenile court jurisdiction until 2007. Less than two years later, the juvenile court adjudicated him as delinquent for fourth-degree criminal mischief. He was placed at the state training school in Eldora until December 2009. Taylor lived with his mother for just twenty-four days before he committed this robbery. Our record does not disclose the nature of the services Taylor received while adjudicated delinquent, but the rapidity of his reoffending shows he did not reform his behavior in response to juvenile court programming. This factor suggests the need to incapacitate Taylor through long-term incarceration. *See Oliver*, 812 N.W.2d at 653 (concluding defendant's criminal history detracted from an inference of gross disproportionality).

5. Summary

Even if Taylor's age and the fact that he did not act as the principal in the robbery appear as mitigating factors, those two features do not amount to the perfect storm of circumstances that would require us to find his punishment violated our state constitution. *Compare Bruegger*, 773 N.W.2d at 885 (highlighting "unusual convergence" of mitigating features), *with Oliver*, 812 N.W.2d 653–54 (finding no "unique combination of the features" that would support the inference of gross disproportionality in Oliver's case). In fact, several features of Taylor's case diminish the inference that his sentence is grossly disproportionate to the crime. Specifically, the gravity of the robbery was increased by the foreseeable killing of the victim. In addition, Taylor's failure to accept responsibility for the current offense and failure to reform following

repeated intervention by the juvenile court are circumstances that tip the scales toward finding the sentence constitutional.

After considering the features of Taylor's case, we do not find the mandatory minimum sentence of seventeen and one-half years to be grossly disproportionate to his crime. Because the punishment does not create an inference of gross disproportionality, we need not consider the second and third factors of *Solem*. *See Oliver*, 812 N.W.2d at 653.

In closing, we return to *Bruegger*'s admonition that it is not the job of courts to "generally blue pencil criminal sentences to advance judicial perceptions of fairness." 773 N.W.2d at 873. *Bruegger* reserved a finding of gross disproportionality for those cases where the sentence was "off the charts." *Id*. at 886. Taylor's mandatory minimum sentence of seventeen and one-half years (a length of time slightly longer than he had lived at the time he committed the robbery) may well score at the upper end of the sentencing scale. But given the circumstances here, both mitigating and aggravating, we cannot find the mandatory minimum is "off the charts"—even under the more exacting standard for proportionality imposed by our state constitution. We affirm in full the sentence imposed by the district court.

AFFIRMED.