SUMMARY
September 21, 2023

**2023COA83**

**No. 21CA1203, *Peo v Kennedy* — Crimes — Vehicular Homicide (DUI); Constitutional Law — Eighth Amendment — Cruel and Unusual Punishments — Proportionality Review — Per Se Grave or Serious Offenses**

A division of the court of appeals considers whether vehicular homicide under section 18-3-106(1)(b)(I), C.R.S. 2023, is a per se grave or serious offense in light of *Wells-Yates v. People*, 2019 CO 90M, ¶ 63. The division concludes that, because the offense is not grave or serious in every potential factual scenario, it should not be considered a per se grave or serious offense for purposes of proportionality review. *Id.* In so doing, the division disagrees with another division of this court that reached the opposite conclusion, albeit before *Wells-Yates*. *See People v. Strock*, 252 P.3d 1148, 1157-59 (Colo. App. 2010).

COLORADO COURT OF APPEALS **2023COA83**

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Court of Appeals No. 21CA1203
Larimer County District Court No. 18CR2412
Honorable Susan Blanco, Judge

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The People of the State of Colorado,

Plaintiff-Appellee,

v.

Kari Mobley Kennedy,

Defendant-Appellant.

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ORDER AFFIRMED

Division II
Opinion by JUDGE FOX
Furman and Richman*, JJ., concur

Announced September 21, 2023

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Philip J. Weiser, Attorney General, Melissa D. Allen, Senior Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Mulligan Breit, LLC, Patrick J. Mulligan, Denver, Colorado, for Defendant-Appellant

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2023.

¶ 1 In 2019, defendant, Kari Mobley Kennedy, pleaded guilty to (1) vehicular homicide under section 18-3-106(1)(b)(I), C.R.S. 2023; and (2) vehicular assault under section 18-3-205(1)(b), C.R.S. 2023. She received a combined sentence of twenty-nine years in the custody of the Department of Corrections for vehicular homicide (twenty-four years) and vehicular assault (five years). Kennedy petitioned for review of her sentence under Crim. P. 35(c)(2)(I), which the district court denied in a written order.

¶ 2 Kennedy appeals the district court's denial of her Crim. P. 35(c)(2)(I) motion on the grounds that the twenty-nine-year sentence is grossly disproportionate and violates the Eighth Amendment. Although we agree with Kennedy that the court erred by designating vehicular homicide as a per se grave or serious offense, we nevertheless conclude that her sentence does not give rise to an inference of gross disproportionality. Accordingly, we affirm.

## I. Background

¶ 3 On September 18, 2018, twenty-two-year-old B.S. drove with his mother and sister from Denver to Estes Park for a day trip. B.S. offered to drive the car back to Denver that evening. The family was traveling safely on Highway 36 toward Lyons when the car in front

of them suddenly veered off the road to avoid a car barreling down the wrong lane. B.S.'s car and the incoming car smashed into one another at a high rate of speed.

¶ 4 B.S. died at the scene. His mother, who had been sitting behind him, sustained severe injuries that left her partially paralyzed. B.S.'s sister was also injured.

¶ 5 Kennedy, the other driver, was unharmed. Bystanders noticed that she was visibly intoxicated. Several vodka shooters were in her car, some open and empty, some closed. Kennedy was arrested, and approximately two hours after the crash, her blood alcohol content (BAC) registered as 0.282g/100ml — three and a half times the legal limit.

¶ 6 This was not Kennedy's first experience drinking and driving. Kennedy had three prior drinking and driving offenses. She had struggled with alcoholism and addiction for years; indeed, she claimed she was driving to Estes Park that evening to check into a rehab facility.

¶ 7 Kennedy pleaded guilty to vehicular homicide for killing B.S. and to vehicular assault for seriously injuring his mother. Although the standard sentencing ranges for these crimes are four to twelve

years and two to six years, respectively, Kennedy pleaded guilty to an aggravated sentencing range. *See* § 18-1.3-401(1)(a)(V)(A.1), (6), C.R.S. 2023. This ratcheted the respective maximum sentences to twenty-four years and twelve years. *See* § 18-1.3-401(6). The aggravating factors were (1) Kennedy's extensive history of drinking and driving and (2) her degree of intoxication at the time of the accident. *Id.*

¶ 8 The prosecution sought twenty-two years for vehicular homicide and eleven years for vehicular assault, to be served consecutively. Kennedy asked for probation. After receiving statements from interested parties, the court conducted a sentencing hearing.

¶ 9 At the hearing's conclusion, the court imposed a twenty-four-year sentence for the vehicular homicide conviction. In so doing, it relied on Kennedy's three prior drinking and driving offenses and her failure to complete probationary sentences for those crimes. It also looked to the fact that, while released on bond for these charges, Kennedy repeatedly violated her bond conditions by drinking and abusing medication, which led the court to revoke it. Kennedy's history of driving while intoxicated and inability to stay

sober, combined with her extreme BAC level at the time of this crash, informed the court's conclusion that it simply "did not feel safe with [Kennedy] in the community." Finally, it imposed a five-year sentence for vehicular assault to be served consecutively — thus bringing Kennedy's total sentence to twenty-nine years.

¶ 10 Pursuant to Crim. P. 35(c)(2)(I), Kennedy sought review of her sentence. She claimed that, because both crimes were strict liability offenses, neither should be considered per se grave or serious for purposes of proportionality review. She reasoned that the absence of mens rea prohibited the court from examining her culpability. She also claimed that, in this instance, she was not particularly culpable because her mental illnesses drove her alcohol abuse.

¶ 11 The court disagreed. It first concluded that vehicular homicide under section 18-3-106(1)(b)(I) is per se grave or serious because it results in the death of another. The court then observed that the penalty here is not excessively harsh given the aggravating circumstances and the ongoing threat Kennedy poses to the community. But it agreed that vehicular assault under section 18-3-205(1)(b) was not a per se grave or serious offense. Nevertheless,

it concluded that the five-year sentence did not give rise to an inference of gross disproportionality because of the aggravating circumstances of the crime and Kennedy's ongoing threat to the community.

## II. Applicable Law and Standard of Review

¶ 12 The Eighth Amendment's prohibition on cruel and unusual punishment proscribes sentences that are grossly disproportionate to the crime. *Wells-Yates v. People*, 2019 CO 90M, ¶¶ 5, 10. Review of the constitutional proportionality of a sentence involves a two-step process: an abbreviated proportionality review and, if needed, an extended proportionality review. *Id.* at ¶¶ 7, 10.

¶ 13 Upon request, a trial court must conduct an abbreviated proportionality review of a defendant's sentence. *See* Crim. P. 35(c)(2)(I); *People v. Gee*, 2015 COA 151, ¶ 57. An abbreviated proportionality review involves a comparison of two subparts: (1) the gravity or seriousness of the offense and (2) the harshness of the penalty. *Wells-Yates*, ¶¶ 11-14, 18. The purpose of this comparison is to determine whether it gives rise to an inference of gross disproportionality — in other words, that the sentence is

grossly disproportionate to the gravity or seriousness of the crime. *Id.* at ¶ 7.

¶ 14 "[W]hether [a] crime is grave or serious depends on the facts and circumstances underlying the offense." *People v. Hargrove*, 2013 COA 165, ¶ 12, *abrogated on other grounds by Wells-Yates*, ¶¶ 16-17. The gravity or seriousness of an offense is determined by considering the "harm caused or threatened to the victim or society, and the culpability of the offender." *Solem v. Helm*, 463 U.S. 277, 292 (1983).

¶ 15 As for the harshness of the penalty, we may consider whether a sentence is parole eligible. *Wells-Yates*, ¶ 14. We consider parole eligibility because reducing the period of confinement reduces the harshness of the penalty. *Id.* Yet regardless of parole eligibility, the General Assembly's establishment of penalty ranges deserves "great deference." *Id.* at ¶¶ 14, 62. Accordingly, if a crime is grave or serious, and so long as the penalty is within the statutory range, the sentence is nearly impervious to attack. *Id.* at ¶ 62.

¶ 16 The exception to this framework is when a crime is designated as "per se grave or serious." In this context, the reviewing court skips the first subpart of the analysis (i.e., was *this specific crime*

grave or serious) and proceeds straight to an assessment of the harshness of the penalty. As our supreme court recognized, such a designation has significant consequences because it is nearly impossible to show that a sentence for a grave or serious crime is grossly disproportionate. *Id.* For this reason, a crime will not be considered per se grave or serious "unless the court concludes that the crime would be grave or serious in *every* potential factual scenario." *Id.* at ¶ 63 (emphasis added).

¶ 17 In sum, if the comparison of the gravity or seriousness of the crime and the harshness of the penalty gives rise to an inference of gross disproportionality, then the court must conduct an extended proportionality review. *Id.* at ¶ 8. But if the abbreviated proportionality review does not give rise to such an inference, no further analysis is required. *Close v. People*, 48 P.3d 528, 542 (Colo. 2002), *abrogated on other grounds by Wells-Yates*, ¶¶ 16-17.

¶ 18 We review de novo whether a sentence is grossly disproportionate in violation of the Eighth Amendment to the United States Constitution and article II, section 20 of the Colorado Constitution. *Wells-Yates*, ¶ 35.

## III. Discussion

¶ 19 We begin by examining whether vehicular homicide under section 18-3-106(1)(b)(I) is a per se grave or serious offense. After concluding that it is not, we then analyze whether Kennedy's twenty-nine-year sentence gives rise to an inference of gross disproportionality, ultimately concluding that it does not.

### A. Vehicular Homicide Under Section 18-3-106(1)(b)(I) is Not a Per Se Grave or Serious Offense

¶ 20 A person commits the strict liability crime of vehicular homicide, as relevant here, if the person operates or drives a motor vehicle while under the influence of drugs, alcohol, or both, and such conduct proximately causes the death of another. § 18-3-106(1)(b)(I). The district court concluded that vehicular homicide under section 18-3-106(1)(b)(I) is a per se grave or serious offense. The People urge us to reach the same conclusion; in support, they point to *People v. Strock*, in which a division of this court held that vehicular homicide under section 18-3-106(1)(b)(I) is a grave or serious offense because it results in the death of another person and the offender chose to drive while intoxicated. 252 P.3d 1148, 1158 (Colo. App. 2010). We decline to follow *Strock* for three

reasons.[1] *See People v. Smoots*, 2013 COA 152, ¶ 20 ("We are not obligated to follow the precedent established by another division, even though we give such decisions considerable deference."), *aff'd sub nom. Reyna-Abarca v. People*, 2017 CO 15.

¶ 21 First, since *Strock* was decided in 2010, the definition of a grave or serious offense has evolved based on our supreme court's 2019 directive to use the designation sparingly. *Wells-Yates*, ¶ 63. Indeed, we must only designate the "rare crimes" that "necessarily involve grave or serious conduct." *Id.* In our view, vehicular homicide while under the influence is not one of those rare crimes.

¶ 22 Second, the offense is not grave or serious in every potential factual scenario. *Id.* By way of example, imagine an individual who exceeds the prescribed dosage of a prescription medication and then crashes a golf cart into an infirm, elderly man thereby causing

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[1] Kennedy stresses that we lack insight as to her mental state because this offense is a strict liability crime. Since mental state informs culpability, and because there is no cognizable mental state with a strict liability crime, she argues that a strict liability crime cannot be a per se grave or serious offense. But we do not reach that question because there are other reasons why the offense is not per se grave or serious. We express no opinion as to whether a strict liability offense cannot, by definition, be considered per se grave or serious.

his death. *See* § 18-3-106(1)(b)(I). Now imagine another individual with a history of drinking and driving who intentionally drinks to the point of severe intoxication before driving his car and fatally running over that same man. If the first individual was warned of the intoxicating side effects of exceeding the prescribed dosage, or his prior use of the drug forewarned him of that possibility, both have likely committed the same offense. *See People v. Low*, 732 P.2d 622, 628 (Colo. 1987) (involuntary intoxication affirmative defense likely would not excuse conduct where the manufacturer's warning on the prescription advised of the possible intoxicating side effects of exceeding the prescribed dosage or where patient's prior excessive dosages put him on notice of the side effects); *People v. Turner*, 680 P.2d 1290, 1293 (Colo. App. 1983) (same).

¶ 23 Even so, the stark difference between the culpability of these two individuals and the threat they pose to society — i.e., the gravity or seriousness of the offense, *Wells-Yates*, ¶ 14 — demonstrates that the offense is not grave or serious in every potential factual scenario. *Id.* at ¶ 63. This reason alone is sufficient to not designate vehicular homicide under section 18-3-106(1)(b)(I) as per se grave or serious. *Id.*; *see also People v.*

*Session*, 2020 COA 158, ¶¶ 44-49 (second degree burglary and attempted second degree burglary are not per se grave or serious offenses because they are not grave or serious in every potential factual scenario); *People v. Wright*, 2021 COA 106, ¶¶ 73-77 (possession of a weapon by a previous offender not per se grave or serious for same reason); *People v. Caime*, 2021 COA 134, ¶¶ 50-57 (reckless driving not per se grave or serious for same reason).

¶ 24 Finally, that the offense results in the death of another does not alone render it per se grave or serious. As the *Caime* division astutely noted, there is at least one offense that results in the death of another that the General Assembly has not even classified as a felony, let alone considered a grave or serious offense. *Caime*, ¶ 52; *see* § 42-4-1402(2)(c), C.R.S. 2023 (defining careless driving resulting in death as a class 1 traffic misdemeanor). The General Assembly's classification thus suggests that a fatality, on its own, is insufficient to justify the designation of a crime as per se grave or serious.

¶ 25 For these reasons, we conclude that vehicular homicide under section 18-3-106(1)(b)(I) is not a per se grave or serious offense for purposes of proportionality review.

### B. Kennedy's Sentence Does Not Give Rise to an Inference of Gross Disproportionality

¶ 26 We now turn to whether Kennedy's vehicular homicide offense was grave or serious. We conclude it was.

¶ 27 Although culpability is not an element of her offense, Kennedy bears a high degree of personal culpability. She admitted to officers that she drank all afternoon before getting in her car to drive to Estes Park. Her staggering BAC level showed that she was not slightly intoxicated but extremely drunk, and nonetheless she got into an automobile to drive. And, crucially, Kennedy took this action despite *three* previous drinking and driving offenses.

¶ 28 Her actions harmed many people in many ways. She killed a young man and left his mother permanently paralyzed. The event also left a permanent psychological, emotional, and financial toll on B.S.'s family and friends. What is more, there is ample evidence that Kennedy would continue to pose a threat to society as highlighted by the fact that she continued to drink while released on bond.

¶ 29 Kennedy claims that her mental illnesses (bipolar and borderline personality disorders) lessen her degree of culpability.

She argues that her mental illnesses are the reason she drinks and that she cannot change those diagnoses. Thus, according to her, drinking is not simply a personal choice but an outgrowth of a deeper neurosis. While we recognize the seriousness of these mental illnesses and how those conditions may contribute to an individual's addiction, we fail to see how they relate to drinking *and* driving — the offense to which she pleaded guilty. Even if she was unable to control her drinking, she made the choice to drive.

¶ 30 We now turn to the harshness of the penalty. The sentences are both within the ranges deemed appropriate by the General Assembly. And the aggregate sentence here is parole eligible, meaning that Kennedy will likely not serve the entirety of her sentence. The penalty is therefore not unconstitutionally harsh on its own terms.

¶ 31 In sum, Kennedy's offense was grave and serious and our comparison of that offense to the harshness of the penalty does not suggest that the penalty is grossly disproportionate to the crime.

## IV. Disposition

¶ 32 The order is affirmed.

JUDGE FURMAN and JUDGE RICHMAN concur.