No. 15-1738

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

GORDON LASLEY, JR.,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Iowa
Honorable Linda R. Reade, Chief Judge

BRIEF OF APPELLEE

C.J. WILLIAMS
ANTHONY MORFITT
Assistant United States Attorneys
Northern District of Iowa
111 Seventh Avenue SE, Box 1
Cedar Rapids, IA 52401
(319) 363-6333
(319) 363-1990 (fax)
cj.williams@usdoj.gov
tony.morfitt@usdoj.gov

SUMMARY OF THE CASE

Defendant Gordon Lasley, Jr., appeals his two consecutive life sentences after he was found guilty of two counts of Second Degree Murder for slaying his parents with a machete. The jury rejected defendant's insanity defense.

At sentencing, the statutory range was up to life in prison, and the advisory guidelines range was 360 months to life in prison. The sentencing court found the evidence at trial proved defendant committed murder in the first degree with regard to both victims. The court sentenced defendant to two life terms in prison.

On appeal, defendant asserts the trial court erred in failing to instruct the jury as to the lesser included offense of involuntary manslaughter. Defendant also asserts the sentence was unreasonable.

If oral argument is granted, the government requests fifteen minutes.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. On March 25, 2015, the court entered final judgment, and on April 7, 2015, defendant filed a timely notice of appeal. This Court has jurisdiction over this criminal appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether the District Court Abused Its Discretion When It Declined to Give the Lesser Included Offense Instruction for Involuntary Manslaughter When There Was No Evidence Defendant Committed an Unlawful Act Not Amounting to a Felony and No Evidence Defendant Committed a Lawful Act?

United States v. Eagle Elk, 658 F.2d 644 (8th Cir. 1981)
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II. Whether the District Court Abused Its Discretion When It Sentenced Defendant Within the Advisory Guideline Range to Life for Murdering His Parents With a Machete Because the Evidence Supported a Finding by a Preponderance of the Evidence Defendant Committed First Degree Murder and the 18 U.S.C. §3553(a) Factors Supported the Sentence

United States v. Watts, 519 U.S. 148 (1997)
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18 U.S.C. § 3553(a)

STATEMENT OF THE CASE

Relevant Procedural History

On April 9, 2014, a grand jury indicted defendant, charging him with two counts of first degree murder in Indian Country in violation of Title 18, United States Code, Sections 1111 and 1153. (DCD 2).[1] The case proceeded to trial on December 8, 2014, and the jury returned its verdict on December 18, 2014. (DCD 89-103). On February 19, 2015, the court denied defendant's motion for judgment of acquittal and for new trial. (DCD 111).

Rulings Presented for Review

The district court denied defendant's request that it give a lesser included offense instruction for involuntary manslaughter. (Trial Tr. 1567-68).

On March 25, 2015, the court sentenced defendant to two life terms in prison. (DCD 120).

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[1] "DCD" refers to the district court docket in district court case number 14-CR-45-LRR, and each reference is followed by the docket entry number. "PSR" refers to the presentence report (at DCD 112) and, unless otherwise noted, each reference is to a paragraph number in the report. Each of the following references is followed by the applicable page number:

- "Def. Brief" refers to defendant's opening brief;
- "Sent. Tr." refers to the sentencing hearing transcript; and
- "Trial Tr." refers to the trial transcript.

Statement of the Facts[2]

A. Defendant and His Background

Defendant was 25 years old at the time of the offense. (PSR Identifying Data). He was five foot, ten inches tall and weighed approximately 200 to 240 pounds. (PSR Identifying Data; Trial Tr. 1334). Defendant was the youngest of four children. (PSR ¶¶77, 78). Defendant is a Native American and a member of the Sac and Fox Tribe. (PSR ¶81). Defendant grew up in Tama, Iowa, on the Meskwaki Settlement. (PSR ¶¶4, 81).

Defendant was placed outside his parents' home on several occasions during his teenage years due to his violating the terms of his juvenile detention. (PSR ¶81). Specifically, defendant resided at the Wittenmyer Youth Program in Davenport, Iowa, from April 2003 to July 2003; at the Keystone Treatment Center in Canton, South Dakota, from

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[2] Defendant's factual recitation contains speculation, conjecture and argument. For example, defendant states sexually transmitted diseases "may have been a trigger for the later violent outburst against his parents." (Def. Brief 4). Defendant further argues that his extended family's resistance to his relationship with his girlfriend "seemingly weighed on defendant." (Def. Brief 5). Defendant goes on to state that he "seemingly viewed the killings as healing or cleansing," that his comments "basically reflected a troubled mind," and that it was his "irrational thinking that seemingly led to the killings." (Def. Brief 7). These and other similar statements in defendant's brief are not facts supported by the record.

February to March 2004; at the Clarinda Academy in Clarinda, Iowa from June 2004 to January 2005; and at the Iowa State Training Center for Boys in Eldora, Iowa, from September 2005 to March 2006. (*Id.*). Defendant resided in Ankeny, Iowa, for a period during 2007 and 2008, but he otherwise lived at his parents' home as an adult. (*Id.*).

Defendant earned his high school diploma in 2006, and he was attending a community college at the time he committed the murders. (PSR ¶¶ 103, 104). Defendant worked for approximately two months in the summer of 2013 detasseling corn, and he worked for ten months in 2012 at a food court in the Meskwaki Casino. (PSR ¶ 106). Other than that, he was unemployed. (Trial Tr. 73). Social Security records showed no income from 2004 through 2011, $12,480 in 2012, and $567 in 2013. (PSR ¶ 107).

When defendant turned 18 years old, he received more than $100,000 from the Meskwaki tribe. (Trial Tr. 294). Defendant spent the money in the course of two years, purchasing a condominium in Ankeny (later foreclosed upon), a car he wrecked, and four-wheel vehicles. (Trial Tr. 294-95, 377-78). By 2014, defendant's assets consisted of $500 in a

checking account, and he owed more than $5,000 to creditors. (PSR ¶¶ 108, 110).

Defendant was adjudicated delinquent at age 14 for possession of alcohol as a minor and for possession of marijuana. (PSR ¶ 40). Three years later, at age 17, defendant was adjudicated delinquent for interference with official acts. (PSR ¶ 41). As an adult, defendant has been convicted of possession of marijuana twice (PSR ¶¶ 42, 52), public intoxication twice (PSR ¶¶ 43, 46), theft (PSR ¶ 44), trespass five times (PSR ¶¶ 45, 48, 56, 61, 64), interference with official acts four times (PSR ¶¶ 47, 50, 51, 54), driving with a suspended or barred license two times (PSR ¶¶ 53, 57), criminal mischief three times (PSR ¶¶ 48, 59, 60), driving while intoxicated three times (PSR ¶¶ 55, 58, 65), public intoxication (PSR ¶ 63), and assault twice (PSR ¶¶ 62, 66). In total, defendant has been adjudicated delinquent twice and convicted as an adult of 26 offenses.

Defendant was involved in an off and on relationship with Antonia Hernandez since 2002. (PSR ¶ 79; Trial Tr. 61, 238-39). Defendant and Hernandez have three minor children together. (PSR ¶¶ 5, 79; Trial Tr. 61). At the time of the murders, the children were living with Hernandez

in an apartment while defendant was living in his parents' basement. (PSR ¶ 5; Trial Tr. 75, 295-96). Hernandez reported that defendant was violent to her between five and ten occasions, on one occasion "choking her out" and breaking her foot. (PSR ¶ 5; Trial Tr. 290-93, 298). Defendant was convicted of domestic abuse assault for only one of these incidents. (PSR ¶ 62; Trial Tr. 302).

B. Defendant's Mental Health History

Defendant had no history of treatment for mental illness. (PSR ¶ 85). There is no history of mental illness in defendant's extended family, with the possible exception that defendant's father was claimed to have undiagnosed Post Traumatic Stress Disorder as a result of witnessing his cousin's murder. (PSR ¶ 77, Trial Tr. 83). While defendant was in various juvenile placements, he was evaluated for mental illness. He was generally found to have marijuana dependence and antisocial traits, but no mental disease or defect. (PSR ¶¶ 97-100; Trial Tr. 1030-1219).

In early 2004, when defendant was admitted to the Keystone Treatment Center, his admission problems were listed as antisocial behavior, anger, pathological relationships with chemicals, and a living environment deficiency. (PSR ¶ 97). He was diagnosed with antisocial

traits and marijuana dependence. (*Id.*). Defendant admitted he had an anger problem. (*Id.*). In one evaluation, defendant acknowledged having "feelings of uncontrollable anger, rage, or violence." (Trial Tr. 1054). Defendant also acknowledged having thoughts of harming his probation officer. (Trial Tr. 1055). One test administered at Keystone concluded defendant's profile was characterized as someone with "impulsive hostility, oppositional behavior, an angry mistrust of others, all intermixed with depressive feelings and self-destructive indications." (Trial Tr. 1093). It also concluded that defendant was someone who "often loses his temper, is irritable, and acts in a passive-aggressive fashion . . . projecting blame on others." (Trial Tr. 1095). Finally, it predicted that defendant is the type of person who is "[r]arely . . . able to submerge the depressing memories of past humiliation, and the resentments he feels may break through his controls in acts of impulsive anger." (*Id.*).

By mid-2004, when defendant was in the Clarinda Academy, his admitted problems included disrespecting authority, negative peer relationships, dishonesty, noncompliance, and substance abuse. (PSR ¶

98). It was noted that defendant's mother enabled his negative behavior and that his father had problems with alcohol and domestic abuse. (*Id.*).

Defendant was on "runaway status" when admitted to the State Training School for Boys in Eldora, Iowa, in September 2005. (PSR ¶ 99). During a mental health evaluation there, defendant admitted he had set fire to a barn and had been cruel to a squirrel with firecrackers. (*Id.*).

C. Defendant's Parents and Murder Victims

Defendant's father, Gordon Lasley, Sr., was 60 years old at the time of his death. (PSR ¶ 77). He stood five foot, six inches tall and weighed 157 pounds. (Trial Tr. 189). He had not worked for at least ten years prior to his death, but he had previously worked as a carpenter. (PSR ¶ 77). He abused marijuana and alcohol for most of his adult life, consumed alcohol almost daily, and was verbally abusive when intoxicated. (PSR ¶ 77; Trial Tr. 77, 337-38, 340-41).

When intoxicated, defendant's father was mean and would taunt and belittle those around him. (Trial Tr. 59, 77, 239-40, 337-38). He would say things to others, including his children, which were hurtful and designed to intimidate them. (Trial Tr. 77). Defendant and his

father did not get along "too well" and got in verbal arguments, especially when defendant's father was being verbally mean. (Trial Tr. 58, 241).

Defendant's mother was 56 years old at the time of her death. (PSR ¶ 77). She was five foot, two inches tall and weighed 188 pounds. (Trial Tr. 209). She was employed at the Meskwaki Casino. (*Id.*). Defendant's mother "let the defendant do whatever he wanted" and "wouldn't let [defendant's father] discipline" defendant. (PSR ¶ 77; Trial Tr. 78). Defendant's mother would leave the house on occasion when defendant's father became intoxicated because she did not want to be around him when he was verbally abusive. (PSR ¶ 77).

D. The Day of the Murders

At the time of the murders, defendant was living in his parents' basement, was unemployed, had no vehicle, and had three minor children to support. (PSR ¶ 5; Trial Tr. 48, 339). On February 5, 2014, defendant's girlfriend was working. (Trial Tr. 242). That afternoon, defendant went to the medical center with his children, where defendant's girlfriend joined them. (Trial Tr. 242, 845-52, 875-76). The doctor examined one of defendant's children, who was ill with the flu, and he also examined defendant, who complained of a cough. (Trial Tr. 243,

875-76). Defendant was found to be recovering from the flu and was given some nose spray. (Trial Tr. 875). Defendant said nothing of sexually transmitted diseases ("STDs") and otherwise acted unremarkably during the visit. (Trial Tr. 877).

After the doctor's visit, defendant, his girlfriend, and their children drove to his girlfriend's apartment. (Trial Tr. 244). At around 5:00 p.m., defendant had his girlfriend drive him home. (Trial Tr. 244). A little after 6:00 p.m., defendant texted a Facebook screenshot to his girlfriend. (Trial Tr. 246). The Facebook posting by a tribe member alleged AIDS was rampant on the settlement and people should watch out. (*Id.*). Defendant suggested he and his girlfriend should get tested, she agreed, "[a]nd that was the end of it." (Trial Tr. 247). Medical records showed that, a few years before, defendant had asked to be tested for STDs when he thought he had an unusual growth at the base of his penis. (Trial Tr. 868). The growth was determined to be an ingrown hair and the tests turned up negative for STDs. (Trial Tr. 869).

A short time after texting about getting tested for STDs, defendant and his girlfriend exchanged texts again, this time about marijuana. (Trial Tr. 247). She indicated she wanted to get high and he invited her

over. (*Id.*). She brought marijuana with her, arriving at defendant's parents' home at about 7:00 to 7:30 p.m. (*Id.*). She also brought their children with her. (*Id.*). Defendant and his girlfriend smoked marijuana and watched television. (Trial Tr. 248-50). Defendant's parents were home but remained upstairs while defendant, his girlfriend, and their children remained in the basement. (Trial Tr. 248-29).

E. The Murders

Defendant's girlfriend left at about 8:30 p.m. with two of the children, and left a daughter with defendant because the child was ill and would not be able to attend school the following day. (PSR ¶ 6; Trial Tr. 252-53). When defendant's girlfriend left that night, she thought the defendant appeared "happy," though under the influence of marijuana. (PSR ¶ 6; Trial Tr. 250).

At some time between 8:00 p.m. and 9:18 p.m., defendant used a three-foot long machete to kill his parents. (PSR ¶ 7). The evidence showed that defendant stabbed his father from above and behind, likely while defendant's father was seated on the couch in the upstairs living room. (Trial Tr. 187-209; Exhibit 30). One cutting wound was delivered to the left side of the victim's head, delivered from above, and back to

front, to a depth of four inches. (PSR ¶ 8; Trial Tr. 191). This blow was hard enough to fracture the victim's cheekbone. (Trial Tr. 191-92). Another stab wound was delivered from above, entered behind the victim's left ear, and traveled down five or more inches into his throat, striking his spinal column. (PSR ¶ 8; Trial Tr. 193-94). The crime scene showed that defendant's father struggled with defendant and attempted to flee the attack. (Trial Tr. 112-13, 125-33; Government's Exhibit 4). The living room was covered with blood spatter, furniture was smashed, and a large amount of blood was located near the front door of the house. (Trial Tr. 161-76). Consistent with raising his arm in an attempt to block an attack while trying to open the door, defendant's father had a cutting wound on his left arm that sliced down four inches through the flesh to the bone. (PSR ¶ 8; Trial Tr. 199-202). The medical examiner concluded that defendant's father died from bleeding to death. (PSR ¶ 8; Trial Tr. 209). Defendant's father's blood tested positive for marijuana and had an alcohol content of .101 at the time of his death. (PSR ¶ 8; Trial Tr. 206-08).

Defendant's mother was standing in the kitchen area and watched defendant attack his father. (PSR ¶ 9). Defendant later told his

girlfriend, "I did it right in front of her and she didn't even stop me or call the cops." (PSR ¶ 10; Trial Tr. 307-08). After murdering his father, defendant turned on his mother. (PSR ¶ 9). Defendant's mother attempted to flee down the stairs, into the basement, and out another door. (PSR ¶ 9; Trial Tr. 108-110). Defendant's mother's blood was spattered against the stairwell walls. (Trial Tr. 134-36, 151). Defendant repeatedly stabbed his mother from above and behind as she fled down the stairs, stabbing or slicing her at least six times. (PSR ¶ 9; Trial Tr. 219). She suffered two stab wounds to her chest which entered from above and behind her, a stab wound to her right arm, a stab wound traveling down through her right shoulder and into her lung, a stab wound at the base of the left side of her neck that severed her carotid artery, and a stab wound just below her right ear that continued through her cheek and exited near her mouth. (PSR ¶ 9; Trial Tr. 211-19; Exhibit 32). Defendant's mother also bled to death. (PSR ¶ 9; Trial Tr. 220).

F. The Aftermath and Defendant's Flight

At 9:18 p.m., defendant called his girlfriend. (PSR ¶ 10). He asked her if she was afraid to die and told her to go to the light. (PSR ¶ 10; Trial Tr. 253-54). He told her he had brought up to his parents that

there was AIDS on the settlement and his father said "that it was right here." (Trial Tr. 254). Defendant then calmly told his girlfriend that he had killed his parents. (Trial Tr. 254). Defendant's girlfriend hung up the phone. (Trial Tr. 255).

Defendant's girlfriend then called defendant's mother's cell phone, and defendant answered it. (Trial Tr. 255). During this call, defendant told his girlfriend they were now free, and he stated that his parents had "raised him wrong." (PSR ¶ 10; Trial Tr. 255). Fearing defendant would come after her next, defendant's girlfriend fled with her children to a friend's house. (PSR ¶ 10; Trial Tr. 255-56). Together, she and her riend called defendant. (PSR ¶ 10; Trial Tr. 256, 306-08). They both heard defendant admit he killed his parents and when asked why, he said "because they raised me wrong." (PSR ¶ 10; Trial Tr. 257; 315-16).

When defendant's girlfriend attempted to call defendant again at 10:06 p.m., the call went unanswered. (PSR ¶ 10). By this time, defendant had taken his mother's car and driven with his sick child to the home of one of his brothers, located approximately two miles away. (PSR ¶ 11; Trial Tr. 326-30, 339, 345-46, 351). Defendant entered his brother's house, put his hand on his brother's shoulder, and whispered,

"I'm sorry, I killed mom and dad." (PSR ¶ 11; Trial Tr. 331-32). Defendant admitted to his brother that he had used a machete to kill his parents. (PSR ¶ 11; Trial Tr. 335). He told his brother that he "wasn't raised right" and that "our culture is messed up." (PSR ¶ 11; Trial Tr. 335-36, 366). Defendant's brother persuaded defendant to bring defendant's daughter into the house; defendant did so, leaving his daughter there and driving away. (PSR ¶ 11; Trial Tr. 345-47, 351-52).

Shortly after midnight, a deputy sheriff found defendant driving north, away from the settlement, on a gravel road. (PSR ¶ 15; Trial Tr. 407-410). The deputy stopped defendant's car and arrested defendant without incident. (PSR ¶ 15; Trial Tr. 407-13). Defendant had blood on his hands and clothing, a laceration on the inside of his left hand, and scratches on his right hand. (PSR ¶ 15; Trial Tr. 415-19).

G. The Trial

In its case-in-chief, the government presented evidence of the murders as summarized above. (Trial Tr. 43-452). When the government rested, defendant presented evidence in support of his insanity defense. (Trial Tr. 453-811). This consisted of the testimony of (1) a jailer regarding her observations of defendant (Trial Tr. 453-67); (2)

a pastor who visited defendant while awaiting trial (Trial Tr. 468-83); and (3) two experts who claimed defendant was insane at the time of the murders. (Trial Tr. 507-810). Dr. Arthur Konar opined that defendant suffered from paranoid schizophrenia that prevented him from "accurately interpret[ing] reality" at the time of the murders. (Trial Tr. 564-76). Dr. Dewey Ertz also opined that defendant was insane, but he concluded defendant was insane as the result of a delusional disorder and a brief psychotic episode. (Trial Tr. 666, 678-96, 704-07, 798-800). During a psychiatric examination, defendant explained to Dr. Ertz that he killed his parents because he believed they put "bad medicine" on him, causing him to have a STD, and that the only way to remove the bad medicine was to kill his parents. (Trial Tr. 694-700).

In rebuttal, the government presented evidence from ten members of the Meskwaki tribe regarding defendant's behavior and lack of symptoms of mental health problems. (Trial Tr. 887-1029). Eight of these witnesses also testified that belief in bad medicine was a part of their Native American culture. (Trial Tr. 891-92, 911-912, 923-24, 940-41, 958-59, 977-78, 109-11, 1028). The government also presented testimony from five counselors, psychologists, and other mental health

professionals who evaluated or worked with defendant while he was in the various juvenile placements. (Trial Tr. 1030-1219). These witnesses testified about defendant's mental health status as outlined above. The government also presented testimony from seven jailers, a probation officer, and other mental health personnel who had contact with defendant after he was arrested, all of whom testified to the absence of symptoms of mental illness. (Trial Tr. 812-37, 1220-1234, 1315-1402). Five of the instructors at the community college defendant was attending at the time of the murders also testified that defendant behaved normally in their classes. (Trial Tr. 1235-1377). Two of defendant's assault victims and two officers also testified about defendant's past violent conduct. (Trial Tr. 1403-1447).

Finally, the government presented expert testimony by Dr. Chris Grote. (Trial Tr. 1465-1546). Dr. Grote opined that defendant's belief in bad medicine was not a delusion; rather, he found it was a shared cultural belief. (Trial Tr. 1516-17). Dr. Grote also opined that defendant did not suffer from any mental disease or defect; rather, he found defendant was cannabis-dependent, and he also made a provisional diagnosis of antisocial personality disorder. (Trial Tr. 1520-24).

In sur-rebuttal, defendant recalled Dr. Ertz, who repeated his opinions and expressed disagreement with Dr. Grote. (Trial Tr. 1547-56).

Defendant did not testify in his case-in-chief or in sur-rebuttal.

In closing argument, the government asserted defendant committed first degree murder, arguing that the evidence showed premeditation and malice aforethought. (Trial Tr. 1574-99, 1647-60). The government emphasized defendant's explosive temper and history of violence, and argued that defendant blamed his parents for everything that was wrong in his life. (Trial Tr. 1574, 1584-85, 1659). The government argued that defendant's father was drunk the night of the murders, that he must have said something belittling defendant and taunted him, and that defendant simply exploded, taking out his anger and frustration on his parents. (Trial Tr. 1577-89).

Defense counsel argued the evidence did not show malice aforethought or premeditation, but he did not argue that the murders were the result of a fight or sudden provocation. (Trial Tr. 1600-46). Defense counsel argued that in any event, defendant was insane at the time of the murders. (Trial Tr. 1646). The defense attorney did not

argue that, the murders were the result of an accident, self-defense, or any lawful conduct.

The jury returned a verdict finding defendant guilty of second degree murder of both victims. (DCD 103).

H. The Sentencing

At sentencing, defendant's advisory guidelines range was 360 months' to life imprisonment. (PSR 114). The government asked for a life sentence, setting out numerous grounds for an upward departure to life imprisonment should the court grant defendant's request for an acceptance of responsibility reduction. (DCD 114). Among other things, the government urged that the evidence proved defendant committed first degree murder of the victims, regardless of the jury's verdict finding second degree murder. (DCD 114; Sent. Tr. 16-19). Defendant argued for a reduction for acceptance of responsibility, arguing he merely presented an insanity defense at trial and did not otherwise contest the facts. (DCD 117; Sent. Tr. 7-9).

The sentencing court declined to award defendant with a reduction for acceptance of responsibility, finding there was "nothing in the record showing that the defendant truthfully admitted the conduct comprising

the offense of conviction." (Sent. Tr. 28). The court noted, however, that if this Court found it erred in denying defendant a reduction for acceptance of responsibility, it "would grant a departure upward under 5K2.0 to at least a level 40, criminal history category III, with a range of imprisonment of 360 months to life." (Sent. Tr. 31). The court noted that the second murder defendant committed resulted in only a two-level increase in the offense level. (*Id.*). The court also noted that "the advisory guidelines range fail[ed] to take into account the brutal manner in which these victims were murdered." (*Id.*). The court further found that the evidence did prove defendant committed first degree murder with respect to both victims. (Sent. Tr. 35-36). The court also considered all the other factors at 18 U.S.C. § 3553(a). (Sent. Tr. 32-38). Among these, the court noted that defendant "brutally murdered two people," that "he gave thought to killing his daughter," and that defendant "still poses a substantial risk to the public safety . . . because of his personality and his striking out and his lack of control of his anger." (Sent. Tr. 32, 37). The court then imposed two consecutive life sentences. (Sent. Tr. 38).

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion when it declined to give the jury an instruction on the lesser included offense of involuntary manslaughter. For defendant to be entitled to this instruction, there must have been evidence that he committed the killings (1) while committing an unlawful act not amounting to a felony or (2) while committing a lawful act, done either in an unlawful manner or with wanton or reckless disregard for human life. The evidence showed neither. To the contrary, defendant's assault of his parents with a machete constituted a felony offense and the lesser included offense instruction was not warranted.

The district court also did not abuse its discretion when it sentenced defendant within the advisory guidelines range to life imprisonment. The district court acted well within its discretion and with ample support in the record when it found by a preponderance of the evidence that defendant committed first degree murder of his parents, notwithstanding the jury's verdict of second degree murder. Moreover, the factors at 18 U.S.C. § 3553(a) fully supported a life sentence. Defendant would have had the same advisory guideline range

had he murdered only one parent; he murdered both. Defendant had a substantial and violent criminal history that was not adequately reflected in his criminal history score. Defendant posed a danger to the community and life imprisonment served the goal of protecting society.

Accordingly, this Court should affirm defendant's conviction and sentences.

ARGUMENT

I. The District Court Did Not Abuse Its Discretion When It Declined to Give the Lesser Included Offense Instruction for Involuntary Manslaughter Because There Was No Evidence Defendant Committed an Unlawful Act Not Amounting To a Felony or Evidence Defendant Committed a Lawful Act

A. Standard of Review

This Court "review[s] the district court's decision not to instruct the jury on a lesser included offense for abuse of discretion." *United States v. Never Misses A Shot*, 781 F.3d 1017, 1026 (8th Cir. 2015) (citations omitted); *see United States v. Martin*, 777 F.3d 984, 997 (8th Cir. 2015). "[A] defendant is entitled to an instruction on a lesser included offense if the evidence would permit a rational jury to find him guilty of the lesser offense and acquit him of the greater." *United States v. Jones*, 586 F.3d 573, 575 (8th Cir. 2009) (citation omitted).

B. Merits

The evidence did not support defendant's request for an involuntary manslaughter instruction. No evidence existed that defendant accidentally killed his parents while engaging in a non-felony offense, or while engaging in lawful conduct. Defendant slaughtered his parents by repeatedly stabbing and slashing them with a machete. This was not an involuntary act.

A defendant is entitled to an instruction on a lesser included offense if:

> (1) a proper request is made; (2) the elements of the lesser offense are identical to part of the elements of the greater offense; (3) there is some evidence which would justify conviction of the lesser offense; (4) proof on the element or elements differentiating the two crimes is sufficiently in dispute so that the jury may consistently find the defendant innocent of the greater and guilty of the lesser included offense; and (5) there is mutuality, i.e., a charge may be demanded by either the prosecution or defense.

Never Misses A Shot, 781 F.3d at 1026 (quoting United States v. Pumpkin Seed, 572 F.3d 552, 562 (8th Cir. 2009)). The government concedes the first, second, and fifth factors were met in this case, but it disputes that the third and fourth factors were satisfied.

The third factor requires that there be "some evidence which could justify a conviction on the lesser included offense. *Id.* The fourth factor requires that the evidence regarding the element(s) that differentiate the offenses be "sufficiently in dispute so that the jury may consistently find the defendant innocent of the greater and guilty of the less included offense. *Id.* The reason for the fourth requirement is "to prevent the jury from 'capriciously convicting on the lesser offense when the evidence requires either conviction on the greater offense or acquittal.'" *United States v. Short,* 805 F.2d 335, 337 (8th Cir. 1986) (quoting United States v. Ashby, 771 F.2d 392, 394 (8th Cir. 1985)).

Here it is important to note, as did defendant (Def. Brief 3), that defendant's statements to the three evaluating mental health experts were not introduced for the truth of the matter asserted at trial. Therefore, the jury could not rely on these self-serving statements as evidence supporting a claim of involuntary manslaughter. (DCD 11, p. 11; Jury Inst. No. 10). So defendant is incorrect when he asserts that "[t]he reason for the sudden violence had to be gleaned from statements defendant made to his girlfriend Antonia, and his brother Tysin, shortly after the incident, and from statements defendant made to mental health

professionals in subsequent evaluations." (Def. Brief 3) (emphasis added). To the contrary, statements defendant made to mental health professionals were not admissible for their truth. Defendant did not testify, so his mental state could only be discerned from his actions and statements he made to others immediately after the murders. The district court was equally restricted from relying on statements defendant made to the mental health professionals in determining the propriety of instructing on the lesser included offense of involuntary manslaughter.

Involuntary manslaughter is a lesser included offense of first degree murder. *United States v. One Star*, 979 F.2d 1319, 1321 (8th Cir. 1992). The crime of involuntary manslaughter has four essential elements, which are:

> *One*, the victim is dead;
>
> *Two*, the defendant caused the death of the victim;
>
> *Three*, the death of the victim occurred as a result of an act done by the defendant during the commission of an unlawful act not amounting to a felony, or during the commission of a lawful act, done either in an unlawful manner or with wanton or reckless disregard for human life, which might produce death; and

> *Four*, the killing occurred within [a location where there is federal jurisdiction].

18 U.S.C. § 1112; *United States v. McMillan*, 820 F.2d 251, 257 (8th Cir. 1987) (holding that involuntary manslaughter can occur in the commission of (1) an unlawful act, or (2) a lawful act in an unlawful manner or without due caution); Eighth Circuit Pattern Criminal Jury Instruction 6.18.1112B.

In this case, there was no evidence defendant slaughtered his parents with a three-foot long machete (1) as a result of engaging in non-felonious conduct or (2) while lawfully engaged in conduct with the machete. First, defendant's conduct in repeatedly stabbing his parents was a felony offense. Assault with a dangerous weapon, with the intent to do bodily harm, is a felony offense. *See* 18 U.S.C. § 113(a)(3). Therefore, defendant was not entitled to an involuntary manslaughter instruction on this basis. *See*, *e.g.*, *United States v. Pluma*, 511 Fed. App'x 705, 708-10 (10th Cir. 2014) (unpublished) (finding no error in failing to give the lesser included involuntary manslaughter instruction where the defendant's assault constituted a felony offense). This is not a case where, for example, defendant got into a physical fight with his parents and struck them in a manner that was not of a nature dangerous

to life. Rather, defendant repeatedly stabbed and sliced his parents with a three-foot long machete, striking his father three times and his mother at least six times. (Trial Tr.187-220). Defendant did not testify at trial and presented no evidence that he accidentally stabbed his parents multiple times. *See United States v. Sampson*, 2 F. App'x 903, 904-05 (9th Cir. 2001) (unpublished) (finding no error in failing to give lesser included involuntary manslaughter instruction where the defendant slashed the victim's neck with a broken bottle but did not testify or present any other evidence that the killing was accidental).

Second, defendant was not engaged in lawful conduct. Defendant did not claim an imperfect self-defense, for example, where he could assert that his conduct was lawful. *Compare United States v. Toledo*, 739 F.3d 562, 568-69 (10th Cir. 2014) (reversing conviction, finding trial court erred in refusing to give lesser included involuntary manslaughter instruction because defendant's testimony could have supported claim he acted lawfully in self-defense), *and United States v. Begay*, 833 F.2d 900, 901-03 (10th Cir. 1987) (holding the district court erred when it failed to give an involuntary manslaughter lesser included offense instruction because the defendant's testimony could have supported a claim he acted

legally in self-defense and did not intend to stab the victim), *with United States v. F.D.L.*, 836 F.2d 1113, 1118 (8th Cir. 1988) (finding the district court did not abuse its discretion in denying a lesser included involuntary manslaughter instruction where there was insufficient evidence to support a self-defense theory). In this case, defendant did not claim he was lawfully committing any other act where his parents' death was an involuntary outcome.

Defendant's failure to identify an unlawful act not constituting a felony, or a lawful act done in an unlawful or reckless manner that involuntarily resulted in his parents' death, distinguishes the cases he cites where courts have reversed convictions for failing to give involuntary manslaughter instructions. For example, in *Toledo*, 739 F.3d at 568-69, the Tenth Circuit Court of Appeals reversed the defendant's conviction, finding the trial court erred in refusing to give a lesser included involuntary manslaughter instruction, but only because the defendant's testimony could have supported the claim he acted lawfully in self-defense. Similarly, in *Begay*, 833 F.2d at 901-03, the Tenth Circuit Court of Appeals found the district court erred when it failed to give an involuntary manslaughter lesser included offense instruction

because the defendant's testimony could have supported a claim he acted legally in self-defense and did not intend to stab the victim. In contrast, this case is most similar to those cases where this Court has found the district court did not err in declining to instruct on involuntary manslaughter. *See*, *e.g.*, *United States v. Eagle Elk*, 658 F.2d 644, 649-50 (8th Cir. 1981) (affirming the district court's refusal to give an involuntary manslaughter instruction where the evidence showed defendant committed a felony when he shot the victim and was not engaged in lawful self-defense); *United States v. Lincoln*, 630 F.2d 1313, 1319-20 (8th Cir. 1980) (affirming the district court's refusal to give an involuntary manslaughter instruction where the evidence showed a felony assault); *United States v. Wallette*, 580 F.2d 335, 338-39 (8th Cir. 1978) (affirming the district court's refusal to provide an involuntary manslaughter instruction where the defendant committed a felony assault). *See also United States v. Chapman*, 615 F.2d 1294, 1299 n.2 (10th Cir. 1980) (noting in dicta that an involuntary manslaughter instruction would have been improper because defendant's conduct in shooting at the victim would have constituted a felony offense).

Defendant suggests that his rejected insanity defense somehow morphs into a factual basis from which a jury could find the killing of his parents was involuntary. (Def. Brief 18-19). Defendant fails to cite a single case supporting this proposition. The government was unable to find any case supporting defendant's proposition. The only related cases the government found where insanity was asserted contained holdings where the appellate courts found no error when the trial courts refused to give an involuntary manslaughter instruction. In *United States v. Hendrix*, 542 F.2d 879, 883 (8th Cir. 1976), this Court affirmed the district court's refusal to give an involuntary manslaughter instruction where the jury rejected the insanity defense. There was little analysis of the issue in *Hendrix*, however, other than to note that the victim was "brutally kicked and strangled to death." *See also United States v. Silvia*, No. 88-5153, 1989 WL 87653, *5-6 (4th Cir. 1989) (unpublished) (finding district court did not err in denying involuntary manslaughter instruction where jury rejected an insanity claim because the evidence failed to support it).

In this case, the jury rejected defendant's insanity defense. It rejected the proposition that he had such "impaired perception" "that he

could not accurately interpret reality." (Def. Brief 19). Had the jury found this to be the case, it could have found him not guilty only by reason of insanity. It did not. This was precisely the type of case where the evidence was simply insufficient to support an involuntary manslaughter verdict. To have given such an instruction would have invited the jury to capriciously convict defendant of the lesser offense when the evidence required either conviction or acquittal by reason of insanity. A further defect in defendant's argument remains his inability to meet the third element of involuntary manslaughter. He cannot identify a non-felonious act, or a lawful act, that he committed in a reckless manner that involuntarily caused his parents' death.

Finally, defendant continues to argue on appeal, as he did at trial, that "[t]hese were motiveless, senseless, inexplicable killings that occurred in a crazed fashion." (Def. Brief 19). Saying so, even repeatedly, does not make it so. The jury rejected the idea defendant was "crazy." Defendant's history of disputes with his parents, disrespect of authority, and explosive anger and violence, combined with a father who taunted and belittled defendant when drunk, provided motive, sense, and explanation to what was a horrific slaughter.

Accordingly, the district court did not abuse its discretion when it declined to give a lesser included offense instruction for involuntary manslaughter because such an instruction was not supported by the evidence.

II. The District Court Did Not Abuse Its Discretion When It Sentenced Defendant Within the Advisory Guidelines Range to Life for Murdering His Parents With a Machete Because the Evidence Supported a Finding by a Preponderance of the Evidence That Defendant Committed First Degree Murder and the 18 U.S.C. § 3553(a) Factors Supported the Sentence

A. Standard of Review

When determining whether a district court imposed a substantively unreasonable sentence, this Court applies a deferential abuse of discretion standard of review. *See United States v. Ford*, 705 F.3d 387, 389 (8th Cir. 2013) (setting forth standard of review); *United States v. Franik*, 687 F.3d 988, 990 (8th Cir. 2012) (same). In doing so, this Court considers the totality of the circumstances. *United States v. Feemster*, 572 F.3d 455, 461 (8th Cir. 2009) (*en banc*). "A district court abuses its discretion when it: (1) fails to consider a relevant factor that should have received significant weight; (2) gives significant weight to an improper or irrelevant factor; or (3) considers only the appropriate factors but in weighing those factors commits a clear error of judgment." *Id.*

(quotations and citations omitted). This Court affords a sentencing court wide latitude in weighing the § 3553(a) factors. *United States v. Borromeo*, 657 F.3d 754, 757 (8th Cir. 2011). A sentence is not unreasonable merely because this Court may have weighed the factors differently and imposed a different sentence. *United States v. Scott*, 732 F.3d 910, 918-19 (8th Cir. 2013). Finally, this Court may consider sentences within the advisory guidelines range as presumptively reasonable. *United States v. Rubashkin*, 655 F.3d 849, 869 (8th Cir. 2011). Therefore, this Court reverses sentences for substantive unreasonableness only in "unusual" cases. *Borromeo*, 657 F.3d at 757.

B. The District Court Did Not Abuse Its Discretion When it Imposed A Substantively Reasonable Sentence of Life Imprisonment

The district court acted within its substantial discretion when, considering the totality of the circumstances, it imposed life sentences for defendant's murder of his parents. Defendant takes issue with the district court's conclusion that defendant committed first degree murder, the jury verdict notwithstanding, and claims the court erred in so finding. (Def. Brief 22-25). The court did not err in finding the government had proved first degree murder by a preponderance of the

evidence. In any event, the within-guidelines sentence was substantively reasonable pursuant to the Section 3553(a) factors.

A sentencing judge may properly consider acquitted conduct in determining an appropriate sentence. *See, e.g.*, *United States v. Watts*, 519 U.S. 148, 157 (1997) (holding that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence."); *United States v. Martin*, 777 F.3d 984, 997-98 (8th Cir. 2015) (affirming a six-level enhancement for infliction of permanent injury on victim where jury acquitted defendant of murder of victim).

Although defendant was acquitted of first degree murder, the evidence overwhelmingly proved first degree murder and the judge so found. As the court concluded:

> The trial evidence and the unobjected-to portions of the Presentence Report, as well as the evidence and arguments produced throughout this case, establishes in my mind by a preponderance of the evidence that, in fact, this was Murder in the First Degree as to both Gordon Lasley Sr. and Kim Lasley. Perhaps there's an argument that the murder of Gordon Lasley Sr. was not premeditated, but when you think of the trial evidence and the way he was attacked from behind and the number of blows and the evidence that suggests that he was trying to escape from the front door – or to the front

> door, I think Murder in the First Degree was established by the evidence. Not found by the jury, but established by a preponderance of the evidence in my mind.
>
> Clearly, the murder of Kim Lasley was premeditated. She watched the defendant attack her husband with the machete. She saw him collapse, and as he bled to death, with horror, the defendant turned on her, and the defendant even remarked after the incident that his mother just stood there and she didn't do anything; she didn't call the police. Rather, she ran down the stairs, was likely attacked on the stairs, and there is indication that she was struggling, hoping to get out the basement door.

(Sent. Tr. 35-36).

In any event, life imprisonment was a reasonable sentence, even had the district court not concluded that defendant committed first degree murder. Life imprisonment was within the advisory guidelines range. Indeed, life imprisonment was within the guideline ranges had he murdered only one of his parents. That he murdered both of them only further supports the conclusion that life imprisonment was appropriate. (Sent. Tr. 31). Further, defendant murdered his parents in a particularly heinous, cruel, and brutal manner involving the gratuitous infliction of injury and prolongation of pain. (*Id.*). *Cf. United States v. Chase*, 451 F.3d 474, 487 (8th Cir. 2006) (affirming an upward departure, pursuant to USSG §5K2.8, where the defendant stabbed the unarmed victim five times, then kicked the prostrate victim, leaving him to bleed to death);

see also United States v. Carey, 574 Fed. App'x 530, 532 (5th Cir. 2014) (unpublished) (affirming upward departure, pursuant to USSG §5K2.8, where the defendant attacked victims while they slept, hit them with a hammer, repeatedly stabbed the victims, then did nothing to help them, pacing around the room for 40 minutes).

Defendant's criminal history also fully supported a life sentence. Defendant had a serious, violent, and lengthy criminal history that shows he was a recidivist with no respect for authority. Defendant was first adjudicated delinquent at age 14 for possession of alcohol as a minor and for possession of marijuana. (PSR ¶ 40). Three years later, at age 17, defendant was again adjudicated delinquent for interference with official acts. (PSR ¶ 41). As an adult, defendant had been convicted of possession of marijuana twice (PSR ¶¶ 42, 52), public intoxication twice (PSR ¶¶43, 46), theft (PSR ¶44), trespass five times (PSR ¶¶ 45, 48, 56, 61, 64), interference with official acts four times (PSR ¶¶ 47, 50, 51, 54), driving with a suspended or barred license two times (PSR ¶¶ 53, 57), criminal mischief three times (PSR ¶¶ 48, 59, 60), driving while intoxicated three times (PSR ¶¶ 55, 58, 65), public intoxication (PSR ¶63), and assault twice (PSR ¶¶ 62, 66). In total, defendant was twice

adjudicated delinquent and convicted 26 times as an adult. Defendant's sentence properly reflected that he was a serial violator and recidivist. *Cf. United States v. Mendez*, 685 F.3d 769, 771 (8th Cir. 2012) (affirming a district court's upward departure under §4A1.3 where court found the defendant was a serial recidivist); *United States v. Ortiz*, 636 F.3d 389, 394 (8th Cir. 2011) (resting upward departure for understatement of criminal history, in part, because the district court found Ortiz was a serial shoplifter.); *United States v. Ruvalcava-Perez*, 561 F.3d 883, 886 (8th Cir. 2009) (affirming upward departure where court found defendant was a serial violator).

Defendant incurred 12 criminal history points for his convictions, although only four of these could be counted pursuant to USSG §4A1.1(c). (PSR ¶ 68). Sixteen of defendant's adjudications or convictions did not score any criminal history points. "The Sentencing Guidelines expressly permit a court to consider an un-scored offense." *United States v. Outlaw*, 720 F.3d 990, 993 (8th Cir. 2013) (citing USSG §4A1.3(a)(2)(A)); *see also United States v. Wilson*, 369 F. App'x 753, 754 (8th Cir. 2010) (unpublished) (affirming an upward departure pursuant to USSG §4A1.3 based, in part, on unscored convictions). Defendant received two

criminal history points because he committed the murders while on probation. (PSR ¶69). That resulted in a total of six criminal history points, placing defendant in criminal history category III. This criminal history category simply failed to reflect the seriousness of defendant's criminal history and the likelihood that he will reoffend.

A life sentence was also appropriate to deter others from murder. A sentence of life without the possibility of parole will deter others from resorting to lethal violence to resolve personal conflicts with family members. *See United States v. Rodriguez-Reyes*, 714 F.3d 1, 10 (1st Cir. 2013) (finding life sentence appropriate in part for purposes of deterrence); *United States v. Acosta*, 314 Fed. App'x 863, 864 (7th Cir. 2008) (unpublished) (same).

Finally, a life sentence was appropriate to protect the public. Defendant is a dangerous person. (Sent. Tr. 32, 37). Dr. Grote testified at trial that defendant's personality is one characterized by impulsivity, irritability and aggressiveness, reckless disregard for the safety of others, and lack of remorse. (Trial Tr. 1522-23). This was reflected, of course, in defendant's violent criminal history. It also was reflected in the instances of violence directed at his girlfriend which she mentioned

during her testimony but which did not result in criminal convictions. Finally, of course, defendant's brutal slayings of his unarmed parents without provocation demonstrated that he poses a danger to the public.

"Where the district court in imposing a sentence makes 'an individualized assessment based on the facts presented,' addressing the defendant's proffered information in its consideration of the § 3553(a) factors, such sentence is not unreasonable." *United States v. Stults*, 575 F.3d 834, 849 (8th Cir. 2009) (quoting *Gall v. United States*, 552 U.S. 38, 50 (2007)). That is precisely what the district court did here.

The court had "substantial latitude to determine how much weight to give the various factors under § 3553(a)." *United States v. Ruelas-Mendez*, 556 F.3d 655, 657 (8th Cir. 2009). Given the many aggravating factors in this case, the district court did not abuse its discretion in weighing these factors.

This is not "the unusual case when [this Court] reverse[s] a district court sentence . . . as substantively unreasonable." *Feemster*, 572 F.3d at 464. Defendant has failed to meet his burden to show the district court abused its discretion, and defendant's sentence was substantively reasonable.

CONCLUSION

For the above reasons, defendant's conviction and sentence should be affirmed.

Respectfully submitted,

KEVIN W. TECHAU
United States Attorney

By, s/ C.J. WILLIAMS

C.J. WILLIAMS
ANTHONY MORFITT
Assistant United States Attorneys
111 7th Avenue SE, Box 1
Cedar Rapids, IA 52401-2101
(319) 363-6333
(319) 363-1990 (Fax)
cj.williams@usdoj.gov

CERTIFICATE OF FILING AND SERVICE

I certify that on August 17, 2015, I, Sali Van Weelden, Paralegal Specialist for the Attorney for Plaintiff-Appellee, the United States of America, electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the CM/ECF system. The electronic brief and the addendum attached to the brief, if any, have been scanned for viruses using Trend Micro OfficeScan and the scan showed no virus.

I further certify that on _____, 2015, I submitted ten paper copies of the brief to the Clerk of Court and one paper copy to each party separately represented or proceeding pro se.

KEVIN W. TECHAU
United States Attorney

BY:s/ Sali Van Weelden

Copies to:
John Messina
Federal Public Defender's Office
Capital Square, Suite 340
400 Locust Street
Des Moines, IA 50309-2360

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

I certify that the foregoing brief complies with the type volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief uses a proportional-spaced typeface, fourteen-point Century Schoolbook font. Based on a count under Microsoft Word Version 2010 for Windows, the brief contains 8,244 words, excluding the table of contents, table of authorities, statement with respect to oral argument, and addendum, and certificates of counsel.

KEVIN W. TECHAU
United States Attorney

By: s/ C.J. WILLIAMS

C.J. WILLIAMS
Assistant United States Attorney