IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 24-1143
Worth County No. FECR012500

STATE OF IOWA,
Appellee,

v.

DOUGLAS NEAL WARBURTON,
Appellant.

APPEAL FROM
THE DISTRICT COURT OF WORTH COUNTY
THE HONORABLE
DISTRICT COURT JUDGE GREGG R. ROSENBLADT

AMENDED BRIEF FOR APPELLANT

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CERTIFICATE OF SERVICE

On the 21st day of March 2025, the undersigned certifies that a true copy of the foregoing instrument will be served upon Defendant-Appellant, Douglas Neal Warburton, by placing one copy thereof in the United States mail, proper postage attached, addressed to:

Douglas Neal Warburton
P.O. Box 330
Riceville, Iowa 50466

/S/ Karmen R. Anderson

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ROUTING STATEMENT

Pursuant to Iowa Rule of Appellate Procedure 6.1101(3), it is appropriate for this case to be transferred to the Court of Appeals.

NATURE OF THE CASE, THE PROCEEDINGS, AND DISPOSITION OF THE CASE IN DISTRICT COURT

This is an appeal by Defendant-Appellant, Douglas Neal Warburton, from his conviction following his plea in Worth County Case Number FECR012500.

On June 12, 2023, Warburton was charged with Sexual Abuse in the Second Degree in violation of Iowa Code Section 709.3(1)(B) and Lascivious Acts with a Child – Fondle or Touch, in violation of Iowa Code Section 709.8(1)(A). (D0001 & D0002; Criminal Complaints; 06/12/2023). A Trial Information was filed charging Warburton with the same, but also added a third Count of Sexual Abuse in the Third Degree in violation of Iowa Code Sections 709.1 and 709.4(1)(b)(2)(a) as well as a fourth Count of Indecent Contact with a Child in violation of Iowa Code Sections 709.1 and 709.12(1)(a). (D0025; T.I.; 06/23/2023).

The case proceeded to trial in an ordinary fashion. On the eve of trial, a plea agreement was ultimately reached and Warburton entered a written Alford plea on April 30, 2024. (D0071; Alford Plea; 04/30/2024). In relevant part, Warburton only plead to Count II: Lascivious Acts with a Child. (D0071; Alford Plea; 04/30/2024). The plea agreement was for the State to adopt the recommendation of the Presentence Investigation Report (hereafter PSI) in addition to recommending sex offender registration, a

special sentence, and the dismissal of all other counts and the related Worth Co. Case No. SRCR026838. (D0071; Alford Plea at 2; 04/30/2024). The PSI was accordingly conducted and a sentencing hearing was scheduled.

On June 24, 2024, the defense made one minor correction to the PSI before proceeding. (D0109; Sent. Trans. at 4-5; 06/24/2024). The defense called Warburton's son and his niece's guardian, Megan Flugge, to testify on his behalf. (D0109; Sent. Trans. at 9-13; 06/24/2024). At sentencing, the State deferred to the PSI, pursuant to the agreement, and formally requested a prison sentence. (D0109; Sent. Trans. at 6; ln. 18-25; 06/24/2024). Importantly, the State testified that they had no victim impact statement. (D0109; Sent. Trans. at 8; ln. 1-12; 06/24/2024). Following a lengthy colloquy, discussed below, the court ultimately sentenced Warburton to a ten-year prison sentence including the special sentence and sex offender status as agreed. (D0109; Sent. Trans. at 24-25; ln. 18-25; and D0079; Order of Disposition; 06/24/2024).

The following day, Warburton filed a Motion for Resentencing stating that the guardian ad litem (hereafter GAL) for the child victims contacted defense counsel and indicated that there was actually a victim impact statement. (D0081; Motion for Resentencing; 06/25/2024). The State

formally resisted this and argued that they spoke with the GAL on June 26th and that was when a copy was provided to the State. (D0083; Resistance; 07/01/2024). Moreover, the State wrote that "[a]s far as the undersigned knows, the victim impact statement was not in existence at the time of sentencing." (D0083; Resistance; 07/01/2024). Moreover, that "if it was, then somebody can advise differently." (D0083; Resistance; 07/01/2024).

The Court noted this in their ruling and that "[t]here has been no further advice or response." (D0087: Ruling on Resentencing; 07/10/2024). The Court denied resentencing without hearing. (D0087: Ruling on Resentencing; 07/10/2024).

On July 12, 2024, Warburton filed a timely notice of appeal. (D0088; Notice of Appeal 07/12/2024).

STATEMENT OF THE FACTS

The events giving rise to the underlying criminal proceeding in Worth County case number FECR012500.

As it relates the issue here appealed, the allegations raised involved Warburton's granddaughter, E.W. (D0001; Criminal Complaint: 06/12/2023). On October 19, 2023, attorney Danielle M. Ellingson was appointed as Guardian Ad Litem to represent, among another victim, E.W.'s

interests in the case. (D0043; Order Appointing GAL; 10/19/2023). At sentencing, the prosecutor testified to the court that:

> "generally either talked with Ms. Ellingson; or when I was talking with E.W., I would usually do it with Ms. Ellingson. But I notified Ms. Ellingson obviously of her right -- of the right for E.W. to make a victim impact statement. I have not talked with E.W. about that myself. I thought it more appropriate that her guardian ad litem do so. And I have communicated with that guardian ad litem. She's indicated there is no victim impact statement. And so with that, Your Honor, I have none." (D0109; Sent. Trans. at 8; ln. 3-11; 06/24/2024).

While no hearing was held on the matter, counsel for the Defendant argued that Ellingson advised him that "no one had reached out to the victim about filling out a victim impact statement." (D0081; Motion for Resentencing; 06/25/2024). In response, counsel for the State duly filed the Victim Impact Statement on July 1, 2024. This consisted of a handwritten letter by E.W. that, in relevant part, stated as follows:

> "I didn't like what papa did to me. My feelings were hurt by the bad things he did to me. I was feeling scared, mad, and sad. I still want to have a relationship with him because he will always be my papa and I will always be his grandaughter [sic]. He should be able to have his job back and be in our community. I don't think he should go to prison." (D0084: VIS; 07/01/2024).

Following both the defense's motion and the State's resistance, Ellingson was conspicuously silent and there was no further record of exactly when this letter was written or received. Accordingly, the Court held

that it "the victim impact statement in this case may have been generated post-sentencing." However, importantly the Court noted that "[i]f either party had requested to continue the sentencing to allow the presentation of a victim impact statement, the Court would likely have done so." (D0087: Ruling on Resentencing at 2; 07/10/2024).

Any additional relevant facts will be discussed below.

JURISDICTIONAL CAUSE

On July 1, 2019, our legislature implemented several new changes to the Iowa Code. Specifically, Iowa Code § 814.6(1) was amended to disallow appeals from final judgments when a defendant plead guilty to a crime other than a class "A" felony. There was an exception to this rule change, "where the defendant establishes good cause." Iowa Code § 814.6(1)(2019). Good cause was not defined in the statute.

""[W]hen the legislature has not defined a term, we look to the common meaning of that term in interpreting the statute." *State v. Tesch*, 704 N.W.2d 440, 451 (Iowa 2005). A dictionary can be a reliable source for the common meaning of a word or phrase. *Id. Black's Law Dictionary* defines "good cause" to mean "[a] legally sufficient reason." *Good Cause*, *Black's*

Law Dictionary (11th ed. 2019). We adopt that definition of good cause for section 814.6." *State v. Damme*, 944 N.W.2d 98, 104 (Iowa 2020).

"We hold that good cause exists to appeal from a conviction following a guilty plea when the defendant challenges his or her sentence rather than the guilty plea. Damme received a discretionary sentence that was neither mandatory nor agreed to as part of her plea bargain, and she is appealing that sentence and asking for resentencing without challenging her guilty plea or conviction. A sentencing error invariably arises after the court has accepted the guilty plea. This timing provides a legally sufficient reason to appeal notwithstanding the guilty plea." *State v. Damme*, 944 N.W.2d 98, 105 (Iowa 2020).

Warburton received a discretionary sentence that was neither mandatory nor agreed to as part of his plea bargain, and he is appealing that sentence and asking for resentencing without challenging his guilty plea or conviction, this has established good cause to proceed.

ARGUMENT

I. DID THE SENTENCING COURT ABUSE ITS DISCRETION WHEN IT FAILED TO GRANT WARBURTON A SUSPENDED SENTENCE?

Standard of Review and Preservation of Error:

The Court reviews sentences imposed in a criminal case for "correction of errors at law." *State v. Damme*, 944 N.W.2d 98, 104 (Iowa 2020).

"If the sentence imposed is within the statutory limits, as it is here, we review for an abuse of discretion." *State v. Majors*, 940 N.W.2d 372, 385–86 (Iowa 2020).

Error was preserved in this case when defense counsel advocated for a lesser sentence and presented two witnesses in support of a lesser sentence. Further, counsel filed a motion for resentencing advocating for a new sentencing hearing based on the absence of the victim impact statement. (D0081; Motion for Resentencing; 06/25/2024).

Law:

"A sentencing court's decision to impose a specific sentence that falls within the statutory limits "is cloaked with a strong presumption in its favor, and will only be overturned for an abuse of discretion or the consideration of inappropriate matters." Our task on appeal is not to second-guess the sentencing court's decision. Rather, we must determine that its decision "was exercised on grounds or for reasons that were clearly untenable or unreasonable." We afford sentencing judges a significant amount of latitude

because of the "discretionary nature of judging and the source of respect afforded by the appellate process." *Id.* at 105–06 (citations omitted)." *State v. Martin*, No. 22-0021, (Iowa Ct. App. Jan. 25, 2023).

"A discretionary sentencing ruling, similarly, may be [an abuse of discretion] if a sentencing court fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case. *Id.* at 138 (alteration in original) (quoting *People v. Hyatt*, 316 Mich. App. 368, 891 N.W.2d 549, 578 (2016), *judgment affirmed in part and reversed in part by People v. Skinner*, 502 Mich. 89, 917 N.W.2d 292, 295 (2018)). "Sentencing decisions of the district court are cloaked with a strong presumption in their favor." *State v. Crooks*, 911 N.W.2d 153, 171 (Iowa 2018); *see also State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002)." *State v. Majors*, 940 N.W.2d 372, 385–86 (Iowa 2020).

"We reiterate that our role on review is for abuse of discretion. An abuse of discretion may exist if the sentencing court fails to consider a factor, gives significant weight to an improper factor, or arrives at a

conclusion that is against the facts. *Id.* at 138. But if the court follows our outlined sentencing procedure by conducting an individualized hearing, applies the *Miller/Lyle/Roby* factors, and imposes a sentence authorized by statute and supported by the evidence, then we affirm the sentence. *Goodwin v. Iowa Dist. Ct.*, 936 N.W.2d 634, 637 (Iowa 2019); *see also Seats*, 865 N.W.2d at 552–53 (explaining our review for abuse of discretion and emphasizing the discretionary nature of judges). As we stated in *Formaro*,

> Judicial discretion imparts the power to act within legal parameters according to the dictates of a judge's own conscience, uncontrolled by the judgment of others. It is essential to judging because judicial decisions frequently are not colored in black and white. Instead, they deal in differing shades of gray, and discretion is needed to give the necessary latitude to the decision-making process. This inherent latitude in the process properly limits our review. Thus, our task on appeal is not to second guess the decision made by the district court, but to determine if it was unreasonable or based on untenable grounds." *Id.*

"District courts are required to "state on the record its reason for selecting the particular sentence." Iowa R. Crim. P. 2.23(3)(*d*). "[T]his requirement ensures defendants are well aware of the consequences of their

criminal actions" and gives "our appellate courts the opportunity to review the discretion of the sentencing court." *State v. Hill*, 878 N.W.2d 269, 273 (Iowa 2016) (quoting *State v. Thompson*, 856 N.W.2d 915, 919 (Iowa 2014)). However, district courts are not obligated "to give its reasons for rejecting particular sentencing options." *State v. Russian*, 441 N.W.2d 374, 375 (Iowa 1989); *see also Thomas*, 547 N.W.2d at 226 ("The fact the district court did not specifically mention the absence of mitigating circumstances is inconsequential since this court has recognized that the district court is not required to note them."). "The court need only explain its reasons for selecting the sentence imposed." *Russian*, 441 N.W.2d at 375." *State v. Wilbourn*, No. 20-0257, 2022 WL 1434531 (Iowa May 6, 2022).

"The court is to [w]eigh and consider all pertinent matters in determining proper sentence, including the nature of the offense, the attending circumstances, defendant's age, character and propensities and chances of his reform. The courts owe a duty to the public as much as to defendant in determining a proper sentence. The punishment should fit both the crime and the individual. *Id.* (alteration in original) (quoting *State v. August*, 589 N.W.2d 740, 744 (Iowa 1999)); *accord* Iowa Code § 901.5 (providing that an appropriate sentence "will provide maximum opportunity

for the rehabilitation of the defendant, and for the protection of the community from further offenses by the defendant and others")." *State v. Hayden*, No. 22-0644, 2022 WL 16985227 (Iowa Ct. App. Nov. 17, 2022).

"When, as here, the court imposes a sentence within the statutory limits, it "is cloaked with a strong presumption in its favor, and will only be overturned for an abuse of discretion or the consideration of inappropriate matters." *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002). "A district court abuses its discretion when it exercises its discretion on grounds clearly untenable or to an extent clearly unreasonable, which occurs when the district court decision is not supported by substantial evidence or when it is based on an erroneous application of the law." *State v. Wicker*, 910 N.W.2d 554, 564 (Iowa 2018) (cleaned up)." *State v. Hill*, 964 N.W.2d 24 (Iowa Ct. App. 2021).

"The district court's sentence should "provide [the] maximum opportunity for the rehabilitation of the defendant, and for the protection of the community from further offenses by the defendant and others." Iowa Code § 901.5. Moreover, "the district court is to weigh all pertinent matters in determining a proper sentence, including the nature of the offense, the

attending circumstances, the defendant's age, character, and propensities or chances for reform." *State v. Johnson*, 513 N.W.2d 717, 719 (Iowa 1994).

The district court must then determine the appropriate sentence based on individual factors of each case, though no single factor alone is determinative. *See Id.*

Hill contends the court "failed to give a rational basis for the extreme sentence imposed upon [her] given the record and evidence presented at the time of sentencing." In arguing against imprisonment, Hill notes her offenses were nonviolent, her family relied on her, and her pre-existing health conditions put her at higher "risk of danger to being exposed to Covid-19" in the prison population. "A sentencing court is to consider any mitigating circumstances relating to a defendant." *State v. Withan*, 583 N.W.2d 677, 678 (Iowa 1998). But the court is not "required to specifically acknowledge each such claim of mitigation urged by a defendant." *State v. Boltz*, 542 N.W.2d 9, 11 (Iowa Ct. App. 1995)." *State v. Hill*, 964 N.W.2d 24 (Iowa Ct. App. 2021).

'"In applying the abuse of discretion standard to sentencing decisions, it is important to consider the societal goals of sentencing criminal offenders, which focus on rehabilitation of the offender and the protection of

the community from further offenses." *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002). Sentencing courts in Iowa generally have broad discretion to rely on information presented to them at sentencing. *See State v. Pappas*, 337 N.W.2d 490, 494 (Iowa 1983) ("[W]hatever Iowa statutes leave to the courts in matters of sentencing should be the responsibility of the sentencing judge."); *State v. Gartin*, 271 N.W.2d 902, 910 (Iowa 1978) ("[T]he decisions of the trial court are cloaked with 'a strong presumption in [their] favor,' and '[u]ntil the contrary appears, the presumption is that the discretion of the [trial] court was rightfully exercised.' " (Alterations in original.) (quoting Kermit L. Dunahoo, *The Scope of Judicial Discretion in the Iowa Criminal Trial Process*, 58 Iowa L. Rev. 1023, 1024 (1973))); *State v. Delano*, 161 N.W.2d 66, 71 (Iowa 1968) (holding the sentencing court may rely on any information to which the defendant did not object). A court "should weigh and consider all pertinent matters in determining proper sentence, including the nature of the offense, the attending circumstances, defendant's age, character and propensities[,] and chances of his reform." *State v. Cupples*, 260 Iowa 1192, 1197, 152 N.W.2d 277, 280 (1967)." *State v. Headley*, 926 N.W.2d 545, 550 (Iowa 2019).

Analysis*:*

a. Sentencing Factors

In its initial sentencing statements, the Court indicated that there were numerous factors that weighed in favor of the granting of a suspended sentence.

Specifically, the court stated, that Warburton did not have any prior criminal record; his employment; and family circumstances weighed in favor of a suspended sentence.

The court talked about the age of the victim as a consideration for a prison sentence. However, the crime is lascivious acts with a child, which necessitates that the child will be of a young age. The code does not make it more heinous of a crime whether it is performed on a six-year-old or a thirteen-year-old, but the court considered it a more egregious offense based on age alone. This appears to be a predetermined sentencing policy by the court which is disallowed.

"Defendant's main reliance is on *State v. Jackson,* 204 N.W.2d 915 (Iowa 1973) and *State v. Hildebrand,* 280 N.W.2d 393 (Iowa 1979).

In those cases this court set sentences aside because judges sentenced defendants in accordance with predetermined sentencing policies. In each case the judge did not exercise sentencing discretion because of the fixed

policy. The teaching of those cases is that a judge must fairly consider all relevant factors and every sentencing option before pronouncing sentence." *State v. Wright*, 340 N.W.2d 590, 593 (Iowa 1983).

The Court also relied heavily on the PSI writers statements in this matter citing them at length. (D0109; Sent T. pg. 23-4; Ll 16-1; 6/24/24). The PSI provided no rhyme or reason for a recommendation for prison, yet the district court adopted this recommendation.

Warburton was sixty-six years of age at the time of sentencing. It indicated that Warburton did not have any prior criminal history and that he had never been supervised by the Department of Corrections in the past. (D0077, PSI, pg. 1 & 3; 6/19/24).

It indicated that he had consistent employment for the last nineteen years. (D0077, PSI, pg 10; 6/19/24). Warburton does not have a history of drug or alcohol abuse. (D0077, PSI, pg 8; 6/19/24). The defendant does not have any major mental health issues. (D0077, PSI, pg 9; 6/19/24).

The PSI writer interjected her opinion into the recommendation. There was no evidence in the record to support these statements by the PSI writer. "The victim was in the care of her grandparents when she was sexually abused by her grandfather, she did not only experience the immediate

trauma of sexual abuse but also her trust and security has been violated which would add to the intensity of the trauma that she experiences. Crimes such as these cause a great deal of fear and apprehension to the victim, their families, and others in the community. Children have the right to be protected from those who will exploit them." (D0077, PSI, pg 10; 6/19/24).

The court then echoed the entirety of this statement when handing down the sentence.

The record does not support these statements. The Minutes of Testimony indicate that E.W. is doing well and does not have a history of counseling. This would have been two to four years after the incident occurred. Further, there were no behavioral concerns noted at home or school. (D0024; Minutes, pg. 16; 6/23/23).

There was also no evidence of fear or apprehension. E.W. specifically stated that if she told, she would not get to see her Papa again. This implies that she does not fear him and that there is no apprehension. The PSI writer was merely parroting generic statements about trauma and not actual facts related to this defendant or this case. During the sentencing hearing, the guardian testified that E.W. wanted to wish her Papa a happy birthday and

desired to see him. Again, indicative of significant trauma and lack of apprehension.

The PSI writer then recommended a prison sentence in this case. Notably, the PSI writer did not explain why there was a prison recommendation or how the writer came to that conclusion as nothing in the PSI prior to the recommendation indicated that prison was appropriate in this case. It would appear that this recommendation is based solely on the fact that this was a sex offense against a child and not based on an individualized assessment of Warburton. *See State v. White*, 903 N.W.2d 331, 333-34 (Iowa 2017) (finding the sentencing court abused its discretion when it drew "critical conclusions" that were "not grounded in science but rather based on generalized attitudes of criminal behavior").

The PSI author did not evaluate Warburton with *any* risk assessment tools or conduct any unbiased assessments.

In almost every PSI there are evaluation tools utilized to determine the appropriate sanction for an offender and to determine needs during supervision. These include the Iowa Mental Health Screening which is designed to measure mood, psychotic features, substance abuse issues which

will impact an offenders overall risk for recidivism. This test was not administered. [1]

The Iowa Revised Risk Assessment is a tool which focuses on predictions of likelihood to commit new offenses and to assign an initial level of supervision in the community, was also not utilized.

The Dynamic Risk Assessment for Offender Re-Entry is used to assist with analysis of risk factors along with protective factors that may mitigate risk areas. This test was also not administered.

The PSI writer did not provide any information as to why none of these tests were administered in this matter.

"Section 901.5 contains numerous sentencing options from incarceration to deferred judgment. When the department of correctional services recommends a deferred judgment, deferred sentence, or a suspended sentence, each of which is accompanied by probation, the department is telling the court the defendant can be rehabilitated in the community without incarceration, is a low risk for recidivism, and is not a danger to the community. When the department of correctional services recommends incarceration, the department is telling the court that the defendant cannot be

[1] The descriptions of these tools was from prior PSI reports authored by the Iowa Department of Corrections PSI writers.

rehabilitated in the community, is a high risk for recidivism, or is a danger to the community. This information is "pertinent information" for a court to consider when sentencing a defendant under section 901.5." *State v. Headley*, 926 N.W.2d 545, 552 (Iowa 2019).

This information was pertinent to the court. However, the PSI writer did not provide any of this information and instead just provided the court with a conclusion. It was error for the court to give the PSI recommendation any significant weight as there were no facts to support its conclusion. The facts contained in it, supported a probation recommendation – lack of criminal history, steady employment, no substance abuse or mental health issues, family support, financial security, age, and compliance with the courts orders while the matter was pending.

Sentencing Warburton probation is not just a slap on the wrist.

"The probationer is not a free man, but is subject to surveillance, and to such restrictions as the court may impose." *State v. Jepsen*, 907 N.W.2d 495, 501 (Iowa 2018) (internal quotation marks and citations omitted).

There was no evidence that the publics safety would be at risk by suspending the sentence or that Warburton could not be rehabilitated. In fact, the court never gave any credence to the rehabilitation aspect. We also know

that the public would not be at continued risk as Warburton remained out of custody for over a year while the charges were pending. He does not have a prior history and remained compliant with the law throughout the year long wait for resolution. Further, there was a no-contact order in this case. Warburton unfailingly abided by it. He even took it a step further and remained out of contact with his daughter, Megan, as she was the caretaker for E.W. (D0109; Sent T. pg. 12; Ll 11-13; 6/24/24).

In this case, the court committed a clear error of judgment by fixating on the age of the victim, the alleged trauma she suffered without any supporting evidence and in fact evidence to the contrary, as opposed to looking at the public safety, or rehabilitation of Warburton.

"The societal goals of sentencing are to provide maximum opportunity to rehabilitate the defendant and to protect the community. Iowa Code § 901.5. A sentencing court weighs multiple factors, "including the nature of the offense, the attending circumstances, the age, character and propensity of the offender, and the chances of reform." *Formaro*, 638 N.W.2d at 725.

Before imposing its sentence, "the court must additionally consider the defendant's prior record of convictions or deferred judgments,

employment status, *family circumstances*, and any other relevant factors, as well as which of the sentencing options would satisfy the societal goals of sentencing." *Id.* (emphasis added)." *State v. Damme*, 944 N.W.2d 98, 106 (Iowa 2020).

The court did not discuss the possibility of reform, the propensity of the offender, or the least restrictive placement to achieve societal goals. It simply focused on the fact that this offense was against a child. This gave improper weight to that factor and disregarded any of the other considerations or proper factors that should have been given more weight, such as, a lack of any prior criminal history.

"A sentencing court's mission is to consider all pertinent information before deciding which option "will provide maximum opportunity for the rehabilitation of the defendant, and for the protection of the community from further offenses by the defendant and others." Iowa Code §901.5. When exercising its sentencing discretion, the court must weigh relevant factors such as the nature of the offense and attending circumstances; the defendant's age; and the defendant's character, propensities, and chances of reform. Iowa Code § 907.5; *State v. Leckington*, 713 N.W.2d 208, 216 (Iowa 2006)." *State v. Deschepper*, 946 N.W.2d 767 (Iowa Ct. App. 2020).

Applying all the factors listed above make Warburton a supreme candidate for a suspended sentence. His chances of reform are undoubtedly high as evidenced by the year out of custody pending sentencing. He has family support, and stable employment. The court cannot ignore this pertinent information and simply order prison because a child was violated.

When determining what the appropriate punishment is to rehabilitate Warburton, probation is more than enough. He will still be required to attend SOTP, register as a sex offender and be subject to a special sentence.

The judgment in this case should be overturned.

b. Victim Impact Statement

The record in this case indicates that the State was asked at sentencing if the victim wished to make an impact statement and it indicated that it spoke to the Guardian Ad Litem and there were no victim impact statements. (D0109; Sent Tr. Pg. 7-8; Ll 25-11; 6/24/24).

On June 25, 2024 the Defendant filed a Motion requesting Re-Sentencing, stating in part, that Defense Counsel spoke to the Guardian and that no one had reached out to the minor child victim about filling out a victim impact statement. Defense counsel further averred that the victim had

provided a victim impact statement to him at that time. (D0081; Motion to Resentence; 6/25/25).

On July 1, 2024, the state filed a resistance to said motion, stating in part, "it was the understanding of the undersigned that the Guardian Ad Litem had spoken to the victim advocate, the victim advocate had spoken to the victim, and the victim had advised she did not wish to make a victim impact statement." (D0083; Resistance; 7/1/24). The State further indicated that, "As far as the undersigned knows, the victim impact statement was not in existence at the time of sentencing…If it was, then somebody can advise differently." (D0083; Resistance; 7/1/24).

It appears that the State does not have any personal knowledge regarding the existence of a victim impact statement and whether it was in fact available at the date and time of sentencing. It would further appear that the state was relying on multiple levels of hearsay when it determined that there was not a victim impact statement to be submitted. The Guardian of the minor child contradicted the assertions by the State.

The court did not set the matter for hearing and denied the motion without consideration of the victim in this matter, or the contradictory

statements between the State and Defense Counsel. (D0087; Denial of Resentencing; 7/10/24).

Iowa Code Section 915.21(1) holds that: "The court must allow a crime victim to make a victim impact statement."

It also appears that this same code section holds that, should there be a Victim Impact Statement, it is mandatory for the court to include/examine them: "…expressly requires sentencing courts to 'receiv[e] and examin[e]…victim impact statements." *State v. Nichols*, 958 N.W.2d 232 (Iowa Ct. App. 2021) *quoting* Iowa Code Section 915.21(1).

Likewise, it is required that the Presentence Investigation Report shall provide a victim impact statement form to each victim. 901.3(1)(e).

"The enactment of section 915.37(1), however, shows the legislature viewed the statutory duties of the child's GAL in a CINA proceeding as compatible with the same GAL providing assistance to the child "at all stages of the proceedings" in the criminal action, including the sentencing hearing." *State v. Lopez*, 872 N.W.2d 159, 177 (Iowa 2015).

Therefore, the GAL in the instant case would, as in a CINA case, be "duty-bound to look out for the child's best interests." *Id.* This would include reaching out to the child, personally, and communicating with the

child regarding the victim impact statement and her right to speak and/or be present at a sentencing hearing.

Even without a written statement, the GAL should have advocated for the child victim in this case. it was the GAL's duty to obtain the child's opinion and submit anything relevant about that *before* the sentencing hearing occurred. The phrasing of the child's opinion in the Victim Impact Statement would reasonably infer that the child maintained this position before sentencing, as it talks in subjunctives and future tenses. Therefore, the GAL clearly failed to obtain that opinion from the child and present it in a timely manner (i.e. before the important sentencing hearing.).

Most importantly, there is not anything in the record about what actually transpired, as a hearing was not held. We just have both Defense and the State putting forth their opinions as to what might have occurred without actually knowing what the facts are. Instead, the record is replete with hearsay statements about what is believed to have occurred, by both sides.

There could be the argument that the child was asked their opinion and did not provide anything or had a different opinion and then later changed their opinion after sentencing and submitted that letter. However,

again, the victim impact statement isn't phrased like that and doesn't suggest anything to that effect. Furthermore, the GAL's silence on the matter one way or the other during the reconsideration/resentencing proceedings means that this could only be speculation. This could also further the argument that the GAL was consistently failing in essential duties as they did not comment even when ostensibly given the opportunity to as the Court also noted their silence: "There has been no further advice or response." (D0087; Denial of Resentencing at 2; 07/10/2024)

The language in 915.37(1) is particularly relevant. To start with, there is the element of the GAL which Iowa Code Section 915.37(1) holds that a GAL for a prosecuting child witness: "…***shall receive notice*** of and may attend all depositions, hearings, and trial proceedings to support the child and advocate for the protection of the child." Quoted by *State v. Lopez*, 872 N.W.2d 159, 177 (Iowa 2015).

A sentencing hearing, wherein the minor child is a victim, is certainly an important proceeding where advocacy is to expected. In this case, we cannot hold the child to be at fault for failing to timely comply, if that is the case. If the minor child was not given timely notice and the opportunity to present her statement to the court due to the untimely communication of the

GAL, that is a violation of the essential duties of the GAL. This issue should be before the court, but the record is lacking.

In this case, given that the victim was advocating against prison, the court's failure to consider that at the time of sentencing, and in the post-sentencing motion, greatly prejudiced the Defendant in this case and was an abuse of discretion.

CONCLUSION

For the above-mentioned reasons, Appellant Douglas Warburton respectfully requests the appellate court that his judgment be vacated and this matter be remanded for resentencing.

REQUEST FOR NON-ORAL SUBMISSION

Appellant Douglas Warburton does not request that his counsel be heard orally by the court regarding all matters addressed herein.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because the brief contains 5,476 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word in Times New Roman 14 pt. font.

/s/ Karmen Anderson — 3/21/2024
Karmen R. Anderson — Date