IN THE SUPREME COURT FOR THE STATE OF IOWA
NO. 15-2203

STATE OF IOWA,
Plaintiff-Appellee

vs.

RENE ZARATE
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR BUENA VISTA COUNTY,
HONORABLE DAVID A. LESTER

APPELLANT'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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I hereby certify that I e-filed the Defendant-Appellant's Final Brief with the Electronic Document Management System with the Appellate Court on the 30th day of March 2017.

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ROUTING STATEMENT

This appeal should be retained by the Iowa Supreme Court because it is a case presenting substantial constitutional questions as to the validity of a statute, in accordance with 6.1101(2)(a), is a case presenting substantial issues of first impression in accordance with 6.1101(2)(c), is a case presenting fundamental and urgent issues of broad public importance requiring prompt or ultimate determination by the supreme court in accordance with 6.1101(2)(d), and is a case presenting substantial questions of enunciating or changing legal principles in accordance with 6.1101(2)(f) presenting the application of existing legal principles in accordance with 6.1101(3)(a) and is a case presenting issues that are appropriate for summary disposition in accordance with 6.1101(3)(b).

CASE STATEMENT

Iowa Code § 902.1(2) violates the Iowa Constitution because it does not allow individualized sentencing for juveniles and mandates a de facto life sentence without a meaningful opportunity for release for juveniles. In addition, Iowa Code § 902.1(2) violates the Iowa Constitution because it

mandates that the court give an improperly heavy weight to aggravating factors of the offense.

FACTUAL BACKGROUND

Rene Zarate had a relatively happy early life, but started to have trouble once his family moved to the United States. (App. 161). Rene Zarate was born in Mexico in 1983. (App. 161). He and his family arrived in the United States between 1994 and 1996. (App. 161). René became increasingly more difficult to control once he came to the United States. (App. 161). Rene did not speak English and had difficulty behaving at school. (App. 161). In 9th grade he incurred approximately 53 infractions, and at least one suspension for fighting with another student. (App. 161). He did not make new friends at school, and felt as though he did not fit in socially. (App. 161). Rene felt disconnected from his family, and Rene's father used alcohol excessively and was physically violent towards immediate family members, including Rene and his mother. (App. 161).

These familial circumstances lead to Rene succumbing to peer pressure. Rene began to associate with Hispanic peers who were similarly disaffected. (App. 161). When he was about 13 years old, Rene began to associate with the Sur 13 gang. (App. 161). He became especially close with his friend Isaac Cruz. (App. 53). When he was approximately 13 years old,

Rene started to drink alcohol and use drugs, including cocaine, methamphetamine, marijuana, and glue. (App. 32) At times his use was heavy, resulting in blackouts. (App. 32). When he was about 14 years old, Rene was arrested on various occasions for non-violent delinquent acts, and adjudicated delinquent for burglary and criminal mischief. (App. 26). He spent time in juvenile detention and on "house arrest." (App. 26). He was unsuccessful on probation. (App. 26).

On May 1, 1999, Rene killed Jorge Ramos by stabbing him 50 times. (App. 162). On the night of the murder, René, Isaac, and a few of his other friends were drinking beer in a trailer. (App. 162). The victim, Jorge Ramos, returned home to the mobile home, where he lived. (App. 162). Rene's friend, Isaac Cruz, invited Jorge to drink with them, but Jorge indicated he did "not drink with kids." (App. 162). An argument ensued between Isaac and Jorge, and Jorge made a comment that Rene interpreted as being threatening. (App. 162). Jorge went to his bedroom. Rene became worried Jorge would call the police, and began to think about the possibility of getting into trouble for violating his court conditions. (App. 162). Rene recalled feeling angry because Isaac was upset and because he thought Jorge was going to hurt them. (App. 162). Rene grabbed a screwdriver and approached Jorge, but a friend took the screwdriver away. (App. 162). Rene

then found a hatchet, which a friend also removed from his possession. (App. 162). Rene next went to a bedroom and retrieved a knife he had seen earlier. (App. 162). Rene recalled that one of his friends nodded at him, which he interpreted as tacit support for stabbing Jorge. (App. 162). Rene then stabbed Jorge approximately 50 times; his friends ran out of the mobile home while this was occurring. (App. 162). At some point after stabbing Jorge, Rene kicked and spat on him. (App. 163). Rene moved Jorge's body outside and covered it with blankets. (App. 163). He was initially trying find gasoline to burn the blankets or body. (App. 163). Shortly after the homicide, while speaking with police, Rene provided false information before being arrested. (App. 163). He later gave a full confession. (App. 163).

After the murder charges, Rene was sent to Eldora for an evaluation. (App. 24). The school psychiatrist, Terry Augspurger, noted that Rene had "somewhat compromised intellectual abilities" with an IQ of 79 and a 4^{th}-5^{th} grade academic functioning, which made him less mature, more impetuous, gave him an underdeveloped sense of responsibility, and gave him poor risk assessment skills. (App. 31). Rene had been hanging out with a negative peer group, including some boys who identified with the Sureno 13 gang, which highlighted Rene's vulnerability to peer pressure and

impressionability. (App. 33). Augspurger concluded "Given this boy's history and appearance, it would be my clinical impression that he might be successfully rehabilitated within a span of 5-8 years." (App. 28) Augspurger recommended Rene be returned to juvenile court jurisdiction. (App. 28). Despite Augspurger's recommendation, the report recommended waiving Rene to adult court. (App. 33).

On 12/6/2000, Rene had an interview with Donney Dewdney, M.D., a child psychiatric consultant, who also wrote a psychiatric evaluation. (App. 49). Dr. Dewdney noted that Rene had immigration and transculture stress, which lead Rene to seek approval from others, made him vulnerable to peer pressure, and impressionable. (App. 51). Dr. Dewdney diagnosed Rene with dysthymic mood disorder at the time of the stabbing and stated that Rene's emotions were out of control, demonstrating Rene's lack of maturity, underdeveloped sense of responsibility, impetuosity, poor risk assessment skills, and inherently sensitive nature, capacity for change. (App. 53). Dr. Dewdney thought the 50 stab wounds were proof that Rene was outside of control and in a fit of rage. (App. 66).

Rene was also evaluated by Dr. Sheila Pottebaum, who worked for Child Psychiatry Associates in Des Moines. (App. 73). Dr. Pottebaum noted that Rene was probably functioning in the bottom 5% of the IQ-range and

that Rene had the capability to lose touch with reality under stressful circumstances. (App. 75). This demonstrated Rene's lack of maturity, underdeveloped sense of responsibility, impetuosity, and inherently sensitive nature. Dr. Pottebaum's opinion was that due to Rene's substance use, immigrant status, and lower cognitive function, he was extremely impressionable and vulnerable to peer pressure. (App. 77). Dr. Pottebaum thought Rene had the characteristics of someone who could be rehabilitated, in that he had guilt and remorse, and that his guilt and remorse was legitimate. (App. 84). She agreed with Augspurger's recommendation that he could be rehabilitated within 5-8 years. (App. 84).

Rene initially had a difficult time in prison, but eventually became a model inmate. (App. 163). As he began to serve his sentence, Rene had substantial behavior problems, disciplinary infractions, and relatively poor evaluations regarding his work performance and relationships with supervisors. (App. 163). Starting in about November 2004, Rene began to receive above average evaluations of his work performance and overall institutional adjustment. (App. 163). While incarcerated, Rene completed his GED as well as numerous intervention programs. (App. 163). He has been involved in hobbies such as sports and religious groups. (App. 163). Rene has not incurred any major disciplinary infractions since 2005, indicating

that Rene did indeed have a great capacity for change, because while he started out immature, impetuous, and with an underdeveloped sense of responsibility, he became a model inmate. (App. 163). He has not allowed other inmates to make impressions on him or convince him to act out as a result of peer pressure. (App. 163).

After the filing of the Motion to Correct Illegal Sentence, Rene was evaluated by Dr. Stephen Hart. (App. 158). Dr. Hart reviewed the entire case file, Rene's Department of Corrections records, and conducted interviews with Rene and his family. (App. 158). Dr. Hart found that Rene's risk of recidivism is low, as all of the factors that elevated his risk for violence when he was a youth either have remitted, decreased in relevance, or improved. (App. 167). Dr. Hart found that Rene had demonstrated more significant change and improvement since the homicide than would be expected for a typical offender. (App. 167). Dr. Hart also found that at the time of the offense, Rene was immature, had an underdeveloped sense of responsibility, was vulnerable to peer pressure, that Rene was impetuous, that Rene had poor risk assessment skills, was impressionable, and was inherently sensitive. (App. 165-67). Dr. Hart found that Rene had changed significantly since the time of the offense. (App. 167).

A resentencing hearing was held on June 3, 2015. At the resentencing hearing held on June 3, 2015, Dr. Hart testified that Mr. Zarate's demeanor was open and honest, and that Mr. Zarate seemed ashamed of the offense. He also testified that Mr. Zarate's version of the offense lined up with the other documents that he viewed.

At the hearing, Mr. Zarate gave an allocution to the court where he admitted to the offense, apologized to the community in Storm Lake, apologized to his family, apologized to the court, apologized to Jorge Ramos and his family, and acknowledged the inadequacy of his apology and irreversibility of the harm that he had done.

All testimony involving the mandatory mitigating sentencing factors articulated in Miller, Ragland, Null, and Lyle was in the Defendant's favor. The only factors that were not in his favor were those newly articulated in the legislature's statute related to the circumstances and nature of the crime.

COURSE OF PROCEEDINGS

Mr. Zarate was found guilty of murder in the first degree, in violation of Iowa Code § 707.2 on February 8, 2001, and was sentenced to life with no possibility of parole on April 5, 2001. (App. 163). In 2012, the United States Supreme Court decided Miller v. Alabama, 132 S.Ct. 2455 (2012). The United States Supreme Court held the Eighth Amendment prohibited "a

sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders" and that defendants who committed homicide crimes as juveniles were entitled to a sentencing hearing that would permit the sentencing court to consider the individual characteristics of the defendant and the individual circumstances of the crime as mitigating factors for a lesser sentence. Id. at 2468.

On July 26, 2012, Governor Branstad commuted Mr. Zarate's sentence to sixty years with no possibility for parole and directed that no credit be given for earned time. On September 26, 2012, Mr. Zarate filed a Motion to Correct Illegal Sentence. In 2013, the Iowa Supreme Court decided State v. Ragland, 836 NW 2d 107 (Iowa 2013). In Ragland, the Court determined that Miller applies retroactively to all juveniles previously sentenced to mandatory minimum sentences. The Court went on to conclude that the governor's commutations were *de facto* sentences of life without parole. The Court therefore held that juvenile offenders such as Mr. Zarate, serving life sentences without possibility parole, are entitled to a resentencing hearing. On March 7, 2014, Mr. Zarate's filed a Supplemental Motion to Correct Illegal Sentence.

On April 24, 2015, the governor signed into law Senate File 448, a bill changing the text of Iowa Code § 902.1(2). The bill reduced the statutorily

authorized sentences to life without parole, life with the possibility of parole, and life with the possibility of parole after a term of years. It also added several sentencing factors that the court may take into consideration at sentencing when choosing among these sentences.

At the trial court, Mr. Zarate took the position

> that recently amended Iowa Code Section 902.1(2) is also unconstitutional and violates the cruel and unusual punishment clause of the Iowa Constitution, because the legislature has taken away the wide discretion given to trial courts in determining sentences for juveniles to commit capital crimes as contemplated by both Miller and Ragland. Zarate further contends that even with the parole options now available under the recently amended Iowa Code Section 902.1(2)(a), he is still denied a meaningful opportunity for release under the existing statutes governing the Iowa parole system."

(Order, 12/09/15 Page 9).

The court overruled Mr. Zarate, stating "the court now concludes that recently amended Iowa Code Section 902.1(2), on its face, is not unconstitutional and comports with the mandates set forth in both the Miller and Ragland cases." (App. 9).

ISSUES

I. THE SENTENCING SCHEME IN IOWA CODE § 902.1(2)(a) VIOLATES THE IOWA CONSTITUTION'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT

A. Error Preservation

Error preservation is not at issue, because illegal sentence claims may be brought at any time, even for the first time on appeal. See State v. Bruegger, 773 NW 2d 862, 871 (Iowa 2009). However, error was preserved when Mr. Zarate raised the argument that the

> recently amended Iowa Code Section 902.1(2) is also unconstitutional and violates the cruel and unusual punishment clause of the Iowa Constitution, because the legislature has taken away the wide discretion given to trial courts in determining sentences for juveniles to commit capital crimes as contemplated by both Miller and Ragland. Zarate further contends that even with the parole options now available under the recently amended Iowa Code Section 902.1(2)(a), he is still denied a meaningful opportunity for release under the existing statutes governing the Iowa parole system.
> (Order, 12/09/15 Page 9).

The issue was decided when the court overruled Mr. Zarate, stating "the court now concludes that recently amended Iowa Code Section 902.1(2), on its face, is not unconstitutional and comports with the mandates set forth in both the Miller and Ragland cases." (App. 9).

B. Standard of Review

The standard of review when a Defendant challenges his sentence as unconstitutional is de novo. State v. Lyle, 854 N.W.2d 378, 382 (Iowa 2014).

C. Iowa Constitutional Requirements of Juvenile Sentencing

In 2014, the Iowa Supreme Court decided State v. Lyle, and ruled that "all mandatory minimum sentences of imprisonment for youthful offenders are unconstitutional under the cruel and unusual punishment clause in article I, section 17 of [the Iowa] constitution." State v. Lyle, 854 N.W.2d 378, 400 (Iowa 2014). This decision applies to all juveniles currently serving mandatory minimum sentences, and each is entitled to resentencing hearing. Id. at 403 (Iowa 2014).

On April 24, 2015, the governor signed into law Senate File 448, a bill changing the text of Iowa Code § 902.1(2). Section 4 of that bill makes it effective upon enactment. Section 5 makes it apply to anyone convicted of a class "A' felony prior to, on, or after the effective date of this Act.

On May 27, 2016, the Iowa Supreme Court decided State v. Sweet. In Sweet, the court adopted "adopt a categorical rule that juvenile offenders may not be sentenced to life without the possibility of parole under article I,

section 17 of the Iowa Constitution." State v. Sweet, No. 14-0455 (Iowa May 27, 2016).

However, there are two additional juvenile sentencing concerns that come down from the Miller and Ragland line of cases. The first is that the sentencing process is individualized. The second is that there is a sentencing option with a meaningful opportunity for release.

D. The Iowa Constitution mandates individualized sentencing.

Individualized sentencing allows the court a variety of sentencing options and even the imposition of a term of years. The Iowa Supreme Court's decision in Ragland and the United States Supreme Court's decision in Miller held that juveniles are entitled to individualized sentencing hearings, even for homicide cases. State v. Ragland, 836 NW 2d 107, 112 (Iowa 2013). After the individualized sentencing, the court might still permit a life without parole sentence in a murder case. Id. at 121. However, the court may also impose a sentence *far less* than life without parole. Id. The sentencing process must be tailored to account in a meaningful way for the attributes of juveniles that are distinct from adults. Id. The court must be able to take mitigating factors into account. Id. The decision by the court must be individualized. Id.

The United States Supreme Court held that their individualized sentencing mandate would allow for flexibility and discretion in sentencing, allowing for judges to choose life with parole, life without parole, or just lengthy terms of years. "Discretionary sentencing in adult court would provide different options: There, a judge or jury could choose, rather than a life-without-parole sentence, a lifetime prison term with the possibility of parole or a lengthy term of years." Miller v. Alabama, 132 S. Ct. 2455, 2474-75 (2012) (emphasis added).

The Iowa Supreme Court explained:

> Miller effectively crafted a new subset of categorically unconstitutional sentences: sentences in which the legislature has forbidden the sentencing court from considering important mitigating characteristics of an offender whose culpability is necessarily and categorically reduced as a matter of law, making the ultimate sentence categorically inappropriate. This new subset carries with it the advantage of simultaneously being more flexible and responsive to the demands of justice than outright prohibition of a particular penalty while also providing real and substantial protection for the offender's right to be sentenced accurately according to their culpability and prospects for rehabilitation.

State v. Lyle, 854 NW 2d 378, 386 (Iowa 2014).

However, Iowa Code § 902.1(2)(a) does not allow for such flexibility in sentencing. The law requires that a juvenile convicted of murder in the first degree must receive one of the following sentences.

> (1) Commitment to the director of the department of corrections for the rest of the defendant's life with no possibility of parole unless the governor commutes the sentence to a term of years.
>
> (2) Commitment to the custody of the director of the department of corrections for the rest of the defendant's life with the possibility of parole after serving a minimum term of confinement as determined by the court.
>
> (3) Commitment to the custody of the director of the department of corrections for the rest of the defendant's life with the possibility of parole.

Mr. Zarate's position is that the recently amended Iowa Code § 902.1(2)(a) is unconstitutional and violates the cruel and unusual punishment clause of the Iowa Constitution, because Miller contemplates that judges will have wide discretion in fashioning juvenile sentences and the legislature has superseded this process, much like the governor attempted to do in Ragland.

The Iowa Supreme Court's ruling that juveniles should receive individualized sentencing should be given preference over the statute's three authorized sentences. The Iowa Supreme Court's decision in Ragland and the United States Supreme Court's decision in Miller made it clear that juveniles are entitled to individualized sentencing hearings, even for homicide cases. State v. Ragland, 836 NW 2d 107, 112 (Iowa 2013). The Iowa legislature does not control the law on this subject until they have

amended the constitution. Until the legislature does so, the courts are bound by Miller, Ragland, Null, and Lyle to conduct a Miller hearing, consider the mandatory mitigating factors, and impose a sentence which will lead to a meaningful opportunity for release.

Individualized sentencing allows the court a variety of sentencing options and even the imposition of a term of years. After the individualized sentencing, the court might still permit a life without parole sentence in a murder case. Id. at 121. However, the court may also impose a sentence far less than life without parole. Id. The decision by the court must be individualized. Id. The United States Supreme Court clearly thought that their individualized mandate would allow for flexibility and discretion in sentencing, allowing for judges to choose life with parole, life without parole, or just lengthy terms of years. "Discretionary sentencing in adult court would provide different options: There, a judge or jury could choose, rather than a life-without-parole sentence, a lifetime prison term with the possibility of parole or a lengthy term of years." Miller v. Alabama, 132 S. Ct. 2455, 2474-75 (2012) (emphasis added).

Iowa Code § 902.1(2) is unconstitutional because it does not allow for individualized sentencing. It mandates that the court sentence the defendant to at least a sentence of life with the possibility of parole, which is anathema

to the spirit of Miller and Ragland. Individualized sentencing requires that the court have more flexibility to grant a term of years sentence or craft the appropriate punishment. The governor has previously attempted to circumvent Miller; the legislature now seeks to circumvent Ragland, Null, and Lyle. Instead of allowing an individualized sentencing, the legislature wants to circumvent the cruel and unusual punishment clauses of both the Iowa and US constitutions, and mandate that courts sentence these juvenile offenders to at least life with the possibility of parole.

The court should find that a mandatory indeterminate sentence of life with parole violates the cruel and unusual punishment clauses in article I, section 17 of the Iowa Constitution and the 8th Amendment of the United States Constitution. The Iowa Constitution should offer more protection than the United States Constitution because of Iowa's long history of recognizing individual rights, of affording more individual rights than the federal constitution, and for the cornucopia of ways juveniles are different than adult offenders, as noted in Ragland, Null, and Lyle. The sentencing process must be tailored to account in a meaningful way for the attributes of juveniles that are distinct from adults.

E. The Iowa Constitution requires that the Court have the option to give a Defendant a sentence with a meaningful opportunity for release.

It is not enough for a juvenile offender to have an opportunity for release, that opportunity for release must be meaningful. Miller and Ragland require that the court have the option to sentence someone with a meaningful opportunity for release. State v. Ragland, 836 NW 2d 107, 115 (Iowa 2013). Miller applies to sentences that are the functional equivalent of life without parole. Id. at 122. The United States Supreme Court did not specify what constitutes a meaningful opportunity to obtain release, leaving that to the states. See Graham v. Florida, 130 S. Ct. 2011, 2030 (2010). A meaningful opportunity for release requires "(1) a chance of release at a meaningful point in time, (2) a realistic likelihood of release for the rehabilitated, and (3) a meaningful opportunity to be heard." Sarah French Russell, *Review for Release: Juvenile Offenders State Parole Practices, and the Eighth Amendment*, 89 Ind. L. J. 373, 375-76 (2014).

Juvenile homicide offenders are not entitled to annual review of their status and they do not receive earned time. The Iowa parole system is one that is based on the accumulation of earned time by defendants. See Iowa Code § 903A. The newly enacted Iowa Code § 903A.2(5) (2015) prohibits Defendants from accumulating earned time. "Earned time accrued

by inmates serving life sentences imposed under section 902.1 shall not reduce the life sentence, or any mandatory minimum sentence imposed under section 902.1." The parole board does not have to annually review the status of a Defendant convicted of a Class "A" felony. See Iowa Code § 906.5. The governor and legislature have the power to appoint and confirm all member of the parole board. Iowa Code § 904A.2.

Mr. Zarate's position is that a sentence of life with the possibility of parole in Iowa is unconstitutional and violates the cruel and unusual punishment clause of the Iowa Constitution, because it does not provide a meaningful opportunity for release under Miller.

Because the laws and regulations governing parole for juveniles convicted of first degree murder fail to provide for a meaningful opportunity for release, the only way for an Iowa district court to give a sentence assured to comply with Miller, Ragland, Null, and Lyle is to sentence a defendant to a term of years. Miller and Ragland require that the court have the option to sentence someone with a meaningful opportunity for release. State v. Ragland, 836 NW 2d 107, 115 (Iowa 2013). Miller applies to sentences that are the functional equivalent of life without parole. Id. at 122. The United States Supreme Court did not specify what constitutes a meaningful opportunity to obtain release, leaving that to the states. See Graham v.

Florida, 130 S. Ct. 2011, 2030 (2010). A meaningful opportunity for release requires "(1) a chance of release at a meaningful point in time, (2) a realistic likelihood of release for the rehabilitated, and (3) a meaningful opportunity to be heard." Sarah French Russell, *Review for Release: Juvenile Offenders State Parole Practices, and the Eighth Amendment*, 89 Ind. L. J. 373, 375-76 (2014).

Life with the possibility of parole in Iowa is a de facto life sentence. The current parole system in Iowa does not allow defendants a meaningful opportunity to obtain release before the end of their lives. The Iowa parole system will never allow an inmate serving a life sentence with the possibility of parole to actually be paroled. The Iowa parole system is one that is based on the accumulation of earned time by defendants. See Iowa Code § 903A. But the newly enacted Iowa Code § 903A.2(5) (2015) prohibits Defendants from accumulating earned time. Id. The parole board does not have to annually review the status of a Defendant convicted of a Class "A" felony. See Iowa Code § 906.5. It is unclear how persons serving life sentences with the possibility of parole will even have the chance to be reviewed for parole or earn good time credit for release. The governor and legislature have the power to appoint and confirm all member of the parole board. Iowa Code § 904A.2.

Because Ragland requires the judge to be able to give a juvenile the meaningful opportunity for release, the legislature cannot force the court to give a life sentence with the possibility of parole in Iowa while also functionally depriving the defendant of the opportunity for parole. Both the passage of Senate File 448 and the governor's commutation language make it clear that the legislature and governor do not intend to have a parole board that will consider the constitutional mandatory mitigating factors from Null, Ragland, Lyle, and Miller. In practice, the Board of Parole has not provided for parole to any of the offenders convicted of Class A felonies committed while they were juveniles save for one. Stageberg et. al, Paul Stageberg, Scott Musel, and Lanette Watson, *Status Report: Juvenile Offenders Serving Life Sentences in Iowa*, Iowa Dept. Human Rts., Div. Crim. and Juvenile Justice Planning (Mar. 12, 2014). The legislature, governor's, and the Board's failure to create a parole process that would provide juveniles with a meaningful opportunity for release means that a life sentence with the possibility of parole is actually a life sentence without parole or opportunity for meaningful release.

II. IOWA CODE § 902.1(2) MANDATES COURT CONSIDERATION OF IMPROPER SENTENCING FACTORS FOR JUVENILE SENTENCING AND IS UNCONSTITUTIONAL UNDER THE IOWA CONSTITUTION

A. Error Preservation

A defendant need not preserve error on improper sentencing factor by timely objection, because the court pronounces the sentence and gives the reason for the sentence after the Defendant has had the opportunity to address the judge. See State v. Thomas, 520 NW 2d 311, 313 (Iowa Ct. App. 1994). Even if Mr. Zarate did need to preserve error, he did so by making his constitutional challenge to the improper factors of Iowa Code § 902.1(2) before the court pronounced sentence, arguing "that the Iowa Legislature attempted to undermine and circumvent the constitutional requirements of Ragland, Lyle, and Miller by including in Iowa Code Section 902.1(2)(b)(2) improper aggravating factors the court is directed to consider in determining . . . the appropriate sentence for a juvenile offender who is convicted of murder in the first degree." (App. 14). The court ruled on the issue when it stated "that consideration of aggravating factors is permissible as long as the sentencing court also considers the mandated mitigating factors from Miller and Ragland, which are listed as some of the 'circumstances' the court is to consider under the amended version of Iowa Code Section 902.1(2)" was "currently more amply supported by existing case law." (App. 14).

Mr. Zarate argues that this consideration was in error, that the consideration of the Iowa Code § 902.1(2) aggravating factors was improper, and that he should be resentenced.

B. Standard of Review

The standard of review when a Defendant challenges his sentence as unconstitutional is de novo. State v. Lyle, 854 N.W.2d 378, 382 (Iowa 2014).

C. Mitigating Factors in Juvenile Sentencing

There is a presumption and general rule that children cannot be held to the same standard of culpability as adults in criminal sentencing. State v. Null, 836 NW 2d 41, 74 (Iowa 2013) (internal citations omitted). If the district court believes a case is an exception to the generally applicable rule, the district court must make findings discussing why the general rule does not apply beyond reciting the nature of the crime. Id.

Miller, Null, Ragland, and Lyle, and made it clear that when the court sentences juveniles, there are mitigating factors that the court must consider, and they must be considered as mitigating factors. These factors can only be used as mitigating factors; they cannot be used as aggravating factors. "[T]he typical characteristics of youth . . . are to be regarded as mitigating, not aggravating factors." State v. Null, 836 NW 2d 41, 75 (Iowa 2013)

(citing Miller v. Alabama, 132 S. Ct. 2455 (2012)). The sentencing process is be tailored to account in a meaningful way for the attributes of juveniles that are distinct from adults State v. Ragland, 836 NW 2d 107, 112 (Iowa 2013). The court must be able to take mitigating factors into account. Id. The decision by the court must be individualized. Id. Under both the United States and Iowa constitutions, the district court may not consider any of these factors as aggravating factors, and it must consider them. State v. Null, 836 NW 2d 41, 75 (Iowa 2013).

Mr. Zarate's position is that to the extent the statute authorizes the court to consider mitigating factors, those factors constitutionally must be considered and those factors must be considered in his favor. However, the trial court indicated that it would consider these factors as mitigating, so he does not challenge it at this time. See (App. 17-18).

D. Aggravating Factors in Juvenile Sentencing

Aggravating factors are due much less weight in juvenile sentencing, and cannot overwhelm the mitigating factors. Typical aggravating factors, such as retribution, deterrence, and incapacitation are inherently significantly weaker when sentencing juveniles. See State v. Lyle, 854 NW 2d 378, 413-14 (Iowa 2014). Rehabilitation is a typical goal of sentencing, but life without the possibility of parole cannot be justified by a court's

desire to rehabilitate the Defendant, because it forecloses the possibility of rehabilitation. Id. at 414.

The nature of the offense cannot overwhelm the court's analysis in juvenile sentencing. The general rule is that children are constitutionally different from adults and cannot be held to the same standard of culpability as adults in criminal sentencing. State v. Null, 836 NW 2d 41, 75 (Iowa 2013). If a case is an exception to the generally applicable rule, the court must make findings on why the general rule does not apply. Id. The court must go beyond merely reciting the nature of the crime. Id. The nature of the crime cannot overwhelm the analysis in juvenile sentencing. Id.

The Iowa legislature passed an amendment to Iowa Code § 902.1(2)(b)(2). That section lists various factors that the legislature asks the court to consider, and some of them are aggravating factors. The factors are listed in their entirety as follows:

> (2) In determining which sentence to impose, the court shall consider all circumstances including but not limited to the following:
>
> > (a) The impact of the offense on each victim, as defined in section 915.10, through the use of a victim impact statement, as defined in section 915.10, under any format permitted by section 915.13. The victim impact statement may include comment on the sentence of the defendant.
> >
> > (b) The impact of the offense on the community.

(c) The threat to the safety of the public or any individual posed by the defendant.

(d) The degree of participation in the murder by the defendant.

(e) The nature of the offense.

(f) The defendant's remorse.

(g) The defendant's acceptance of responsibility.

(h) The severity of the offense, including any of the following:

(i) The commission of the murder while participating in another felony.
(ii) The number of victims.
(iii) The heinous, brutal, cruel manner of the murder, including whether the murder was the result of torture.

(i) The capacity of the defendant to appreciate the criminality of the conduct.

(j) Whether the ability to conform the defendant's conduct with the requirements of the law was substantially impaired.

(k) The level of maturity of the defendant.

(l) The intellectual and mental capacity of the defendant.

(m) The nature and extent of any prior juvenile delinquency or criminal history of the defendant, including the success or failure of previous attempts at rehabilitation.

(n) The mental health history of the defendant.

> (o) The level of compulsion, duress, or influence exerted upon the defendant, but not to such an extent as to constitute a defense.
>
> (p) The likelihood of the commission of further offenses by the defendant.
>
> (q) The chronological age of the defendant and the features of youth, including immaturity, impetuosity, and failure to appreciate risks and consequences.
>
> (r) The family and home environment that surrounded the defendant.
>
> (s) The circumstances of the murder including the extent of the defendant's participation in the conduct and the way familial and peer pressure may have affected the defendant.
>
> (t) The competencies associated with youth, including but not limited to the defendant's inability to deal with peace officers or the prosecution or the defendant's incapacity to assist the defendant's attorney in the defendant's defense.
>
> (u) The possibility of rehabilitation.
>
> (v) Any other information considered relevant by the sentencing court.

Mr. Zarate's position is that Iowa Code § 902.1(2)(b)(2) violates the Iowa Constitution's prohibition against cruel and unusual punishment because it demands that aggravating factors and circumstances of the crime should overwhelm the court's analysis.

E. Iowa Code § 902.1(2)(b)(2) demands that courts give improper weight to aggravating factors

The Iowa legislature attempted to undermine the constitutional requirements of Ragland, Lyle, and Miller, by amending Iowa Code § 902.1(2). Some factors are constitutional, so long as they are mitigating. But other aggravating factors are given an unconstitutionally heavy weight. The provision includes both mitigating and aggravating factors together and fails to distinguish which factors are mitigating and which are aggravating. It also contains aggravating factors that are too vague, and allows for the possibility of additional non-enumerated, aggravating factors.

The Iowa Supreme Court's rule that the circumstances of the crime should not overwhelm the analysis in should guide the court's interpretation of Iowa Code § 902.1(2). A plain reading of Iowa Code § 902.1(2) suggests that the court should consider all listed factors and weigh them all equally. However, a close reading of Ragland, Null, and Lyle reveal that nothing could be further from the truth. The consideration of these aggravating factors cannot overwhelm the consideration of the constitutionally mandated mitigating factors.

Many of the factors are duplicative, merely restating different aspects of the nature of the crime.

1. Iowa Code § 902.1(2)(b)(2)(a) instructs the court to consider the impact of the offense on each victim.
2. Iowa Code § 902.1(2)(b)(2)(b) instructs the court to consider the impact of the offense on the community.
3. Iowa Code § 902.1(2)(b)(2)(d) requires the court to consider the degree of participation in the murder by the defendant.
4. Iowa Code § 902.1(2)(b)(2)(e) requires the court to consider the nature of the offense.
5. Iowa Code § 902.1(2)(b)(2)(h) requires the court to consider the severity of the offense, including the commission of the murder while participating in another felony, the number of victims, and the heinous, brutal or cruel manner of the murder, including whether the murder was the result of torture.
6. Iowa Code § 902.1(2)(b)(2)(v) requires the court to consider any other information considered relevant by the sentencing court.

These factors are actually several different ways to asking the court to consider the nature of the crime. The general rule is that children are constitutionally different from adults and cannot be held to the same standard of culpability as adults in criminal sentencing. State v. Null, 836 NW 2d 41, 75 (Iowa 2013). If the court believes this case is an exception to

the generally applicable rule, the court must make findings on why the general rule does not apply. Id. The court must go beyond merely reciting the nature of the crime. Id. The nature of the crime cannot overwhelm the analysis in juvenile sentencing. Id.

F. The United States Supreme Court's capital punishment jurisprudence helps explain the importance and weight of aggravating and mitigating factors.

The constitutional requirement of individualized sentencing and the necessity of mitigating factors is best explained by analogy to the United States Supreme Court's capital punishment jurisprudence. The United States Constitution requires that a sentence of death has to be individualized, and cannot be automatic. See Lockett v. Ohio, 438 U.S. 586 (1978), Godfrey v. Georgia, 446 U.S. 420 (1980). As the law further developed, it became clear that individualized sentencing was necessary, but not sufficient, to ensure that the sentences were not cruel and unusual. Individualized sentences could be arbitrary, with some defendants receiving the death penalty and others not for essentially the same crime.

To avoid the constitutional problem of arbitrary sentencing, the court introduced the idea of aggravating and mitigating factors. States that maintain a death penalty must enumerate those factors a court considers as aggravating. These aggravating factors 1) have to be specifically enumerated

by the legislature; 2) have to increase the culpability of the crime; 3) cannot overlap with mitigating factors; and 4) have to be precise and easily determinable. See Zant v. Stephens, 462 U.S. 862, 877 (1983); Lewis v. Jeffers, 497 U.S. 746, 774 (1990); Greg v. Georgia, 428 U.S. 153, 198 (1976); Lankford v. Idaho, 500 U.S. 110 (1991); Godfrey v. Georgia, 446 U.S. 420, 428 (1980). Aggravating factors, such as if the crime was "especially brutal, heinous, cruel, or depraved," were thrown out as unconstitutionally vague. Only very exact, easily determined standards such as "there were multiple victims," "the victim was tortured," or "the victim was a child" survived the constitutional requirement. Godfrey v. Georgia, 446 U.S. 420, 432-33 (1980); Maynard v. Cartwright, 486 U.S. 356 (1988); Walton v. Arizona, 497 U.S. 639, 654 (1990).

By contrast, the defendant is allowed to put on evidence regarding any and all mitigating factors that exist. See, e.g., McCleskey v. Kemp, 481 U.S. 279, 305-06 (1987). Unlike aggravating factors, these factors are not determined by the legislature, the defendant can present whatever evidence he likes and argue that it is a mitigating factor. The State can argue that the mitigating factors do not exist, the State cannot argue that the factors are actually aggravating factors.

CONCLUSION

The court should vacate the sentence of the trial court, and direct for further proceedings that will allow the court more sentencing options that will give Mr. Zarate a meaningful opportunity for release.

ORAL ARGUMENT NOTICE

Counsel requests oral argument.

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This brief complies with the type-volume limitation of Iowa R. (Exhibit 6 P. 6.903(1)(g)(1) (no more than 14,000 words) because this brief contains 6,584 words, excluding the parts of the brief exempted by Rule 6.903(1)(g)(1), which are the table of contents, table of authorities, statement of the issues, and certificates.

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/S/ Alexander Smith
Dated: March 30, 2017
Alexander Smith