IN THE SUPREME COURT OF IOWA
Supreme Court No. 15–2203

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RENE ZARATE,
Defendant-Appellant.

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

APPELLEE'S BRIEF

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ROUTING STATEMENT

This cruel-and-unusual-punishment challenge to Iowa Code section 902.1(2) is a candidate for retention because it presents "substantial questions of enunciating or changing legal principles." Iowa R. App. P. 6.1101(2)(f). Section 902.1(2)–(3) is the legislature's attempt to provide a sentencing statute for any juveniles convicted of Class A felonies that would comport with this Court's recent opinions delineating Article I, Section 17's limitations on juvenile sentencing procedures and parameters. The constitutionality of any sentence imposed on a juvenile convicted of a Class A felony will be uncertain until this Court addresses a constitutional challenge to this statute.

Retention is also appropriate for cases that present issues of broad public importance. *See* Iowa R. App. P. 6.1101(2)(d). The ACLU has already weighed in through an amicus brief. Moreover, the public and all stakeholders in the criminal justice system have an interest in reducing the number of cumulative resentencing hearings. *See, e.g.*, *State v. Lyle*, 854 N.W.2d 378, 419 (Iowa 2014) (Zager, J., dissenting). Every sentencing hearing conducted under section 902.1(2)–(3) is implicated by this challenge. Thus, this Court should resolve the issue as soon as possible to provide guidance and minimize harms/costs.

STATEMENT OF THE CASE

Nature of the Case:

Rene Zarate committed first-degree murder in May 1999, when he was fifteen years old. He was convicted in 2001, and was sentenced to life in prison without the possibility of parole.

After *Miller*, Governor Branstad commuted Zarate's sentence to a term of 60 years with no possibility of parole, with no credit for time already served. Zarate filed a motion to correct an illegal sentence. Subsequently, the Iowa Supreme Court decided *Ragland*, *Null*, *Lyle*, *Seats*, and *Sweet*, and the legislature enacted section 902.1(2)–(3).

Zarate was resentenced under section 902.1(2), and the resentencing court analyzed the factors set out in subsection (2)(b)(2). It concluded that the appropriate sentence was life in prison with parole eligibility after 25 years. *See* Ruling (12/9/15); App. 1.

Zarate now appeals, arguing: (1) section 902.1(2) does not allow truly *individualized* sentencing because the most lenient sentence it authorizes for juvenile offenders convicted of first-degree murder is life in prison with immediate parole eligibility; and (2) the 22 factors listed in section 902.1(2)(b)(2) include *aggravating* factors, which makes that sentencing framework unconstitutional under *Lyle*.

Statement of Facts:

The State generally accepts Zarate's summary of the underlying factual background of this case. *See* Iowa R. App. P. 6.903(3).

Course of Proceedings:

The State generally accepts Zarate's recitation of the course of proceedings. *See* Iowa R. App. P. 6.903(3). Additional facts about the resentencing court's decision-making must be discussed.

Before making its decision, the resentencing court identified options that were off the table. *See* Resent. Tr. p.7,ln.12–p.16,ln.10. First, the resentencing court explained that it would not consider imposing a term-of-years sentence because section 902.1(2) did not authorize that sentencing option. Then, it said it would not consider sentencing Zarate to life in prison without the possibility of parole because the record did not show that he was "irreparably corrupt." *See* Resent. Tr. p.7,ln.12–p.8,ln.15. Finally, the resentencing court explained its view of how the facts of this particular case impacted its "consideration of the 25 factors" set out in section 902.1(2)(b)(2)—specifically, it discussed Zarate's intellectual/emotional development, his immaturity, and his susceptibility to peer pressure at the point when he committed this murder. *See* Resent. Tr. p.9,ln.4–p.11,ln.24.

The resentencing court explained it was considering "all those foregoing factors . . . as mitigating factors." *See* Resent. Tr. p.11,ln.25–p.13,ln.17; *see also* Defendant's Br. at 30 (agreeing that the court "indicated that it would consider those factors as mitigating"). The resentencing court concluded that Zarate was "entitled not only to have an opportunity at parole, but also that opportunity should be available to [him] at a fixed point in time in the future." Resent. Tr. p.11,ln.25–p.12,ln.11. The court determined that Zarate should be eligible for parole after serving 25 years of his life sentence, in part to "ensure that the changes in [his] behavior that have occurred and are now documented in the reports and the records [are] permanent, and not just a temporary change." *See* Resent Tr. p.12,ln.17–21; *see also* Hearing Tr. (6/3/15), p.89,ln.8–14 (Zarate's expert testified that he was "still highly dependent on others," and predicted "a bad outcome" if Zarate "were to associate with a negative peer group if he were discharged from prison"). Based on that, the court sentenced Zarate to life in prison with parole eligibility after 25 years. *See* Resent. Tr. p.11,ln.25–p.13,ln.17; *see also* Judgment and Sentence (12/18/15); App. 20.

ARGUMENT

Jurisdiction

This Court has jurisdiction over this appeal because Zarate is appealing from a new final judgment/sentence imposed. *See* Iowa Code § 814.6(1)(a) (2016).

I. When a Sentencing Court Considers the Factors Listed in Iowa Code Section 902.1(2)(b)(2), That Provides the Consitutionally Required Individualized Sentencing.

Preservation of Error

A challenge to an illegal sentence evades error preservation and may be raised at any time. *See State v. Oliver*, 812 N.W.2d 636, 639 (Iowa 2012); *State v. Bruegger*, 773 N.W.2d 862, 871 (Iowa 2009).

Standard of Review

A ruling on a motion to correct an illegal sentence is reviewed for correction of errors at law. Rulings on the constitutionality of sentencing statutes are reviewed de novo. *Lyle*, 854 N.W.2d at 382.

Merits

Iowa Code section 902.1 was recently amended to create a valid sentencing framework for juveniles convicted of Class A felonies. The special subsection applicable to first-degree murder cases states:

> (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.

Iowa Code § 902.1(2)(b)(2). After considering those factors, the court must sentence the defendant to life in prison with immediate parole eligibility or to life in prison with parole eligibility after a certain term of years, which the court may determine. *See* Iowa Code § 902.1(2)(a).[1]

[1] Section 902.1(2)(a)(1) also authorizes a sentence of life with no possibility of parole, but such a sentence would be unconstitutional. *See generally State v. Sweet*, 879 N.W.2d 811 (Iowa 2016).

Zarate argues that section 902.1(2) "is unconstitutional because it does not allow for individualized sentencing." *See* Defendant's Br. at 19–23. The ACLU disagrees, asserting that section 902.1(2) creates "its own enhanced problem of arbitrariness which must be guarded against as judges determine what term of years must be served during which the inmate will not be eligible for parole." *See* ACLU Br. at 23. In reality, section 902.1(2) is neither arbitrary nor "one-size-fits-all"—it creates a framework to guide an individualized analysis of each juvenile defendant's personal level of culpability for the crime he/she committed, with 21 mandatory considerations and a catch-all factor. *See* Iowa Code § 902.1(2)(b)(2). And the resultant sentence must be individualized within certain boundaries: the sentencing court may set a minimum term of years that the juvenile defendant must serve before becoming eligible for parole, and may set that minimum term as low or as high as the unique circumstances of each case demand. The resentencing court's references to the unique circumstances of Zarate's case show that its decision was based on an individualized assessment of his culpability, and its explanation was tethered to the non-arbitrary factors set out in section 902.1(2)(b)(2). *See* Resent. Tr. p.9,ln.4–p.13,ln.7. As such, neither of those two critiques has merit.

Zarate also argues that section 902.1(2) is unconstitutional because it does not authorize any sentence that does not include an indeterminate life sentence, which means it imposes "a mandatory indeterminate sentence of life with parole." *See* Defendant's Br. at 23. He also argues that "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." *See* Defendant's Br. at 25. However, the Iowa Supreme Court rejected both of these arguments in *State v. Louisell*. First, the *Louisell* court set out the premise that "judges may only impose punishment authorized by the legislature within constitutional constraints." *See Louisell*, 865 N.W.2d 590, 598 (Iowa 2015). This led it to vacate a term-of-years sentence because "there was no statutory authority for the determinate sentence of twenty-five years in prison" in the previous iteration of section 902.1. *See id.* Subsequently, when it concluded that it was unconstitutional to sentence every juvenile convicted of a Class A felony to a 25-year mandatory minimum before parole eligibility, the court severed *that* unconstitutional provision from the sentencing statute—but it left the mandatory *indeterminate* life sentence intact. *See id.* at 599–601. And *Louisell* expressly affirmed that sentence's constitutionality:

> As we have noted, we employ the remedy of severing statutory provisions in this context if the excised statute (1) does not substantially impair the legislative purpose, (2) remains capable of fulfilling the apparent legislative intent, and (3) can be given effect without the excised language. . . . We conclude the leaner section 902.1 remaining after severance of the constitutionally infirm provisions comports with these criteria. The legislative purpose of prescribing the most severe sentences for offenders convicted of murder in the first degree—including juveniles—is maintained. Although sentencing courts must have the discretion to decide juvenile offenders convicted of the most serious of offenses shall be eligible for parole, the legislature's power to prescribe the sentence of life in prison is preserved. Similarly, the severance remedy respects the legislature's intent in establishing the most substantial penalty available under Iowa law and consistent with prevailing constitutional principles for first-degree murder. . . .
>
> Having severed the provisions of section 902.1 affected by the constitutional infirmity, we conclude the district court had discretion, after considering the *Miller* factors, to sentence Louisell to life in prison with eligibility for parole.

Id. at 600–01. This opinion expressly addressed "the scope of the district court's discretion to impose an individualized sentence after considering the *Miller* factors"—and concluded that an analysis of the *Miller* factors still could not enable a sentencing court to skirt the rule that "life in prison is the intended punishment for such crimes" by imposing a term-of-years sentence instead. *See id.* at 598, 601 n.9. And the mandatory life sentence with parole survived severance—which meant it was not "constitutionally infirm." *See id.* at 600.

Yvette Louisell, much like Zarate, made a great deal of progress towards her rehabilitation while incarcerated for first-degree murder. *See id.* at 594–95. But even that did not enable the resentencing court to disregard the legislature's decision not to authorize imposition of a term-of-years sentence for *anyone* convicted of first-degree murder, "even if that defendant committed the crime as a juvenile." *Id.* at 598; *cf. State v. Hoeck*, 843 N.W.2d 67, 73–75 (Iowa 2014) (Mansfield, J., concurring in part and dissenting in part) ("[T]he general assembly, expressing the will of the people of this state, may require juveniles who commit first-degree kidnapping to serve life in prison, so long as parole is available."). As such, the resentencing court was correct to hold that it could not impose a term-of-years sentence, and its decision to sentence Zarate within parameters set by section 902.1(2) was not unconstitutional. *See* Resent. Tr. p.7,ln.12–p.8,ln.5; *see also* Ruling (12/9/15) at 13–14; App. 13–14.

Zarate also argues that parole eligibility "does not provide a meaningful opportunity for release under *Miller*" because "the Iowa parole system will never allow an inmate serving a life sentence with the possibility of parole to actually be paroled." *See* Defendant's Br. at 25–27. Again, the same argument was made in *Louisell*, where the

Iowa Supreme Court noted "the question whether Louisell has been wrongfully denied parole is not ripe for our decision at this juncture." *Louisell*, 865 N.W.2d at 602. Indeed, Yvette Louisell became eligible for parole as a result of the Iowa Supreme Court's remand order, and that question was *still* not ripe for review because the parole board had not yet reviewed her case; she could not yet state a claim that she had been "denied [parole] in violation of law." *See id.*

Moreover, entertaining Zarate's claim that he should be entitled to actual release—regardless of his ability to demonstrate progress towards rehabilitation—would undermine the Iowa Supreme Court's assurances about the limits of its juvenile sentencing jurisprudence.

> Even if the judge sentences the juvenile to life in prison with parole, it does not mean the parole board will release the juvenile from prison. . . . If the parole board does not find the juvenile is a candidate for release, the juvenile may well end up serving his or her entire life in prison.

State v. Seats, 865 N.W.2d 545, 557 (Iowa 2015); *see also Sweet*, 879 N.W.2d at 841–42 (Wiggins, J., concurring specially) ("The dissent contends our decision today means the parole board will release every juvenile from prison at some point in the future. That contention is nothing more than fearmongering."). Those assurances foreclose any claim that Zarate is entitled to circumvent the parole board's review.

Factually, Zarate's claim that parole is unavailable for inmates serving sentences for Class A felonies committed as juveniles is just not true. Kristina Fetters was convicted of first-degree murder as a juvenile offender; she was granted parole in December 2013. *See* Grant Rodgers, *Killer Fetters' Release Is First of Its Kind in Iowa*, DES MOINES REGISTER (Dec. 4, 2013), http://bit.do/15-2203-n1. And, earlier this year, Yvette Louisell was granted work release. *See* Grant Rodgers, *Convicted Teen Iowa Killer Leaving Prison on Work Release*, DES MOINES REGISTER (July 8, 2016), http://bit.do/15-2203-n2. Thus, Zarate's claim that parole eligibility grants no meaningful opportunity to demonstrate progress and obtain eventual release is abjectly false.

The unifying thread throughout the argument, thus far, is this: Article I, Section 17 is not offended if the general assembly requires that all juveniles who commit first-degree murder be sentenced to an indeterminate life sentence with parole eligibility, at a *minimum*. Under section 902.1(2), sentencing courts conduct an individualized assessment of each juvenile murderer's unique circumstances; then, based on that meticulously guided assessment, the sentencing court calibrates the parole-eligibility component of his/her sentence on a sliding scale, and the parole board conducts its review in due course.

The resultant sentence is individualized for each juvenile offender, is non-arbitrary, and comports with the *Miller* line of cases holding that "[a]ll that is required is a 'meaningful opportunity' to demonstrate rehabilitation and fitness to return to society." *See State v. Null*, 836 N.W.2d 41, 75 (Iowa 2013) (citing *Graham v. Florida*, 560 U.S. 48, 75 (2010)). As such, Zarate's broad attack on the parameters/procedures set out in section 902.1(2) cannot succeed.[2]

II. Although Iowa Code Section 902.1(2)(b)(2) Requires Sentencing Courts to Consider Additional Factors Beyond the Mitigating Factors Enumerated in *Miller*, That Does Not Render It Unconstitutional.

Preservation of Error

Again, this challenge evades error preservation rules and may be raised at any time. *See, e.g.*, *Oliver*, 812 N.W.2d at 639.

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[2] The State did not read Zarate's brief or the ACLU's brief to argue that a life sentence with parole eligibility is a grossly disproportionate punishment for juvenile offenders who commit first-degree murder. Such an argument would be doomed to fail. *See State v. Fuhrmann*, 261 N.W.2d 475, 479–80 (Iowa 1978) ("Life imprisonment for first-degree murder is not so disproportionate to the seriousness of the offense as to shock the conscience or sense of justice."); *see also Diatchenko v. Dist. Atty. for Suffolk County*, 1 N.E.3d 270, 285 (Mass. 2013) ("The unconstitutionality of this punishment arises not from the imposition of a sentence of life in prison, but from the absolute denial of any possibility of parole."); *cf. Sweet*, 879 N.W.2d at 833 (citing *Seats*, 865 N.W.2d at 555) ("[T]he presumption for any sentencing judge is that a juvenile should be sentenced to life with the possibility of parole even for homicide offenses.").

Standard of Review

Again, rulings on the constitutionality of sentencing statutes are reviewed de novo. *See Lyle*, 854 N.W.2d at 382.

Merits

Zarate argues that any sentence imposed under section 902.1(2) amounts to cruel and unusual punishment because the list of factors in section 902.1(2)(b)(2) "demands that aggravating factors and circumstances of the crime should overwhelm the court's analysis," which overwhelms/excludes any mitigating factors. *See* Defendant's Br. at 33–36. The ACLU's brief takes this argument to its inevitable conclusion, and asserts that "aggravating factors should no longer play any role in sentencing a juvenile." *See* Amicus Br. at 24–34. These arguments fail to recognize that section 902.1(2) specifically applies to juvenile offenders and requires individualized evaluations of each offender's culpability. Because sentencing proceedings under section 902.1(2) do not start by presuming that offenders deserve "adult time for adult crime," and because the sentencing court must tailor a unique sentence based on each juvenile murderer's culpability (rather than imposing a mandatory "one size fits all" sentence), there is no constitutional problem with considering aggravating factors.

A. Aggravating Factors Are Not Constitutionally Radioactive, Even When Sentencing Juveniles.

Both Zarate and the ACLU argue from the premise that *Miller* and its progeny define the outer limits of what courts may consider when sentencing juvenile offenders, and that they preclude any use of aggravating factors in sentencing juveniles. This misconception stems from a failure to understand the precise contours of the problem that the *Miller* line of cases—and specifically *Seats*—sought to address by cautioning sentencing courts to analyze the five *Miller* factors as "mitigating, not aggravating, factors." *See Seats*, 865 N.W.2d at 556.

1. *Seats* used the *Miller* factors as a stopgap measure to require thorough consideration of juvenile murderers' diminished culpability during sentencing.

The core principle that drove the holding in *Lyle* was that "the sentencing of juveniles according to statutorily required mandatory minimums does not adequately serve the legitimate penological objectives in light of the child's categorically diminished culpability." *Lyle*, 854 N.W.2d at 398. As such, *Lyle* held it was unconstitutional to impose "one size fits all" sentences on juvenile offenders without considering five offender-specific, youth-related mitigating factors because "justice requires us to consider the culpability of the offender in addition to the harm the offender caused." *Id.* Those five factors are:

> (1) the age of the offender and the features of youthful behavior, such as "immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) the particular "family and home environment" that surround the youth; (3) the circumstances of the particular crime and all circumstances relating to youth that may have played a role in the commission of the crime; (4) the challenges for youthful offenders in navigating through the criminal process; and (5) the possibility of rehabilitation and the capacity for change.

Id. at 404 n.10 (quoting *Miller v. Alabama*, 132 S.Ct. 2455, 2468 (2012)). Those five factors are reproduced almost word-for-word in section 902.1(2)(b)(2), consecutively labeled (q), (r), (s), (t), and (u). *See* Iowa Code § 902.1(2)(b)(2)(q)–(u); *cf. Sweet*, 879 N.W.2d at 840 (Cady, C.J., concurring specially) (noting these amendments to section 902.1 "addressed the constitutional deficiency identified in *Miller* and in our cases that followed").

Subsequently, *Seats* clarified that when a court is determining whether a juvenile murderer should receive a statutorily-prescribed mandatory LWOP sentence, those five factors must be treated as "mitigating, not aggravating, factors." *See Seats*, 865 N.W.2d at 556 (citing *Miller*, 132 S.Ct. at 2467–69). That caveat was necessary when dealing with statutes that mandated "one-size-fits-all" punishments. *See Lyle*, 854 N.W.2d at 401 n.7. In those cases, the five *Miller* factors functioned as a necessary stopgap that prompted sentencing courts to

consider youth-related factors that might show diminished culpability absent specific legislative guidance to do so—and in order to work, those five factors "[could not] be used to justify a harsher sentence," because the analysis was aimed solely at assessing whether or not an otherwise-mandatory sentence was already disproportionately harsh. *See id.* at 402 n.8 (citing *State v. Ragland*, 836 N.W.2d 107, 115 & n.6 (Iowa 2013)). Thus, *Seats* was another case where a juvenile could not be sentenced like an adult without analyzing the five *Miller* factors—and because those factors were enumerated to remind courts that "children are constitutionally different from adults," they could not weigh in favor of harsh sentencing because that would treat *youth* as an aggravating factor, which would be cruel and unusual. *See Seats*, 865 N.W.2d at 556. But here, that danger is no longer present.

2. Section 902.1(2)(b)(2) renders *Seats* obsolete by creating a special sentencing framework for juvenile murderers and by requiring a full consideration of youth-related circumstances that can mitigate their culpability.

Section 902.1(2) does not apply to adults—it only applies to defendants convicted of committing first-degree murder as juveniles. And section 902.1(2) does not start from a harsh default sentence—unlike *Lyle*-type cases (where, if no mitigating factors are found, the sentencing court imposes the same sentence an adult would receive),

section 902.1(2) provides a lower-bound, a blank slate, and a rubric. This open-ended evaluation of each juvenile murderer's culpability renders the stopgap from *Seats* and *Lyle* obsolete and replaces it.

In a *Lyle*-type case, the *Miller* factors protect juvenile offenders from receiving adult punishment without consideration of youth. But that cannot occur in this context—no matter how heinous the crime, a juvenile murderer cannot be sentenced to LWOP in Iowa, so there is no danger of "adult punishment." *See Sweet*, 879 N.W.2d at 839. Indeed, section 902.1(2) provides a range of possible punishments—which makes it necessary to consider *all* relevant facts. Accordingly, it would be improper to treat all 22 factors in section 902.1(2)(b)(2) like 22 pseudo-*Miller* factors, and improper to bar sentencing courts from considering the enumerated aggravating factors where appropriate.

Section 902.1(2)'s inclusion of aggravating factors comports with language from *Seats* and *Sweet* endorsing some aggravation analysis (separate from the *Miller* factors) in sentencing juvenile murderers. "[T]he presumption for any sentencing judge is that the judge should sentence juveniles to life in prison with the possibility of parole for murder unless the other factors require a different sentence." *Seats*, 865 N.W.2d at 555; *see also Sweet*, 879 N.W.2d at 833. Logically, if

the five *Miller* factors cannot be aggravating in that analysis, then some *other* factors that *can* be treated as aggravating considerations must be available—otherwise, it would be utterly impossible to "overcome that presumption," even to impose a one-year minimum before parole eligibility. *See Sweet*, 879 N.W.2d at 833. Thus, even *Seats* and *Sweet* envisioned the need for sentencing courts to assess facts/circumstances that may demonstrate enhanced culpability.

Moreover, section 902.1(2)(b)(2) does more than delineate aggravating factors—it adds new mitigating factors as well, including: (f) the defendant's remorse; (g) his/her acceptance of responsibility; (i) his/her capacity to appreciate criminality; (j) whether his/her ability to conform to the law was substantially impaired; (k) his/her level of maturity; (l) his/her intellectual and mental capacity; and (o) any compulsion, duress, or influence exerted upon the defendant. *See* Iowa Code § 902.1(2)(b)(2). The decision to include this wide array of potentially mitigating factors shows that the general assembly heeded concerns that the nature of the crime "cannot overwhelm the analysis in the context of juvenile sentencing." *See Null*, 836 N.W.2d at 74–75. And while section 902.1(2)(b)(2) still includes all five *Miller* factors, the inclusion of new mitigating factors is especially important after

Sweet cast doubts on the usefulness of the five *Miller* factors in assessing a juvenile's culpability and/or capacity for reform. *See Sweet*, 879 N.W.2d at 837–39. Indeed, by placing juvenile murderers in a "juveniles only" category for punishment, section 902.1(2) obviates the need to scrutinize each analysis of the five *Miller* factors with a fine-tooth comb, searching for stray remarks that straddle the line between finding aggravation and finding the absence of mitigation.

All of this builds to a critical understanding: Section 902.1(2) is *more* effective at solving the problems identified in *Miller*, *Pearson*, *Ragland*, *Null*, and *Seats* than any judicially-crafted stopgap measure. The Iowa Supreme Court's juvenile sentencing jurisprudence has explained that the Iowa Constitution acts as a floor, prohibiting sentencing practices that apply adult sentences to juvenile offenders without considering the dimished culpability associated with youth. With that guidance, the general assembly has sketched a path for Iowa's sentencing courts that guarantees that any youth-related factors that might demonstrate a juvenile murderer's diminished culpability are comprehensively evaluated during sentencing—and it has set the requirements for that analysis much higher than the floor established by the Iowa Constitution. *See Sweet*, 879 N.W.2d at 840 (Cady, C.J.,

concurring specially) (noting these new provisions in section 902.1 "addressed the constitutional deficiency identified in *Miller* and in our cases that followed"). And the inclusion of aggravating factors does not undermine the value of these new procedural safeguards. The Iowa Supreme Court has always recognized that particular cases may require concluding that the presumption against harsh sentencing has been rebutted, and that the sentencing court "must make specific findings of fact discussing why the record rebuts the presumption" when that occurs. *See Seats*, 865 N.W.2d at 557. To that end, section 902.1(2) ensures that courts analyze case-specific factors that Iowans regard as key considerations in making that important determination.

Because sentencing proceedings under section 902.1(2) do not presume that juvenile murderers deserve "adult time for adult crime," and because sentencing courts must consider youth-related factors in tailoring a sentence based on each juvenile's unique circumstances (instead of imposing a mandatory "one size fits all" sentence), there is no constitutional problem with considering aggravating factors as well. As such, section 902.1(2)(b)(2) may require sentencing courts to assess aggravating factors alongside the five mitigating factors from *Miller* and the new mitigating factors included on its list.

B. Prohibiting Analysis of Aggravating Factors Would Undermine the Legislature's Attempt to Pursue Important Penological Objectives.

"[C]riminal punishment can have different goals, and choosing among them is within a legislature's discretion." *Oliver*, 812 N.W.2d at 646 (quoting *Graham*, 560 U.S. at 71). Both Zarate and the ACLU challenge specific factors listed in section 902.1(2)(b)(2) that they view as aggravating, duplicative, vague, or otherwise inappropriate. *See* Defendant's Br. at 34–36; Amicus Br. at 25–33. Their critiques overlap on items (a), (b), (d), (e), and (h). All five of those factors involve the facts surrounding the murder: (a) its impact on victims; (b) its impact on the community; (d) the defendant's participation; (e) the nature of the offense; and (h) the severity of the offense. Clearly, those will often be aggravating factors.

The State does not believe that it is required to justify each potentially aggravating factor listed in section 902.1(2)(b)(2) in relation to a traditional penological goal; rather, the legislature has the authority to highlight particular factors for sentencing courts to consider in crafting appropriate punishments. And even without such direction, a court exercising sentencing discretion must "[w]eigh and consider all pertinent matters in determining proper sentence." *See*

State v. Leckington, 713 N.W.2d 208, 216 (Iowa 2006) (quoting *State v. August*, 589 N.W.2d 740, 744 (Iowa 1999)).[3] Instead, the State will caution this Court against adopting the ACLU's proposed rule against consideration of any/all aggravating factors in sentencing juveniles, because such a rule would bar pursuit of legitimate penological goals.

1. **Rehabilitation/Incapacitation**: Aggravating factors can be critical in assessing the need for imprisonment.

When sentencing a juvenile, "our collective sense of humanity preserved in our constitutional prohibition against cruel and unusual punishment and stirred by what we all know about child development demands some assurance that imprisonment is actually appropriate and necessary." *See Lyle*, 854 N.W.2d at 401. Section 902.1(2)(b)(2) provides sentencing courts with an array of case-specific factors to consider in determining how much imprisonment, at a minimum, is "appropriate and necessary" given the unique circumstances of the murder at hand. This involves more than the absence of mitigation—this must involve an examination of any aggravating facts that might demonstrate extended imprisonment *is* necessary in a specific case.

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[3] Beyond the constitutional challenge, note that sentencing courts must be able to reference aggravating factors expressly whenever they are pertinent to the sentencing decision, in order to build a record that can enable and survive appellate review. *See State v. Thompson*, 856 N.W.2d 915, 919 (Iowa 2014).

For example, the ACLU attacks factors (f) and (g), which pertain to the defendant's remorse and his/her acceptance of responsibility. *See* Amicus Br. at 28–30. It may be appropriate, in certain cases, to temper evaluations of a juvenile's remorsefulness (or lack thereof) with an understanding of youth-related impediments to remorse—which would enter into the sentencing court's analysis under item (t). But the ability to feel remorse is still an important consideration in determining whether meaningful rehabilitation is possible and/or whether extended incapacitation is necessary; "a defendant's lack of remorse is highly pertinent to evaluating his need for rehabilitation and his likelihood of reoffending." *State v. Knight*, 701 N.W.2d 83, 88 (Iowa 2005); *see also State v. Sims*, 608 A.2d 1149, 1158 (Vt. 1991) ("A defendant's acceptance of responsibility for the offense, and a sincere demonstration of remorse, are proper considerations in sentencing. They constitute important steps toward rehabilitation.").

The ACLU's attack on item (m), which pertains to the juvenile's past delinquency/criminal history and includes "the success or failure of previous attempts at rehabilitation," illustrates the head-in-the-sand problem that pervades the ACLU's brief. It is difficult to imagine any fact or circumstance more probative of the potential for rehabilitation

or the need for incapacitation—indeed, Iowa courts struggle to treat the potential-for-rehabilitation *Miller* factor as "mitigating only" in resentencing juvenile offenders who have abjectly failed to progress:

> When a district court resentences a criminal defendant after the passage of time has revealed a negative response to an opportunity for rehabilitation, it seems a logical impossibility to both accurately describe what has actually transpired and also address the young defendant as a juvenile with an unknown but mitigating capacity for change.

State v. Davis, No. 14–2156, 2016 WL 146528, at *6 (Iowa Ct. App. Jan. 13, 2016); *cf. State v. Foy*, No. 14–1184, 2015 WL 800071, at *3 (Iowa Ct. App. Feb. 25, 2015) ("In sentencing, a court has little to determine how a particular individual will respond to rehabilitation opportunities except for the individual's past record.").

What is even more obvious is that sentencing courts should be consider "[t]he heinous, brutal, or cruel manner of the murder" in determining what minimum term of imprisonment is necessary to provide enough time for meaningful rehabilitation (and to incapacitate the defendant to protect society until full rehabilitation is achieved). *See* Iowa Code § 902.1(2)(b)(2)(h)(iii). The ACLU's argument would foreclose the sentencing judge in Isaiah Sweet's case from weighing *any* of the aggravating facts in crafting his sentence—including these:

> In the eyes of the law, Defendant was almost an adult when he murdered his grandparents. He planned the crimes and acted with cool deliberation and an utter lack of humanity. The crimes were horrific—two helpless and unsuspecting victims shot as they sat in their living room, left to be discovered by other family members. Why? Simply because Defendant did not like the parental authority they tried to exercise over him. . . .
>
> Defendant may be young, but that has not stopped him from showing the world who he is. He is extremely dangerous. He is now and will continue to be a threat to society.

Sweet, 879 N.W.2d at 848 (Mansfield, J., dissenting) (quoting district court's sentencing order). The Iowa Constitution may bar our courts from sentencing him to LWOP based on as-yet-premature findings of "irretrievable corruption"—but facts demonstrating *present* corruption are undeniably relevant when sentencing courts seek to assess the need for incapacitation and the minimum time required for rehabilitation. "Nothing that the [U.S.] Supreme Court has said in these cases" or that the Iowa Supreme Court has said in its divergent line of cases "suggests trial courts are not to consider protecting public safety in appropriate cases through imposition of significant prison terms." *Null*, 836 N.W.2d at 75.

An eyes-wide-open approach is particularly indispensible when sentencing a juvenile murderer—the State cannot fathom accepting any recividism rate for murder above 0%. *See* ELIZABETH S. SCOTT &

LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 142 (2008) ("A policy that treats immaturity as a mitigating condition is viable only if public protection is not seriously compromised."). Sentencing courts must not turn a blind eye to aggravating factors if they demonstrate that an extended minimum term of imprisonment is truly necessary to incapacitate a dangerous murderer or to provide sufficient time for meaningful progress towards rehabilitation.

2. <u>Proportionality/Retribution</u>: <u>Aggravating factors are often indispensible in assessing a murderer's culpability.</u>

"[W]hile youth is a mitigating factor in sentencing, it is not an excuse." *Lyle*, 854 N.W.2d at 398 (quoting *Null*, 836 N.W.2d at 75). The ACLU's argument that Zarate is entitled to have all potentially aggravating facts surrounding the murder wiped away or concealed from the sentencing court is a bridge too far, and finds no support in any juvenile sentencing jurisprudence.

"[A]ttempting to mete out a given punishment to a juvenile for retributive purposes irrespective of an individualized analysis of the juvenile's categorically diminished culpability is an irrational exercise." *Lyle*, 854 N.W.2d at 399. But evaluating any juvenile murderer's culpability without considering facts surrounding the offense would be an equally irrational exercise. For example, consider Zarate: he

was the sole participant in this murder, and he stabbed Mr. Ramos "at least 50 times." Resent. Tr. p.9,ln.17–p.10,ln.2. It is true that Zarate was 15 years old when he committed this crime, and his youth should mitigate his culpability to some degree. But at the same time, his youth cannot give Zarate any right to be sentenced as though he only stabbed Mr. Ramos once, twice, or 49 times. Factors (a), (b), (d), (e), and (h) reflect an understandable refusal to ignore similarly aggravating facts.

Not much needs to be done to extend the ACLU's arguments to a point where they demonstrate their own inherent absurdity—in its brief, the ACLU argues that section 902.1(2)(b)(2) is unconstitutional because it permits a sentencing court to consider whether a juvenile killed victims by torturing them to death. *See* Amicus Br. at 26. That argument provokes instantaneous revulsion because of deep-seated expectations regarding proportionality: "a criminal sentence must be directly related to the personal culpability of the criminal offender." *See Oliver*, 812 N.W.2d at 647 (quoting *Graham*, 560 U.S. at 71). Murder committed through torture may demonstrate heightened personal culpability, which would require more severe punishment in pursuit of "restoration of the moral imbalance caused by the offense." *See id.* (quoting *Graham*, 560 U.S. at 71). Any artificial limitation on

sentencing courts' ability to consider aggravating facts pertaining to a juvenile murderer's culpability necessarily hinders attempts to ensure proportionality between an offender's crime and his/her punishment.

Pragmatists may look at Zarate, whose allocution demonstrated an admirable understanding of the moral depravity of his crime and whose behavioral track record in prison has been commendable, and remark that in cases like his, "delay of parole becomes 'nothing more than the purposeless and needless imposition of pain and suffering.'" *See Lyle*, 854 N.W.2d at 400 (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)). But pragmatism cannot invalidate the retributive imperative: Zarate's decision to murder Mr. Ramos must be *punished*, and our obligation to exact retributive punishment does not vanish when Zarate is no longer dangerous. *See Sweet*, 879 N.W.2d at 846 (Mansfield, J., dissenting) ("Society may want to punish a horrendous murder beyond the time necessary to rehabilitate the murderer."). Each juvenile murderer's individualized level of culpability impacts and calibrates the need for retributive punishment in his/her case—and any argument seeking to erect barriers between sentencing courts and relevant sentencing considerations must be rejected out of hand to preserve courts' ability to tailor each punishment to fit the crime.

CONCLUSION

Zarate was convicted of first-degree murder; if he were an adult, he would be sentenced to life in prison without possibility of parole. *See* Iowa Code § 902.1(1). Instead, the resentencing court considered mitigating factors stemming from the reduced culpability associated with juvenile offenders, and found that Zarate should be given that "opportunity to obtain release based on demonstrated maturity and rehabilitation" after serving 25 years. *See Lyle*, 854 N.W.2d at 394–95 (quoting *Graham v. Florida*, 560 U.S. 48, 75 (2010)). By way of comparison, on the date when Zarate will become eligible for parole, an adult who began serving a sentence for *second*-degree murder on the same day Zarate was sentenced for *first*-degree murder would have 20% of his/her mandatory minimum sentence remaining—that's 10 more years—before becoming eligible for parole. *See* Iowa Code §§ 707.3(2), 902.12(1)(a). Logically, this means the resentencing court found that Zarate successfully demonstrated culpability-mitigating circumstances that went beyond negating the uniquely blameworthy mental state that distinguishes first-degree murder as reprehensible, and even distinguished him from adult offenders who commit murder *without* that unique mens rea.

Together, *Sweet* and section 902.1(2) have obviated the need to scrutinize sentencing courts' reasoning with a fine-tooth comb, searching for stray remarks or phrases that straddle the line between finding aggravation and finding the absence of mitigation. Under section 902.1(2), a familiar list of unique culpability-mitigating characteristics of youth are listed as factors that courts *must* consider. *See* Iowa Code § 902.1(2)(b)(2)(f)–(g), (i)–(l), (o), & (q)–(u). Moreover, those factors must be considered within the context of a sentencing hearing that is unavailable to adult offenders and before imposing a punishment which, after *Sweet*, can never be as harsh as the LWOP punishment imposed on any similarly-situated adult offender. In practice, this is "a categorical approach that constrains decision-makers," and it "represents a collective pre-commitment to recognizing the mitigating character of youth in assigning blame." *See* ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 140 (2008). Zarate and the ACLU argue that this framework does not fully account for the diminished culpability associated with youth—but, in truth, it does precisely that and little else. And there is no constitutional basis for barring sentencing courts from considering aggravating factors, which are indispensible in tailoring punishment.

As such, the State respectfully requests that this Court affirm the resentencing court's order imposing Zarate's corrected sentence.

REQUEST FOR ORAL ARGUMENT

This case should be set for oral argument. This issue is important, and the State believes oral argument will be helpful.

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