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

DEFENDANT-APPELLANT'S FINAL REPLY BRIEF AND REQUEST FOR ORAL ARGUMENT

Benjamin Bergmann
Alexander Smith
Parrish Kruidenier Dunn
Boles Gribble Gentry
Brown & Bergmann L.L.P.
2910 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 284-5737
Facsimile: (515) 284-1704
Email:asmith@parrishlaw.com
ATTORNEY FOR APPELLANT

Thomas Miller
Louie Sloven
Office of Attorney General
Criminal Appeals Division
Hoover State Office Building,
2nd Floor
Des Moines, Iowa 50319
Telephone: (515) 281-3648
Facsimile: (515) 281-8894
Email: tmiller@ag.state.ia.us
ATTORNEY FOR APPELLEE

CERTIFICATE OF FILING AND SERVICE

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

The following counsel will be served by Electronic Document Management System.

Tom Miller
OFFICE OF ATTORNEY GENERAL
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
Telephone: (515) 281-3648
Facsimile: (515) 281-8894
Email: thomas.miller@iowa.gov
ATTORNEY FOR APPELLEE

I hereby certify that on the 30th day of March 2017, I did serve the Petitioner-Appellant's Final Reply Brief on Appellant, listed below, by mailing one copy thereof to the following Defendant-Appellant:

Rene Zarate
Defendant-Appellant /S/ John Maschman

PARRISH KRUIDENIER DUNN BOLES GRIBBLE GENTRY BROWN & BERGMANN, L.L.P.

By: /S/ Benjamin D. Bergmann
Benjamin D. Bergmann AT0009469
Alexander Smith AT0011363
2910 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 284-5737
Facsimile: (515) 284-1704
Email: bbergmann@parrishlaw.com
asmith@parrishlaw.com
ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

REPLY ROUTING STATEMENT

The Appellant and the Appellee both agree that this case should be retained by the Iowa Supreme Court.

ARGUMENT

I. TERM OF YEARS SENTENCES SHOULD BE AVAILABLE FOR JUDGES TO GIVE IN THEIR DISCRETION. LOUISELL DOES NOT INVALIDATE THE IOWA CONSTITUTIONAL REQUIREMENT

The State spends much of their brief not actually discussing the requirement of the Miller line of cases and hangs their hat on Louisell. However, Miller still demands individualized sentencing. That should allow for flexibility and discretion in sentencing. The very language in Miller makes it plain: "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:

> [Individualized sentencing] 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).

This language is pretty devastating to the State's argument, which is why the State stays far away from it. Instead, the State instead tries to make hay out of the court's decision in Louisell, via some pretty convoluted reasoning. Frankly, it is the legal analysis equivalent of reading tea leaves to see a holding that you desire, instead of paying attention to the actual language the court ruled in Louisell.

Louisell is a case about the legality of sentences for which there is no statutory authority, and has nothing to do with the issue in the present case —whether mandating life with the possibility of parole is a legal sentence. The court ruled in Louisell that the district court lacked statutory authority to impose a term of years sentence, so the term of years sentence was illegal and void. State v. Louisell, 865 N.W.2d 590, 598 (Iowa 2015). The court made clear that this was the extent of the holding in Louisell. See id. at 595 ("Louisell has not appealed from the new sentence, and we therefore do not consider whether it is illegal or cruel and unusual.") Referring to Senate File 448 and the statute at issue, the court stated "**we express no opinion as to the constitutionality of this new statute**." Id. at footnote 8 (emphasis added). The court also stated "The question whether the sentence of life in prison with eligibility for parole is in this particular case disproportionate,

illegal, or cruel and unusual under either the Eighth Amendment or article I, section 17 of the Iowa Constitution is neither raised nor decided in this appeal." Id. at footnote 9.

Just because the legislature has not authorized sentences other than life with the possibility of parole does not mean that life with the possibility of parole is a legal sentence. Just because the court may not sentence Mr. Zarate to a term of years does not mean that life with the possibility of parole is a legal sentence for Mr. Zarate. It just means that the legislature, in its attempt to avoid complying with Miller, has put the court in a terrible position, with only two possible illegal sentences for Mr. Zarate. The legislature avoided the spirit of Miller. If the court were to sentence Mr. Zarate to a term of years, the sentence is illegal, because there is no current statutory authority for it. If the court were to sentence Mr. Zarate to life with the possibility of parole, the sentence is illegal because it is cruel and unusual. The legislature might be happy, thinking they circumvented the constitution, but it puts the court in the current unenviable position.

II. THE IOWA CONSTITUTION REQUIRES THAT THE COURT HAVE THE OPTION TO GIVE MR. ZARATE A SENTENCE WITH A MEANINGFUL OPPORTUNITY FOR RELEASE. WHETHER MR. ZARATE HAS BEEN WRONGFULLY DENIED PAROLE IS IRRELEVANT

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). The defendant must have "a 'meaningful opportunity' to demonstrate rehabilitation and fitness to return to society." State v. Null, 836 N.W.2d 41, 75 (Iowa 2013) (citing Graham v. Florida, 560 U.S. 48, 75 (2010)). The chance for release must also be realistic. State v. Louisell, 865 N.W.2d 590, 602 (Iowa 2015) (citing Graham v. Florida, 560 U.S. 48, 82 (2010)). A meaningful opportunity for release should require "(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).

The State's brief attempts to show that juvenile homicide offenders have been released in Iowa. Therefore, there must be a meaningful opportunity for release. But the State ignores that actual law in favor of

anecdotes. Life with the possibility of parole in Iowa is a *de facto* life sentence.

Under the current parole system, there is not a meaningful opportunity for release with a chance to be heard and a realistic possibility for release. 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), passed in Senate File 448 (the same Senate File as the sentencing statute at issue), prohibits defendants serving life sentences 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." In addition, 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 board of parole does not need to interview inmates or hear oral arguments by attorneys. Iowa Code § 906.7; Taylor v. State, 752 N.W.2d 24, 26-27 (Iowa Ct. App. 2008). The defendant may only have the opportunity to present evidence if the parole board chooses to allow them to do so, and the inmate can be limited on any topic. Iowa Admin. Code §§

205-8.12 & 205-8.14(2). The inmate has no right to cross-examine or confront witnesses. Iowa Admin. Code § 205-8.11.

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. The legislature's, 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.

The State also attempts to sidestep the entire question of whether the sentence provides a meaningful opportunity for release by stating that this decision should be about whether the defendant has been wrongfully denied parole. There is some support in the caselaw for this stance, the court in Louisell stated the "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.

However, this is not the question that the court should be deciding, and Mr. Zarate is not asking the court to decide it. Rather, Mr. Zarate is saying that life with the possibility of parole in Iowa is a *de facto* life sentence that does not provide a meaningful opportunity for release under Miller. The court should be able to review the statutes in question and decide the relevant question: is life with the possibility of parole a *de facto* life sentence with a meaningful opportunity for release under current Iowa parole law?

There is also little indication to show how Mr. Zarate would ever successfully challenge a wrongful denial of parole. He will not be annually reviewed for parole, so he has to wait until the parole board decides to see him. He would be left with whatever evidence the parole board decides to review. And he would have to challenge a decision in which the parole board had extremely wide discretion.

III. SEATS IS NOT A "STOP-GAP" MEASURE. IT IS A GUIDE FOR SENTENCING JUVENILES CONVICTED OF CLASS A FELONIES, AS COMPARED TO THE STATUTE, WHICH CAUSED THE CIRCUMSTANCES OF THE OFFENSE TO OVERWHELM THE ANALYSIS IN MR. ZARATE'S SENTENCING

The State appears to be saying that Seats was a good decision for Mr. Zarate's rights, because while the floor of his rights was set by the Iowa Constitution, the legislature has given him new rights and additional mitigating characteristics that the court must now consider in sentencing. Therefore, Mr. Zarate is silly for appealing a statute that is actually very favorable to him.

This argument is incorrect. The court never limited what characteristics could be considered, it just stated that the "the 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 must 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. In contrast, the statute does not even mandate that the court consider these mitigating circumstances as mitigating.

The statute also encourages the circumstances of the offense to overwhelm the analysis, even though 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 State wants Mr. Zarate to be punished and has said so. See State's Brief. The court should be wary of the State's claims that the statute is actually better for Mr. Zarate than the Iowa Constitution. It is not, for two simple reasons 1) It does not mandate that the court actually view all of the mitigating factors as mitigating and 2) The focus on aggravating factors demands that the circumstances of the offense overwhelm the analysis.

IV. THE CIRCUMSTANCES OF THE OFFENSE OVERWHELMED THE ANALYSIS IN MR. ZARATE'S SENTENCING

The State sidesteps the issue of Mr. Zarate's actual sentencing, not even giving the same standard of review as Mr. Zarate. See Appellant's Brief at 28 ("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) cf. State's Brief (only discussing error preservation on a Motion to Correct Illegal Sentence).

The circumstances of the offense overwhelmed the analysis of the court in Mr. Zarate's case. The court generally found that every mitigating circumstance occurred and that Mr. Zarate was no longer a threat to the community and had successfully rehabilitated. (12-8-15 Tr. 9:8-16). The court explicitly gave Mr. Zarate's sentence because the court thought it should be the "minimum" for anyone who takes a life, whether juvenile or adult. (12-8-15 Tr. 12:12-16) ("I've chosen that point of time to be approximately 10 years from now just to ensure that you serve what I believe should be the minimum period of time for somebody that takes the life of another individual, whether that person is a juvenile or an adult").

V. PREVENTING AGGRAVATING FACTORS FROM OVERWHELMING THE SENTENCING COURT'S ANALYSIS DOES NOT UNDERMINE LEGITIMATE PENEOLOGICAL GOALS, FOR EITHER MR. ZARATE OR IN GENERAL

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). The nature of the crime cannot overwhelm the analysis in juvenile sentencing. Id.

A. Rehabilitation/Incapacitation

While rehabilitation and incapacitation can serve as a justification for punishing juveniles, there must also be an understanding that reform is easier for juveniles without the need for harsh sentences. State v. Lyle, 854 NW 2d 378, 399-400 (Iowa 2014). After a juvenile's transient impetuosity ends and the juvenile rehabilitates, the incapacitation justification is no longer served, and delay of parole becomes "nothing more than the purposeless and needless imposition of pain and suffering." Id. at 400 (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)).

The court explicitly found that Mr. Zarate was no longer a threat to the community and had successfully rehabilitated. (12-8-15 Tr. 9:8-16)

("[T]here is no evidence at this time suggesting that you continue to be a threat to the public or to any other individual beyond Mr. Ramos."). The circumstances of the offense, mandated by statute, overwhelmed the court's analysis. See (12-8-15 Tr. 12:12-16) ("I've chosen that point of time to be approximately 10 years from now just to ensure that you serve what I believe should be the minimum period of time for somebody that takes the life of another individual, whether that person is a juvenile or an adult"). The imposition of 25 years before he was eligible for parole was the purposeless and needless imposition of pain and suffering on Mr. Zarate.

B. Proportionality/Retribution

The State acknowledges that under any pragmatic approach, delaying Mr. Zarate's parole would be the "purposeless and needless imposition of pain and suffering." See State's Brief, quoting State v. Lyle, 854 NW 2d 378, 404 (Iowa 2014). Which leaves the State only with the argument that Mr. Zarate deserves his current sentence under a retributive theory of justice.

Juveniles are not as blameworthy as adults. State v. Lyle, 854 NW 2d 378, 414 (Iowa 2014). "[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." Id. at 399. This is supported by the latest advances in neuroscience, which

reveal that juveniles are simply less worthy of moral blame than adults. See State v. Null, 836 NW 2d 41, 54-55 (Iowa 2013). That significantly undermines any retribution justification for the State. The State agrees with the Defendant's statement of facts, which generally reveal that Mr. Zarate is not as blameworthy as many offenders. The evidence shows that at the time of the offense, Mr. Zarate was immature, had an underdeveloped sense of responsibility, was vulnerable to peer pressure, was impetuous, and had poor risk assessment skills. In addition, not only did Mr. Zarate have the capacity for change, he did change in the prison environment, all with no hope of reward, because he always thought that he would be incarcerated forever. Even the State admits that Mr. Zarate's "allocution demonstrated an admirable understanding of the moral depravity of his crime" and that his "behavioral track record in prison has been commendable." State's Brief at 32.

The State gives legitimate peneological goals, but for different offenders in different contexts. The evidence shows that Mr. Zarate has been rehabilitated and that he is much less blameworthy than other offenders, given his status as a juvenile and the circumstances of his life.

CONCLUSION

As the State says, Mr. Zarate should be punished. But his punishment should not be a cruel and unusual one, concerned with retribution, or moral outrage, or revenge. It should be a fair and just one, taking into account Mr. Zarate's status as a juvenile, his significant rehabilitation since entering prison, that he is less worthy of moral blame than adults, and without letting the circumstances of the offense overwhelm the analysis. Finally, his sentence should give him a meaningful opportunity for release.

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.

PARRISH KRUIDENIER DUNN BOLES GRIBBLE GENTRY BROWN & BERGMANN L.L.P.
BY: /S/ Benjamin D. Bergmann
Alexander Smith AT0011363
Benjamin D. Bergmann AT0009469
2910 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 284-5737
Facsimile: (515) 284-1704
Email: asmith@parrishlaw.com
Email: bbergmann@parrishlaw.com
ATTORNEYS FOR DEFENDANT - APPELLANT

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

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 6,709 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.

This brief complies with the typeface requirements of Iowa R. (Exhibit 6 P. 6.903(1)(e) and the type-style requirements of Iowa R. (Exhibit 6 P.6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in font size 14, Times New Roman.

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