IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 16-0824

SIOUX COUNTY NO. FECR003984

STATE OF IOWA,

Plaintiff-Appellee,

vs.

JOHN WALTER MULDER,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR SIOUX COUNTY
THE HONORABLE STEVEN J. ANDREASEN

APPELLANT'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

This case should be sent to the Supreme Court of Iowa. Iowa Rule of Appellate Procedure 6.1101(2).

STATEMENT OF THE CASE

Nature of the Case: Defendant-Appellant, John Walter Mulder, appeals the sentence imposed by the District Court following a juvenile Resentencing Hearing on a homicide offense committed in 1976 when Mulder was 14 years old.

Course of Proceedings: The Defendant-Appellant was charged with Murder in the First Degree in violation of Iowa Code Section 707.2 on September 24, 1978, from events occurring on or about April 23, 1976. A jury trial was held on January 16, 1979, in Kossuth County, and the Defendant was found guilty of Murder in the First Degree and sentenced to life without parole on February 2, 1979, spending the last 37 years in prison.

In *State v. Lyle*, the Iowa Supreme Court invalidated mandatory sentencing that prevents sentencing courts from considering mitigating factors relevant for juvenile offenders. *State. v. Lyle*, 854 N.W.2d 378, 404 (Iowa 2014). The Supreme Court ordered district courts to recall and conduct resentencing hearings of all presently incarcerated offenders who were convicted of crimes that occurred before they were 18 years old. *Id.* The Defendant's Resentencing Hearing took place on May 11, 2016, at which time the Defendant was sentenced to life in prison with

eligibility for parole after 42 years. The Defendant filed a Notice of Appeal on May 13, 2016.

STATEMENT OF THE FACTS

The Defendant, John Walter Mulder, was found guilty by a jury verdict of Murder in the First Degree. (A-74, L. 20-25). The Defendant was 14 years of age when the homicide was committed, three days short of his 15th birthday. (A- 45, L. 19-21).

ARGUMENTS AND AUTHORITIES

I. THE SENTENCE IMPOSED BY THE DISTRICT COURT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE IOWA CONSTITUTION

Standard of Review/Preservation of Error

Appellate review of this issue is de novo. *State v. Seats*, 865 N.W.2d 545, 553 (Iowa 2015). Defendant-Appellant filed a Notice of Appeal on May 13, 2016.

Analysis

Both the U.S. Constitution and the Iowa Constitution prohibit the infliction of cruel and unusual punishment. *U.S. Constitution Amendment VIII*; *Iowa Constitution Article I § 17.*

The Eighth Amendment encompasses a principal of balance and proportion of the punishment to the crime in accordance with the ever changing standards of morals and decency. *Graham v. Florida*, 560 U.S. 48, 58-59 (2010). Likewise, the

Iowa Supreme Court has acknowledged that the right and meaning of the protections afforded to Defendants in the Iowa Constitution is not static. *State v. Lyle,* 854 N.W.2d 378, 384 (Iowa 2014) (noting that constitutional challenges regarding cruel and unusual punishment must be analyzed under the current standards of whether a punishment is excessive "drawing meaning from the evolving standards of decency that mark the progress of a maturing society.").

The United State Supreme Court has specifically addressed claims of cruel and unusual punishment in relation to juvenile defendants. First, the death penalty cannot be imposed on a juvenile offender. *Roper v. Simmons*, 543 U.S.551, 578 (U.S. 2005) (holding that juveniles lacked maturity, had an underdeveloped sense of responsibility, were more susceptible to negative influences, had less control over their environment, and were still in the process of forming character traits). "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 573.

Five years after *Roper*, the Supreme Court held that life without parole could not be imposed against a juvenile Defendant for a non-homicide offense. *Graham* at 74-75. (noting the need for a categorical rule due to inability on a case by case basis to accurately distinguish a rare juvenile incapable of change from the majority who have the capacity to change). States are not mandated to guarantee eventual freedom

to a juvenile Defendant convicted of a non-homicide offense, but States are mandated to give juvenile defendants a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75.

The final case in the trilogy of federal cases involving juveniles held that the difference between juveniles and adults prohibits mandatory life in prison without parole for juvenile homicide offenders. *Miller v. Alabama*, 567 U.S. at ---- (2012) (finding that Courts had to take into account the fact that children are different and said differences push in a direction against a sentence of life in prison). The Court in *Miller* again pointed out the difficulty in trying to distinguish between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.* The *Miller* case applies retroactively to cases on collateral review. *Montgomery v. Louisiana*, 577 U.S. at --- (2016) (holding that *Miller* applied retroactively because the decision rested upon the risk that most juvenile offenders face a punishment that the law cannot impose of them, life without possibility of parole).

While the Iowa Supreme Court follows the holdings of the United States Supreme Court interpreting the infliction of cruel and unusual punishment, those decisions only "create a floor, not a ceiling when we are called upon to interpret parallel provisions of the Iowa Constitution." *State v. Sweet*, 2016 WL3023726 (Iowa 2016). When interpreting the Iowa Constitution, the Iowa Supreme Court is

free to conduct independent analysis, including not only a reading of the United States Supreme Court Opinions but also dissenting opinions of the United States Supreme Court, opinions from other state courts, and other authorities. *State v. Short*, 851 N.W.2d 474, 481 (Iowa 2014); *State v. Ocha*, 792 N.W.2d 260, 267 (Iowa 2010).

The Iowa Supreme Court has considered the analysis of *Roper*, *Graham*, and *Miller* under Article I, Section 17 of the Iowa Constitution, building upon and extending those principles. *State v. Ragland*, 836 N.W.2d 107, 121-122 (Iowa 2013) (ruling commutation of sentence to life with no possibility of parole for sixty years by Governor Branstad following *Miller* was unconstitutional as Defendant was entitled to be resentenced under an individualized process with consideration of the *Miller* factors as *Miller* applies to sentences that are the functional equivalent of life without parole); *State v. Pearson*, 836 N.W.2d 88, 97 (Iowa 2013) (requiring an individualized sentencing hearing in cases involving long prison sentences for juvenile offenders even though the sentence was not life in prison without the possibility of parole); *State v. Null*, 836 N.W.2d 41, 72 (Iowa 2013) (concluding that *Miller* principles are fully applicable to a lengthy term-of-years sentence imposed because an offender sentenced to a lengthy term-of-years sentence should not face a worse situation than a Defendant sentenced to life in prison without parole who has the benefit of individualized hearing as required in *Miller).* The sentences in *Null* and *Pearson* were found unconstitutional under the Iowa Constitution but in

Ragland, the sentence with parole that was basically equal to a life sentence without parole was found to be cruel and unusual punishment under both the United States Constitution and the Iowa Constitution. *Ragland* at 122.

One year after deciding the *Ragland* case, the Iowa Supreme Court held any/all mandatory minimum sentences of imprisonment for juveniles violates the Iowa Constitution against cruel and unusual punishment. *State v. Lyle*, 854 N.W.2d 378, 380-81 (Iowa 2014) (concluding that mandatory minimum sentences for juveniles is too punitive for what is known about juveniles and therefore a categorical rule was necessary). *Lyle* made it clear that the spirit of *Miller*, *Null*, and *Pearson* required the Court to apply that reasoning even to a short sentence that denies the district court any discretion in arriving at a sentence that best serves the interest of the juvenile and society. *Id.* at 400-03.

The Iowa Supreme Court next analyzed the current juvenile sentencing jurisprudence in *State v. Louisell* considering the court's discretion in resentencing a juvenile defendant convicted of murder in 1987. 865 N.W.2d 590, 592 (Iowa 2015) (striking the unconstitutional portions of Iowa's statute on class "A" felonies thereby leaving the sole sentence option of the court having discretion to impose a life sentence with eligibility for parole). *Louisell* only addressed the court's discretion to craft an individualized sentence after a hearing on the *Miller* factors; the court was not making a determination on whether life in prison with eligibility for parole was

illegal or cruel and unusual punishment in those circumstances. *Id.* at 601. However, the court did note that in order to meet the requirement of offering a "meaningful opportunity" for release, the "meaningful opportunity must be realistic." *Id.* at 602.

At the same time as the *Louisell* case, the Iowa Supreme Court introduced a new test that was to be applied in cases where the court has discretion to sentence juveniles to life in prison without the possibility of parole. *State v. Seats*, 865 N.W.2d 545, 555-56 (Iowa 2015) (noting that if a life sentence without parole could ever be imposed on a juvenile offender, the state had the burden to prove that the juvenile was irreparably corrupt). The Court noted that any such finding should be "rare and uncommon" making the presumption that juveniles should be sentenced to life with the possibility of parole even for homicide offenses. *Id.* at 555. To determine whether the presumption was overcome, the district court needed to recognize that children are constitutionally different from adults; consider the family and home environment of the juvenile; consider the nature of the offense, the juvenile's role, and whether substance abuse played a role; and recognize that juveniles are more capable of change than adults. *Id.*

The Iowa Supreme Court accepts the principles outlined in *Roper*, *Graham*, and *Miller*, in interpreting Article 1, Section 17 of the Iowa Constitution, but also has independently applied those principles to the Iowa Constitution beyond the limited factual circumstances of those cases by including application to de facto life

sentences, very long sentences, and also relatively short sentences. *Lyle*, 854 N.W.2d at 402-03; *Ragland*, 836 N.W.2d at 122; *Null* 836 N.W.2d at 71-72.

The Iowa Supreme Court recently added another categorical rule prohibiting juveniles from being sentenced to life without the possibility of parole. *Iowa v. Sweet*, 2016 WL 3023726 (Iowa 2016) (holding that a sentence of life without possibility of parole for a juvenile was cruel and unusual punishment under the Iowa Constitution). "In reviewing the case law development, we believe, in the exercise of our independent judgment, that the enterprise of identifying which juveniles are irretrievable at the time of trial is simply too speculative and likely impossible given what we now know about the timeline of brain development and related prospects of self-regulation and rehabilitation." *Id.* at 26.

The *Sweet* case specifically points to the *Miller* factors and concludes that a district court cannot apply those factors at the time of trial in any reliable way to determine with any certainty which rare juveniles are irretrievably depraved. *Id.* "In short, we are asking the sentencer to do the impossible, namely, to determine whether the offender is "irretrievably corrupt" at a time when even trained professionals with years of clinical experience would not attempt to make such a determination." *Id.*

In this case, the Defendant-Appellant, John Walter Mulder, was resentenced after an individualized hearing to life in prison with eligibility for parole after 42

years. In continuing the independent application of the Iowa Supreme Court of the *Roper*, *Graham*, and *Miller* principles to the Iowa Constitution and applying the case law in Iowa that has followed, this sentence violates the cruel and unusual punishment clause of the Iowa Constitution. A minimum term of 42 years prior to any consideration of parole is the equivalent of a life sentence with no parole with no meaningful or realistic opportunity for release and therefore falls within the definition of cruel and unusual punishment. Not only is the minimum term of 42 years unconstitutional; any minimum terms of years imposed on a juvenile is unconstitutional.

Even if no minimum period of incarceration is imposed by a sentencing court for a juvenile, that does not mean that the juvenile is released immediately. Having no minimum period of incarceration simply means that the Department of Corrections has the authority to release a Defendant prior to the expiration of the maximum sentence in the event there is ever a point that the Department concludes that a release is appropriate for both the Defendant and for society as a whole. The current statute governing release for parole or work release states:

> A parole or work release shall be ordered only for the best interest of society and the offender, not as an award of clemency. The board shall release on parole or work release any person whom it has the power to so release, when in its opinion there is reasonable probability that the person can be released without detriment to the community or to the person. A person's release is not a detriment to the community or the person if the person is able and willing to fulfill the obligations of a law-abiding citizen, in the board's determination.

Iowa Code Section 906.4(1) (2015). When making a determination of whether a grant of parole is appropriate, the Board considers:

> all pertinent information regarding the person, including the circumstances of the person's offense, any presentence report which is available, the previous social history and criminal record of the person, the person's conduct, work, and attitude in prison, and the reports of physical and mental examinations that have been made.

Iowa Code Section 906.5(3) (2015). By imposing a minimum term of 42 years prior to being eligible for parole or imposing any minimum term for a juvenile, the court is stripping the Department of Corrections of any ability to release an offender even if a parole review would be able to conclude, based on all pertinent information, that a release would not be a detriment to society or to the offender. That outcome contradicts the concerns that have emerged in the developing juvenile case law in Iowa as described above.

In *Lyle*, the Iowa Supreme Court did not specifically consider or decide whether imposing a minimum sentence for a juvenile in the absence of statute requiring a minimum sentence for a juvenile would be constitutional; however, the Court did hold that a statutory minimum was cruel and unusual punishment because mandatory minimums failed to serve legitimate penological goals and posed "too great a risk of disproportionate punishment." *State v. Lyle*, 853 N.W.2d 378, 395 (Iowa 2014) (quoting *Miller v. Alabama,* 567 U.S. at ---- (2012)). That exact same

risk is present regardless of whether the minimum sentence is mandated or simply imposed.

As noted above, the Iowa Supreme Court has recognized that a district court cannot apply the *Miller* factors in any sort of reliable way in order to accurately determine which juveniles are "irretrievably corrupt" to justify life without the possibility of parole when trained professionals with years of clinical experience would not be able to do so. *Iowa v. Sweet*, 2016 WL 3023726 (Iowa 2016). "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption" for some period. *State v. Null*, 836 N.W.2d 41, 61 (Iowa 2013).

The Iowa Court of Appeals recently reviewed whether the Iowa Constitution categorically bans minimum terms of incarceration for juveniles. *State v. Howard*, No. 14-1549 (Iowa Ct. App. July 27, 2016). In *Howard*, the Court of Appeals again deferred that decision to the Iowa Supreme Court. *Howard* at *4; citing *State v. Means*, No. 14-1376, 2015 WL 6509741, at *9 (Iowa Ct. App. Oct. 28, 2015). The Court of Appeals in *Howard*, like in *Louisell*, reversed the imposition of a mandatory term based upon the illegal application of a mandatory term, finding that Iowa Code Section 901.5(14) was not retroactive as applied to Defendant Howard. *Howard* at *7. Simply put, the inconsistency in the application, based upon the posture and

timing of the juvenile resentencing hearing, further evidences why Defendant's mandatory sentence is cruel and unusual. While the juveniles in *Louisell* and *Howard* are benefited by their posture, Defendant here is punished with a cruel and unusual mandatory minimum due to his posture.

In light of the above, any determination about if and when a juvenile offender could be released as an individual who is "able and willing to fulfill the obligations of a law-abiding citizen" should be left within the determination of parole board of the Department of Corrections and the Board should not be restricted from even considering a juvenile for release until some minimum time frame, in this case 42 years, has passed. *Iowa Code Section 906.4(1)* (2015). Including that minimum time frame simply equates to any chances for parole becoming even more illusory and certainly not meaningful or realistic.

Under current Iowa law, there is no question that a sentence of life with a chance of parole after 42 years equates to life with no parole. A sentence with no true expectation of release shocks the conscience and is cruel and unusual. None of the 38 Iowa juvenile offenders originally serving life without parole has been paroled, no matter how extensively he or she may have rehabilitated. Without a realistic and meaningful opportunity for release, the fact that a child who was impulsive, reckless, and without moral grounding is able to become an adult without those same traits becomes completely and wrongly ignored. *State v. Louisell*, 865

N.W.2d 590, 602 (Iowa 2015). It contradicts the very concept acknowledging that children are "constitutionally different than adults." *State v. Seats*, 865, N.W.2d 545, 558-63 (Iowa 2015)(J. Hecht concurring) (describing a sentence for a juvenile of life with parole after 50 years as "strikingly similar…to the death penalty").

II. THE DISTRICT COURT IMPROPERLY CONSIDERED AND WEIGHED SENTENCING FACTORS AND/OR CONSIDERED ILLEGAL FACTORS

Standard of Review/Preservation of Error

Appellate review of this issue is for abuse of discretion. *State v. Seats*, 865 N.W.2d 545, 552 (Iowa 2015). Defendant-Appellant filed a Notice of Appeal on May 13, 2016.

Analysis

Argument I above outlines the history of the decisions of the United States Supreme Court and the Iowa Supreme Court precedents in cases involving juveniles. That history will not be repeated again in this section. In the event that the Court believes the *Miller* factors and corresponding *Lyle* principles are still "intact" in Iowa and that the sentence of life in prison with eligibility for parole after 42 years is not cruel and unusual punishment under the Iowa Constitution, then the analysis turns to whether or not the District Court properly considered and weighed the *Lyle* factors as mitigating factors and whether any improper evidence was considered and illegal factors considered.

Children are constitutionally different from adults for purposes of sentencing. *State v. Lyle*, 854 N.W.2d 378, 395 (Iowa 2014). Sentencing courts must recognize that a juvenile offender's "culpability is necessarily and categorically reduced as a matter of law." *Id.* at 386. The Iowa Supreme Court has noted that the sentencing court for a juvenile "must consider" the age of the offender and the features of youthful behavior such as immaturity, impetuosity, and failure to appreciate risks and consequences; the family and home environment; the circumstances of the crime and all circumstances related to the youth that may have played a role in commission of the crime; the challenges of youthful offenders in assisting during the criminal process; and the possibility for rehabilitation or change. *Id.* at 403. All of those factors are to be considered as mitigating factors and cannot be used to justify a harsher sentence. *Id.* In addition, the imposition of lengthy minimum sentences without parole eligibility are only appropriate, if at all, in very rare or uncommon cases. *State v. Null*, 836 N.W.2d 41, 75 (Iowa 2013); *State v. Pearson*, 836 N.W.2d 88, 96 (Iowa 2013). In this case, the Court failed to consider these factors as mitigating factors; erred in concluding this was a rare case where a lengthy minimum term prior to parole eligibility was appropriate; and considered improper evidence and/or factors.

First, the district court did not properly consider as mitigating factors the juvenile characteristics of immaturity, impulsivity, and failure to appreciate risks

and consequences. The Defendant was 14 years old when the crime occurred, just 3 days short of his 15th birthday. (A-45, L.19). The Court noted that the Defendant did have other juvenile offenses at the time this crime was committed, but that he hadn't received rehabilitation services for those charges or been placed into the juvenile home in Eldora prior to committing this offense. (A-72, L.14 – p. 73, L. 10). "The Court believes that in some ways the other juvenile violations that he had could be characterized in conjunction with this crime, again, going towards his youth and those factors of his youth as described in the case law and those *Miller* factors." (A-73, L. 10-15). Even though the Court admits there is no record of receiving rehabilitation services through juvenile court for prior thefts, the court still finds that the fact that he was violating the law and having other behaviors as a juvenile gives the suggestion that the acts were "less impetuous or reactive." (A-75, L.23-p.76, L.6). The Court does not specifically address the Defendant's age in connection with the "failure to appreciate risk and consequences" at the time of the crime. It appears from the discussion that the court actually held Mulder to an adult-like standard, reasoning that the sole fact that he had other juvenile theft charges, even without rehabilitation services offered, was sufficient to work against the mitigating factors of immaturity and impetuosity, and negate the need to discuss the failure to appreciate risks and consequences.

The court's reasoning on chronological age ignores the well settled fact that the "differentiating characteristics of youth are universal." *State v. Lyle*, 854 N.W.2d 378, 389 (Iowa 2014). The reasoning also overlooks the scientific research on juvenile brain development verifying that human brain development and psychological maturation continues through "late adolescence and even into early adulthood." *State v. Seats*, 865 N.W.2d 545, 557 (Iowa 2015). "Much of this development occurs in the frontal lobes, specifically, in the prefrontal cortex, which is central to 'executive functions' such as reasoning, abstract thinking, planning, the anticipation of consequences, and impulse control." *State v. Null*, 836 N.W.2d 41, 55 (Iowa 2013). "Identity development, which is often accompanied by experimentation with risky, illegal, or dangerous activities, occurs in late adolescence and early adulthood." *Id.* This means that even though juveniles have the capability to use adult reasoning by the middle of adolescence, they do not have the ability to accurately assess risk and make adult like decisions exercising self-control. *Id.*

Next, the court failed to consider the Defendant's family and home environment at the time of the crime. The Defendant was one of 10 children in a home where his father was a violent alcoholic who beat him, his mother, and his siblings. (A-25, L.21-23). He did not know his father well and his life as a child was difficult. (A-46, L.7-11). The Defendant started to use drugs and alcohol at the age

of 12, specifically including speed and marijuana. (A-46, L. 13-17). The Defendant had trouble in school and was part of special education classes. (A-46, L. 18-19). At the age of 18, the Defendant scored in the seventh grade academically. (A-47, L. 8-11). Upon his first juvenile delinquent act, the Defendant was sent to Cherokee Mental Health Institute and was diagnosed with unsocial and aggressive reaction to adolescence with moderate to severe antisocial traits and antisocial personality disorder. (A-46, L. 21 – p. 47, L. 3). The sole comment by the court regarding this factor was simply that "the Court believes that his family life played a role in his development as a youth." (A-72, L. 11-13).

The Court was supposed to specifically take into account any information in the record regarding "the family and home environment that surrounds him – and from which he cannot extricate himself" including personal and family drug or alcohol use, lack of parental supervision, or lack of adequate education. *State v. Seats*, 865 N.W.2d 545, 556 (Iowa 2015). There is no explanation from the Court to outline which factors were considered, only a blanket reference to the factor generically. Therefore, the district court either overlooked the evidence relating to the Defendant's family background or failed to assign it any mitigating weight.

The Court appears to have given the most weight to the circumstances of the crime itself, noting that the jury verdict found that the Defendant unlawfully shot Jean Homan in the sanctity of her own home; however, the court failed to properly

factor in all of the circumstances with youth that may have played a role in the commission of the crime. (A-75, L. 9-16). The court did not give weight to the fact that the Defendant had been using alcohol, speed, and marijuana for almost three years by the time of the crime or that at the time the crime was committed, he was diagnosed with unsocial and aggressive reaction to adolescence with moderate to severe antisocial traits and antisocial personality disorder. (A-46, L. 13 – p. 47, L. 3). The only reference to the antisocial personality disorder is the fact that the court does not believe it to be a "prevalent concern" at the current time as it relates to recidivism. (A-73, L. 16 – p. 74, L. 7).

One of the circumstances that the sentencing Judge must consider is whether substance abuse, in this case drug addiction, played a role in the juvenile's commission of the crime. *State v. Seats*, 865 N.W.2d 545, 556 (Iowa 2015); *Lyle*, 854 N.W.2d at 403(Iowa 2014). Since the court did not consider as mitigating circumstances the influence of substance abuse in the commission of the offense or any other circumstances of his youth that played a role, such as his diagnosed disorder, the matter must be remanded for resentencing.

Next, the court failed to consider the challenges of youthful offenders in navigating the criminal process. There is no discussion by the Court of whether the Defendant was able to actively assist his attorney in the initial preparation for the Trial when he was juvenile; whether he was able to understand and discuss trial

strategy; whether he understood his options; whether he had discussion with police officers regarding the initial charge, and so on. The only information provided is that the Defendant was facing prior delinquency charges but that he hadn't received any rehabilitation services for those yet. (A-72, L. 22 – p. 73, L. 15). Even if the Defendant had taken part in juvenile proceedings, those proceedings are vastly different than adult proceedings and there is no way to verify that the Defendant would have had sufficient knowledge and appreciation of the implications of the adult court process. The fact that the Defendant was involved in special education classes and using alcohol and drugs further supports the likelihood that the Defendant was not sufficiently equipped to understand or assist in the adult criminal process. (A-46, L. 13-19). That challenge is another mitigating factor that needed to be considered in resentencing and was not.

Finally, the court failed to properly consider evidence supporting the possibility of rehabilitation and capacity for change. The court admitted that the Defendant did not have any reports of a violent crime in the 37 years he had been incarcerated; that there was relatively little or no reports of misconduct at all in the last 15 years, if not longer; that he had maintained favorable employment throughout the course of his incarceration; and that he had been actively engaged in the scared straight program where he speaks to youths. (A-70, L. 17 – p. 71, L. 18). Yet the confirmation of no violent crimes ever, no misconduct in at least 15 years, steady

employment the entire time, and speaking to youth was all apparently outweighed by the fact that when the Defendant was 37 years old, he and others allegedly made a plan to escape. That non-violent act from nearly 20 years ago was sufficient to work against rehabilitation and instead support the need to protect society on grounds that the Defendant could not control his impulses or actions. (A-76, L. 20 – p. 77, L. 2). In fact, that one act apparently was sufficient for the court to use the information to weigh against the "factors of youth that the Court would otherwise consider." (A-77, L. 3-6).

Contrary to the court's conclusions, the record demonstrates substantial progress towards rehabilitation and self-improvement. In addition, the focus on an attempt to escape from nearly 20 years ago were given far too much weight. Based on his initial sentencing, the Defendant was under the understanding that, no matter what his conduct was in prison, he had no chance of leaving. There was no incentive to become a responsible individual and yet the Defendant still took those steps. Aside from the ongoing employment, the Defendant obtained his GED and his high school diploma. (A-51, L. 15-16). He also completed two semesters of college courses and only ended that pursuit when he could not obtain the Pell Grant any longer. (A-51, L. 16-17). He was a mentor for other inmates. (A-51, L. 21-25). He was in the honor ward or honor barracks at the facility. (A-54, L. 20-23).

Most importantly, after serving time in prison since he was a teenager, those who would know him best, the counselors and staff at the prison facility, gave him positive evaluations. (A-52, L. 2-4). These were the individuals who saw him up close and personal on a daily basis and were in the best position to judge his rehabilitation and capacity for change. Specifically, Layla J. Rysavy, a Correctional Counselor, submitted a four page letter providing a very detailed overview of the Defendant's time under the Department of Corrections since he was 14. She noted that the Defendant began to mature and take better advantage of work opportunities and gaining trust within the system beginning in 1998. She noted that his behavioral history was exemplary until he was accused of sexual misconduct in September of 2013, but she emphasized the fact that the report was dropped for the other offender who appealed the same and she did not believe the evidence substantiated the report.

Much like the prior period of 1998-2013, she again noted his exemplary work record and behavior record through the time of writing the letter. She has been the individual directly preparing the Defendant for the possibility of re-entering the community. She notes his participation in the 180 Miracles program, a substance abuse support group; Toastmaster, a group that helps him gain skills as a public speaker; his employment; signing up to take special classes to help care for dementia patients so he can assist older offenders in the beginning stages of Alzheimer's; taking the Alternatives to Violence program; participating in a lengthy list of

charitable activities; and participating in an intervention program to teach him better problem solving and social skills. She acknowledged his prior disciplinary record but stressed he was in the system since age 14 and how that inexplicably would lead to an imperfect record but also that he never had one instance of institutional violence in 36 years which she felt spoke volumes given the nature of the crime he was convicted of. (See letter of Ms. Rysavy filed November 23, 2015). It is inconceivable to read that letter and not reach the conclusion that the Defendant has undergone rehabilitation and change.

The record does not support a determination that the Defendant is incapable of rehabilitation for a minimum of 42 years. "After the juvenile's transient impetuosity ebbs and the juvenile matures and reforms, the incapacitation objective can no longer seriously be served" and the mandatory sentence becomes a "purposeless and needless imposition of pain and suffering." *State v. Lyle*, 854 N.W.2d 378, 400 (Iowa 2014).

This is not one of those rare cases where a lengthy minimum term of incarceration is appropriate. In light of the mitigating factors that must be considered in resentencing, the district court erred in concluding this is a rare case where a lengthy minimum term (42 years) is appropriate.

Finally, not only did the court fail to consider evidence of the mitigating factors, the court also considered improper evidence for sentencing. One of the

individuals who provided a victim impact statement included several quotes that came directly from the Defendant's confidential psychological report. (A-32, L. 12). According to Iowa Code Section 904.602, that information is confidential. A violation of that Code Section is a serious misdemeanor. *Iowa Code Section 904.602(11)*. It was improper for that evidence to be included in the record and given any consideration.

The Court also permitted multiple victim impact statements from individuals who were not immediate family members of the victim and some whom were not even alive at the time of the homicide. (A- 26, L.1-2) In all, only three out of the seven statements were made by immediate family members. (A- 85, L. 4-9,).

Iowa Chapter 915 sets forth the provisions for victim impact statements. Iowa Code Section 915.21 provides the guidance for how such statements are made. Iowa Code Section 915.10 provides that a victim includes immediate family members. *Iowa Code Section 915.10(3).* Immediate family member is not further defined in Chapter 915, but as used elsewhere in the criminal code of Iowa, it includes, "a spouse, parent, child, sibling, or any other person regularly residing in the household." *Iowa Code Section 708.11(1)(c).* It is similarly defined in common language definitions and by Black's Law Dictionary as "your parents, wife, husband, children and brothers and sisters." *Black's Law Dictionary 9th Edition, West Publishing 2009.*

The Court permitted the statements and Defendant's counsel failed to object to the inclusion of these statements. Counsel's failure to object to the inclusion of four of the seven victim impact statements was ineffective and it materially impacted the Court's sentencing. The general tenor of each statement from non-immediate family members, as well as immediate family, was to cast a grim picture of Defendant and plead for a mandatory life term incarceration from the Court. (A- 22, L.11-14, p. 25, L. 16-17, p. 27, L.4-8, p. 32, L. 19-20).

Defendant's counsel was ineffective in permitting four victim impact statements to be heard, all of which sought the Court to impose life without parole in some form. The victim's grandson provided a statement, despite the fact that the grandson was only baby at the time of the homicide. (A-27, L. 15-16). Mr. Zevenbergen's statement included references that Defendant escaped, that Defendant is evil, and that Defendant killed his grandmother for a sick and twisted desire. (A-29, L. 8, 15 and p. 31, L. 20-21). Mr. Zevenbergen went further to detail that Defendant could not be rehabilitated and required life without parole. (A-32, L. 22).

Counsel was ineffective in permitting the victim's future daughter-in-law to provide a statement that Defendant stole her husband's freedom and that he killed enough and deserved to stay in prison. (A-25, L. 12-17). She went on to state that Defendant was evil and deserved prison for the rest of his life. (A-25, L. 3-9). As

part of the future daughter-in-law's statement, she provided a victim statement from victim's grandson, who was not even alive at the time of the homicide. Consistent with the other statements, the grandson provided that Defendant did not deserve to walk in freedom again. (A-27, L 3-8).

Trial counsel breached an essential duty by failing to object to the inclusion of multiple victim impact statements from individuals who are not immediate family of the victim. This failure had a material impact on the Court weighing life without parole versus parole after a term of years. (A-69 L. 22-p. 70 L. 3). The tenor of both the immediate family members, in this case the victims children, was bolstered by the inclusion of four additional non-immediate family members impassioned pleas for life sentences. The Court having heard these four statements balanced against their requests for mandatory life by fashioning a 37 year mandatory term in lieu of life with parole.

CONCLUSION

The sentence imposed by the District Court constitutes cruel and unusual punishment in violation of the Iowa Constitution. In addition, the District Court failed to consider and weigh the proper sentencing factors.

Based upon the foregoing arguments and authorities, the Defendant-Appellant respectfully requests that this Honorable Court vacate his sentence and remand to the district court for resentencing.

REQUEST FOR ORAL ARGUMENT

The Defendant-Appellant hereby requests to be heard in oral argument on this Appeal.

Respectfully submitted,

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CERTIFICATE OF COSTS

I, the undersigned, hereby certify that the true cost of producing the necessary copies of the foregoing brief was $0.00.

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PROOF OF SERVICE AND CERTIFICATE OF MAILING

I, Jared R. Weber, hereby certify that on the 28th day of November, 2016, I filed the Defendant's/Appellant's Brief as required by the Iowa Rules of Appellate Procedure via EDMS and also by depositing the same in the United States Mail, with postage prepaid, addressed to:

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CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because: This Brief contains 6388 words, excluding the parts of the Brief exempted by Iowa Rule of Appellate Procedure (1)(g)(1).

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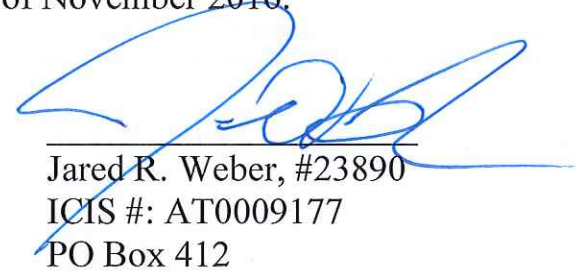

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