SUPREME COURT NO. 15–2203
BUENA VISTA COUNTY CASE NO. FECR024595

IN THE
SUPREME COURT OF IOWA

STATE OF IOWA,
Plaintiff-Appellee,

v.

RENE ZARATE,
Defendant-Appellant.

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

FINAL BRIEF OF *AMICUS CURIAE:*
AMERICAN CIVIL LIBERTIES UNION OF IOWA
IN SUPPORT OF DEFENDANT-APPELLANT

Joseph Fraioli
Counsel for Amicus Curiae
ACLU of Iowa
505 Fifth Ave., Ste. 901
Des Moines, Iowa 50309
PHONE: (515) 259-7047
FAX: (515) 243-8506
EMAIL: joseph.fraioli@aclu-ia.org

Rita Bettis
Counsel for Amicus Curiae
ACLU of Iowa
505 Fifth Ave., Ste. 901
Des Moines, Iowa 50309
PHONE: (515) 207-0567
FAX: (515) 243-8506
EMAIL: rita.bettis@aclu-ia.org

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INTEREST OF AMICUS CURIAE

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization made up of more than 500,000 members dedicated to the principles of liberty and equality embodied in state and federal law. The ACLU of Iowa ("ACLU"), founded in 1935, is its statewide affiliate. This case challenges the constitutionality of Iowa Code section 902.1, the General Assembly's most recently enacted statute governing sentencing for Class A felonies. The ACLU has a longstanding interest in defending the rights of the accused and convicted, which includes challenging unconstitutionally disproportionate and procedurally defective criminal sentences. With respect to the newly developing case law in both state and federal courts concerning the rights of those who were children at the time of their offense, the ACLU has actively pursued cases nationwide affirming the right of juveniles to be free from sentences amounting to cruel and unusual punishment. In addition to providing research support to juvenile defenders in the state to advance this mission and through the filing of amicus briefs, the ACLU has actively worked for years toward legislative reforms by the Iowa General Assembly to adopt constitutional and comprehensive juvenile sentencing and parole procedures that reflect the evolving case law. Because of its experience, record of dedication, and accumulated expertise in the preservation of constitutional rights, including the rights of juveniles, the ACLU can materially contribute to

the legal dialogue in this case, and ultimately assist the Court in rendering the best possible opinion.

ARGUMENT

I. INTRODUCTION AND STANDARD OF REVIEW

In this appeal, Defendant-Appellant Rene Zarate asks the Court to find Iowa Code section 902.1(2)(b)(2) (2015) unconstitutional in violation of the Eighth Amendment to the United States Constitution and article 1, section 17 of the Iowa Constitution, vacate his sentence, and remand this case to the district court for resentencing.

The Iowa General Assembly amended Iowa Code section 902.1 in the 2015 legislative session in response to this Court's decision the previous year in *State v. Lyle*, 854 N.W.2d 378, 400 (Iowa 2014), which held that the portion of then-section 902.1(2)(a) requiring juveniles convicted of Class A felonies to serve a mandatory minimum period of incarceration before becoming eligible for parole was unconstitutional. The current iteration of section 902.1 does not require a mandatory minimum period of incarceration, and further lists various factors the district court must consider in sentencing juvenile offenders convicted of Class A felonies. *See* Iowa Code § 902.1(2)(b)(2)–(3). These lists *include* those '*Miller* factors' recognized by this Court and the U.S. Supreme Court as necessary considerations when sentencing juveniles. *Id.* However, the statute does not instruct district courts that these factors must be considered

purely as mitigating at sentencing. *Id.* at §902.1(2)(b)(2) ("In determining which sentence to impose, the court shall consider all circumstances including but not limited to the following."). Compounding the statute's constitutional infirmity, it includes additional factors that are otherwise inappropriate or unconstitutional. *See, e.g.*, *id.* at §902.1(2)(b)(2)(h)(iii). Finally, the statute permits district courts to consider additional, non-enumerated factors in aggravation of punishment and fails to ensure that a court's reliance on aggravating factors does not outweigh its consideration of mitigating factors. *Id.* at §902.1(2)(b)(2)(v) (permitting courts to consider "[a]ny other information considered relevant by the sentencing court").

The Court considers constitutional challenges to the legality of a criminal sentence de novo. *State v. Bruegger*, 773 N.W.2d 862, 869 (Iowa 2009).

II. THE EVOLVING LANDSCAPE OF CRUEL AND UNUSUAL PUNISHMENT JURISPRUDENCE AS APPLIED TO JUVENILE OFFFENDERS

Within the last decade, both federal and Iowa courts have recognized that juvenile offenders are entitled to special consideration at sentencing that is individualized and takes into account the "hallmark factors of youth" that often instigate juvenile criminal activity. Through a string of decisions expanding upon this recognition, the courts have affirmed that juveniles are constitutionally different than adults, and that juveniles require unique and individualized sentencing procedures that account for those differences.

Both the Eighth Amendment to the Unites States Constitution and article 1, section 17 of the Iowa Constitution prohibit the imposition of cruel and unusual punishments. U.S. Const. Amend. IIX; Iowa Const. art. 1, § 17. In *Roper v. Simmons*, the U.S. Supreme Court announced that, "no matter how heinous the crime," imposing the death penalty on juvenile offenders constitutes per se cruel and unusual punishment. 543 U.S. 551, 568–70 (2005). The Court based its conclusion on the lesser moral culpability of juveniles than adults, citing juveniles' immaturity, susceptibility to negative influence, and underdeveloped character. *Id.* Applying the same analysis five years later in concert with principles of proportionality in sentencing, the Court held that a sentence of life in prison without the possibility of parole ("LWOP") was unconstitutionally excessive, and thus cruel and unusual for juveniles convicted of non-homicide offenses. *Graham v. Florida*, 560 U.S. 48, 68–75 (2010). Soon after, the Court held that a mandatory sentence of LWOP was likewise cruel and unusual for all juveniles convicted of homicide offenses, *Miller v. Alabama*, 132 S.Ct. 2455 (2012), and later reaffirmed that holding and extended its application retroactively, *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016).

The Iowa Supreme Court has recognized that article 1, section 17 of the Iowa Constitution provides even greater protections for juvenile offenders against cruel and unusual punishment. This Court's decisions in *State v. Null*, 836 NW 2d 41 (Iowa 2013) and, later, *Lyle*, 854 N.W.2d 378, eliminated all

mandatory minimum sentences for juvenile offenders in Iowa in favor of individualized sentencing. In *State v. Seats*, 865 N.W.2d 545, 557–58 (Iowa 2015), this Court reversed a juvenile's LWOP sentence where the district court failed to properly consider the appropriate and necessary '*Miller* factors' that must be addressed while sentencing juvenile offenders. Specifically, this Court found improper the district court's use of certain factors about the offender's juvenility in *aggravation* of punishment, rather than in *mitigation* of it. *Id.*

Most recently, in *State v. Sweet*, 879 N.W.2d 811, 839 (Iowa 2016), this Court reached the ultimate issue of whether any juvenile offender may be denied eligibility for parole even following an independent sentencing analysis. In a landmark decision, the Court held unequivocally that sentencing children to die in prison without the hope of future release, however serious their crimes may have been, constitutes cruel and unusual punishment under the Iowa Constitution. *Id.*

Importantly, in deciding *Sweet*, the Court identified the "unacceptable likelihood" that the consideration of aggravating factors would derail the analysis employed in juvenile sentencing proceedings away from their appropriate focus on the specific individual. *Id.* at 831. The Court's opinion highlighted the risk that district courts might overemphasize certain aspects of a crime in disregard of the mitigating circumstances of the individual involved.

Id. at 831. Those circumstances attending to youth, it reiterated, not only must be considered but must be considered as mitigating. *Id.*

In *Sweet*, the Court found that juveniles were entitled to greater procedural protections in sentencing even than used in the sentencing phase of adult death penalty cases. *See id.* It reasoned that even those types of sentencing procedures would be inadequate to ensure district courts were sufficiently prepared to conclude accurately, on the front end, that a juvenile was irreparably corrupt. *See id.* at 837 ("[n]o structural or procedural approach, including a provision of a death-penalty-type legal defense, will cure" the "fundamental problem" of asking district courts to predict irreparably corruption at the time of sentencing).

Yet the special sentencing protections currently afforded juveniles share the jurisprudential origin of the protections required by the Eighth Amendment in the death penalty context—including bifurcation and a mitigation phase—that are necessary to guard against the imposition of cruel and unusual sentences. *See Miller*, 132 S.Ct. at 2463–69. Despite the elimination of LWOP for juvenile offenders, heightened procedures are necessary when sentencing juveniles under the Eighth Amendment and article I, section 17. For all crimes of homicide, the provision of heightened sentencing procedures are required based on the nature of the crime; for juveniles, their status as members of a special class—those who are still children at the time of that offense—requires

additional procedural safeguards. *See Sweet*, 879 N.W.2d at 823 ("The focus here is not on the nature of the crime, as in *Coker or Enmund,* but on the character or qualities of the defendant that arguably lessen the culpability of the defendant and make that defendant less deserving of harsh criminal penalties.").

III. IOWA CODE SECTION 902.1(2)(B)(2)–(3) FAILS TO CREATE A CONSTITUTIONALLY ADEQUATE FACTOR ANALYSIS SCHEME AND INVITES ARBITRARINESS IN JUVENILE SENTENCING IN VIOLATION OF ARTICLE 1, SECTION 17 OF THE IOWA CONSTITUTION

A. The Role of Mitigating and Aggravating Sentencing Factors in Juvenile Sentencings

Iowa courts have long considered several factors about the crime and the offender at sentencing: the nature of the offense; the circumstances surrounding the offense; the defendant's age, character, and propensity to reoffend; whether the defendant may be rehabilitated; whether the defendant showed remorse; and other proper factors the district court considers relevant. *State v. Cooley*, 587 N.W.2d 752, 745–55 (Iowa 1998) (quoting *State v. Hildebrand*, 280 N.W.2d 393, 396 (Iowa 1979)). The district court's ultimate goal in sentencing is to determine which sentence "will provide maximum opportunity for the rehabilitation of the defendant, and for the protection of the community from further offenses by the defendant and others." Iowa Code § 901.5 (2015).

Importantly, the punishment must both fit the crime and the individual. *Hildebrand*, 280 N.W.2d at 396. With respect to juvenile offenders, the recent cases instruct that for a sentence to "fit the crime and the individual," it must take into special consideration the unique characteristics of youth that often instigate, explain, and contextualize juvenile criminal conduct.

In *State v. Ragland*, this Court articulated the factors district courts must consider when sentencing juvenile offenders:

> (1) the "chronological age of the youth and the features of youth including 'immaturity, impetuosity, and failure to appreciate the risks and consequences" of his actions; (2) "the 'family and home environment' that surrounded the youth;" (3) "the circumstances of the homicide offense including the extent of the youth's participation in the conduct and the way familial and peer pressures may have affected [the youth];" (4) the "incompetencies associated with youth;" and (5) "the possibility of rehabilitation."

836 N.W.2d 107, 115 n.6 (Iowa 2013) (quoting *Miller*, 132 S.Ct. at 2468). This Court has also recognized youths' diminished ability to meaningfully assist in their defense, and that these characteristics are more often than not transient given juveniles' extraordinary capacity for rehabilitation. *See Sweet*, 879 N.W.2d at 831–32.

These hallmark characteristics of youth necessarily are mitigating in proceedings to sentence juveniles to the harshest punishments permitted under article 1, section 17. To enhance a juvenile's punishment based on any of these factors would turn the constitutional analysis on its head. *See Seats*, 865 N.W.2d

at 557 (remanding for resentencing because "the district court appeared to use Seats's family and home environment vulnerabilities together with his lack of maturity, underdeveloped sense of responsibility, and vulnerability to peer pressure as aggravating, not mitigating, factors"); *Null*, 836 N.W.2d at 75 ("[T]he typical characteristics of youth, which include immaturity, impetuosity, and poor risk assessment, are to be regarded as mitigating, not aggravating factors.").

Further, while district courts are not precluded from considering the actual factual circumstances surrounding the offense, the seriousness of the crime cannot undermine a court's consideration of mitigating factors. Courts must "go beyond a mere recitation of the nature of the crime" in meting out harsher punishments, and its focus on circumstances regarding the heinous nature of the crime "cannot overwhelm the analysis." *Null*, 836 N.W.2d at 74–75. In categorically banning certain extreme punishments for juvenile offenders, this Court has reiterated that there exists "[a]n unacceptable likelihood . . . that the brutality or cold-blooded nature of a particular crime will overcome mitigating arguments based on youth when the objective immaturity, vulnerability, and lack of true depravity should require a lesser sentence." *Sweet*, 879 N.W.2d at 831 (citing *Graham*, 560 U.S. at 77–78; *Roper*, 543 U.S. at 573).

This threat persists in all juvenile sentencings, not merely those in which juveniles face the harshest of punishments. A sentencing scheme for juvenile

offenders must therefore curtail these threats by 1) properly instructing district courts of the appropriate factors they must consider and the weight those factors must be accorded, 2) narrow the district court's consideration to factors that mitigate punishment, and 3) eliminating otherwise unconstitutional and aggravating factors from consideration.

B. The Role of Mitigating and Aggravating Factors in the Context of Capital Punishment

As this Court and the U.S. Supreme Court have held time and time again, a one-size-fits-all approach to sentencing juvenile offenders violates the prohibition against cruel and unusual punishments. In the context of capital punishment, the courts have required specialized prophylactic procedures at sentencing to combat the disproportionate and unjust administration of the death penalty. Among these protections is strict oversight of the types of aggravating factors that courts and juries may consider.

Several U.S. Supreme Court cases on the constitutionality of death-penalty procedures led to the development of a mitigation strategy defense that shifted focus to the individual offender at issue. *See Sweet*, 879 N.W.2d at 821. From these procedures, the Court distilled the types of factors courts and juries may and may not consider when deciding whether to impose capital punishment.

Central to the capital-punishment case law is that the Eighth Amendment requires "channeling and limiting . . . the sentencer's discretion" in its decision making to "sufficiently minimizing the risk of wholly arbitrary and capricious action." *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988). Current death penalty jurisprudence requires that capital sentencers must find that at least one enumerated, statutorily-enacted aggravating circumstance exists in the case at issue before imposing the death penalty. *Zant v. Stephens*, 462 U.S. 862, 890–91 (1983); Gregg *v. Georgia*, 418 U.S. 152, 206–07 (1976). Further, those statutory aggravating factors violate the Eighth Amendment if they are vague; they must instead provide "'clear and objective standards' that provide 'specific and detailed guidance'" to a sentencer that would make it clear to a reviewing court the reason why it imposed the death penalty. *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (citations omitted). Factors such as the crime "was outrageously or wantonly vile, horrible, or inhuman" or "especially heinous, atrocious, or cruel" have been deemed unconstitutionally vague absent further explanation or guidance to corral the sentencer's decision making. *Id.* at 432–33; *Maynard*, 486 U.S. at 360. Courts have found that factors that are fact-based and easily determinable, such as the presence of "some kind of torture or physical abuse," achieve this goal and reduce arbitrariness. *Maynard*, 486 U.S. at 364–65.

Once a sufficient aggravating factor is found, the analysis refocuses on the presentation of mitigating evidence. While the permissible aggravating factors are circumscribed to avoid arbitrariness in the context of adult death penalty cases, a sentencer must be permitted to consider any aspect of a defendant's character or circumstances of the crime that are mitigating. *McCleskey v. Kemp*, 481 U.S. 279, 305–06 (1987); *Eddings v. Oklahoma*, 455 U.S. 104, 112–13 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). As the Supreme Court articulated in *McCleskey*:

> [T]he Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence. [T]he sentencer . . . [cannot] be precluded from considering, as a *mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Any exclusion of the compassionate or mitigating factors stemming from the diverse frailties of humankind that are relevant to the sentencer's decision would fail to treat all persons as uniquely individual human beings.

481 U.S. at 305–06 (internal citations, footnotes, and quotation marks omitted). "Equally clear," the Supreme Court has further held, "is the corollary rule that the sentencer may not refuse to consider . . . any relevant mitigating evidence." *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (internal citation and quotation marks omitted).

There is a crucial distinction between the factor analyses used in death-penalty cases in "factor weighing" and "factor non-weighing" states. In a

"weighing" state, sentencers are instructed to weigh aggravating factors against mitigating factors to determine if capital punishment is appropriate. *See Brown v. Sanders*, 546 U.S. 212, 216–17 (2006). In these jurisdictions, sentencers may not consider any non-enumerated aggravating factors—in other words, the only aggravating factors that may be considered are those which would make an offender eligible for receiving the death penalty. *Id.* In these jurisdictions, if the sentencer is permitted to consider even *one* improper aggravating factor, where those same facts and circumstances could not be considered under a different and proper factor, then the sentence is unconstitutional. *See id.* at 219–20. In "non-weighing" states, however, sentencers may consider any aggravating factors they desire, but must *at least* find that one statutorily enumerated aggravating factor presents before sentencing the offender to death. *Id.* at 218–19.

While this scheme makes sense for use in jurisdictions where the death penalty remains the ultimate punishment for adults, we know that juveniles must be afforded additional protections against cruel and unusual punishment. And, as this Court announced in *Sweet*, the harshest punishment in Iowa—LWOP—is no longer constitutionally permissible for juveniles. As a result, unlike in the death-penalty context, courts are no longer concerned with determining which juveniles are deserving of the harshest punishment, but rather what period of time will best serve to rehabilitate the juvenile. It follows

that to continue to permit the use of aggravating factors when sentencing juveniles contravenes the intent of *Sweet* and all of its precedents—that an individualized sentence must turn on the juvenile's capacity to change.

C. Article 1, Section 17 of the Iowa Constitution Requires the Adoption of a Similar Factor Analysis for Juvenile Sentencing and Compels the Conclusion that Aggravating Factors Should Play no Part in Juvenile Sentencing

The purpose of article 1, section 17 of the Iowa Constitution is to prohibit disproportionate punishment. *Lyle*, 854 N.W.2d at 385, 400. As we know from the case law, what may be proportional for an adult offender is not necessarily proportional for a juvenile offender, and special procedures must be used to ensure a juvenile offender does not suffer a harsher punishment than is warranted. These procedures are intended to ensure a proper consideration of all mitigating evidence reflecting the immaturity associated with youth. Akin to the death penalty context, the U.S. and Iowa Constitutions require the adoption of prophylactic procedures to govern juvenile sentencing that reflect the appropriate consideration of mitigating and aggravating factors.

Both the Iowa Supreme Court and the U.S. Supreme Court have recognized the shared history of and parallels between capital punishment jurisprudence and the growing body of law concerning juvenile sentencing. *See generally Sweet*, 879 N.W.2d at 823–32 (discussing and summarizing juvenile sentencing law in light of the U.S. Supreme Court's death penalty decisions);

Miller, 132 S.Ct. at 2463–69 (discussing disproportionality principles as applied to juvenile sentencing as stemming from the death penalty case law and the "confluence" of Eighth Amendment decisions leading to the Court's holding). This Court exposed at length in *Sweet* how the cruel and unusual punishment case law on capital punishment both reflects the "evolving standards of decency that mark the progress of a maturing society" and has led to the establishment of an entirely new sentencing structure for death-penalty cases. *Sweet*, 879 N.W.2d at 818–23 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (internal quotation marks omitted)).

These parallels remain despite this Court's elimination of LWOP as a sentence for juveniles in Iowa. As *Sweet* recognizes, the focus in the Eighth Amendment juvenile sentencing jurisprudence "is not on the nature of the crime . . . but on the character or qualities of the defendant that arguably lessen the culpability of the defendant and make that defendant less deserving of harsh criminal penalties." 879 N.W.2d at 823. While the Eighth Amendment requires heightened sentencing requirements in the death penalty context due to the severity of the punishment faced by the offender resulting from the type of crime he or she committed, for juveniles, those requirements are heightened because the class of defendants being sentenced—children—intrinsically are less morally culpable and more capable of rehabilitation. The need for adequate

sentencing procedures therefore persists whenever the State sentences juveniles.

As *Lyle* makes clear, the protections of article 1, section 17 not only extend to the harshest punishments available, but also protect against disproportionate sentencing whenever district courts are deprived of the ability to, or purposefully do not, "craft an appropriate sentence and give each juvenile the individual sentencing attention they deserve and our constitution demands." 854 N.W.2d at 403. And, in so doing, courts must not be permitted to engage in an analysis that could result in a punishment for a juvenile that is harsher than that which is deserved in consideration of the hallmark characteristics of youth. This necessarily includes a court's consideration of mitigating and aggravating factors at sentencing.

At sentencing, an offender must be able to present all mitigating evidence that weighs in their favor. *See Lockett,* 438 U.S. at 608 ("[T]o meet constitutional requirement, a death penalty statute must not preclude consideration of relevant mitigating factors."). In contrast, the sole purpose of the development of aggravating factors within the capital punishment jurisprudence was to ensure that only the worst of the worst offenders could potentially be sentenced to death. *See Gregg*, 428 U.S. at 165 ("The sentence of death may be imposed only if the jury or judge finds one of the statutory aggravating circumstances."); *Zant,* 462 U.S at 877 (Aggravating factors must

"genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.").

In order for the constitutional prohibition of cruel and unusual punishment under article 1, section 17 to be meaningful for juvenile offenders, and in recognition of the parallel considerations and constitutional underpinnings of capital punishment and juvenile sentencing, those prophylactic safeguards currently used with respect to mitigating factors must also apply to all juvenile sentencing considerations. However, because this Court ruled in *Sweet* that any option of life without the possibility of parole for juveniles violates our state Constitution, judges now may only impose a sentence that includes the possibility of parole. This constitutionally preferred outcome, however, 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.

The Court in *Sweet* also recognized that there are no set of factors which are so aggravating in the case of a juvenile defendant that would allow the sentencing judge to determine irredeemable moral culpability or predict accurately whether the juvenile is capable of rehabilitation such that LWOP would ever be appropriate. The same reasoning pertains to the assignment of a lengthy term of years, at the time of sentencing a juvenile offender, during

which she will be wholly ineligible for parole. Allowing district courts to now use aggravating factors to lengthen this minimum period of incarceration without parole eligibility runs contrary to the constitutional focus on rehabilitation. Rather, judges should be required to analyze and account for in sentencing orders only the means by which mitigating factors drive down the sentence imposed. As such, aggravating factors should no longer play any role in sentencing a juvenile.

IV. IOWA CODE SECTION 902.1(2)(B)(2)–(3) IS UNCONSTITUTIONAL BECAUSE IT PERMITS DISTRICT COURTS TO CONSIDER IMPROPER SENTENCING FACTORS AND USE OTHERWISE MITIGATING FACTORS AS AGGRAVATING FACTORS

In light of the protections for juveniles required by article 1, section 17 of the Iowa Constitution, Iowa Code section 902.1(2)(b) subsections (2) and (3)[1] are unconstitutional in at least four ways—by 1) Permitting district courts to consider aggravating factors that in turn place undue emphasis on the nature of the crime; 2) including unconstitutionally "vague" factors; 3) not clearly instructing district courts that the remaining enumerated factors must be considered as mitigating; and 4) permitting courts to consider an infinite universe of non-enumerated aggravating factors, where any such factors must be considered as mitigating.

[1] While subsection (3) is not applicable to Zarate, it is essentially identical to subsection (2), and is therefore similarly unconstitutional.

A. Inclusion of Distinctly Aggravating Factors

Iowa Code section 902.1(2)(b)(2) places an undue emphasis on the "seriousness/nature of the offense" consideration by including duplicative factors and failing to articulate that these factors may not undermine the presence of mitigating circumstances attending to the youth of the offender. Subsections (a), (b), (d), (e), (h), and (s) all address the "nature," "seriousness," or "impact" of the offense element, but simply state it various different ways, thereby overemphasizing the importance of this consideration in the sentencing analysis. Further, while it is true that it is permissible for a court to consider as mitigating for a juvenile that her offense is by its nature less serious, it is constitutionally *impermissible* for a district courts to treat the same as an aggravating factor that could "overcome mitigating arguments based on youth when the objective immaturity, vulnerability, and lack of true depravity should require a lesser sentence." *Sweet*, 879 N.W.2d at 831.

Similarly, the threat to public safety (subsection (c)) and likelihood of recidivism (subsection (p)) unduly focus on future dangerousness, which necessarily must not outweigh a juveniles' unparalleled capacity for rehabilitation. Thus, the statute's failure to require district courts to avoid this pitfall leaves it unconstitutionally inadequate.

B. Unconstitutionally Vague Factors

As discussed Division III.B, aggravating factors that are not clearly identifiable and easily determinable and defined fail to put reviewing courts on notice of the actual reason for the sentence.

In this vein, Iowa Code section 902.1(2)(b)(2)(h)(iii) is unconstitutionally vague, permitting courts to consider "[t]he severity of the offense, including . . . [t]he heinous, brutal, cruel manner of the murder, including whether the murder was the result of torture." The "heinous," "brutal," and "cruel" language is almost identical to that deemed unconstitutionally vague in other the death-penalty context. *Godfrey*, 446 U.S. at 428; *Maynard*, 486 U.S. at 360. However, here, there is no further explanation or definition of the words "heinous," "brutal," or "cruel" in the statute that would clarify for reviewing courts the specific findings the district court relied on in crafting its sentence based on this factor. *Maynard*, 486 U.S. at 364–65. Only that "the murder was the result of torture" is constitutionally salvageable from subsection (h)(iii) absent further description and definition in the statute itself from a vagueness perspective. However, as discussed above, this factor also fails because, as the Court recognized in *Seats*, no factor can accurately indicate culpability or predict an inability to be rehabilitated in the case of a juvenile offender.

C. Mitigating Factors as Aggravating Factors

Iowa Code section 902.1(2)(b)(2) includes many of the factors identified by this Court and the U.S. Supreme Court as necessary mitigating factors in

juvenile sentencing, but fails to identify them as such, implicitly permitting courts to consider these factors as aggravating. As the case law makes explicit, any consideration of the hallmark characteristics associated with youth must be considered in mitigation of punishment. *Null*, 836 NW 2d at 75 ("[T]he typical characteristics of youth . . . are to be regarded as mitigating, not aggravating factors."); *Ragland*, 836 N.W.2d at 121 ("*Miller* requires an individualized consideration of youth as a mitigating factor at a sentencing hearing."); *State v. Pearson*, 836 N.W.2d 88, 95 (Iowa 2013) ("[T]he typical characteristics of youth, such as immaturity, impetuosity, and poor risk assessment, are to be regarded as mitigating instead of aggravating factors."). Importantly, scores of studies and scholarship in the death-penalty context make clear that all factors, unless specified as mitigating, are likely to become aggravating to the sentence: "Such studies indicate that the factors that most clearly ought to affect application of the death penalty—namely, comparative egregiousness of the crime—often do not. Other studies show that circumstances that ought *not* to affect application of the death penalty, such as race, gender, or geography, often *do*." *Glossip v. Gross*, 135 S. Ct. 2726, 2761 (2015), *reh'g denied*, 136 S. Ct. 20 (2015) (Breyer, J., dissenting) (tracing arbitrariness in treatment of aggravating conditions subsequent application of the death penalty).

Iowa Code section 902.1(2)(b)(2) subsections (i), (j), (k), (o), (q), (r), the second half of (s), (t), and (u) fail to instruct the district court that these factors

are necessarily mitigating and cannot be used to enhance punishment. These subsections are written in a way so as to suggest that the court may use them as aggravating factors if a particular juvenile demonstrates, for example, more maturity than other juveniles. Yet, we know this comparison is irrelevant; juveniles are constitutionally different from adults and necessarily less mature than adults. While the lack of maturity may mitigate punishment, the presence of maturity cannot aggravate punishment. *Cf. Sweet*, 879 N.W.2d at 838 (discussing the disutility of relying on chronological age to warrant harsher punishment for certain juveniles despite the fact that older teens may demonstrate "greater intellectual development" than younger children because, as a class, juveniles do not possess "the same as the maturity of judgment necessary for imposing adult culpability"). The failure of the statute to reflect these realities renders it unconstitutionally inadequate.

Furthermore, section 902.1(2)(b)(2) lists other factors district courts may use in aggravation of punishment that should only be appropriate "other mitigating" factors in light of what we know to be true about juveniles. For example, subsection (f) instructs the court to consider the extent of a juvenile's remorse, and does not prohibit the court from using that factor in aggravation of punishment. Iowa Code §902.1(2)(b)(2)(f). However, the expression of remorse or remorselessness in juveniles is subject to erroneous interpretations by courts given what we know about juveniles and how they process their

behavior and the fallout of their criminal activity. *See, e.g.*, Adam Saper, *Juvenile Remorselessness: An Unconstitutional Sentencing Consideration*, 38 N.Y.U. Rev. L. & Soc. Change 99, 122–37 (2014) (criticizing the use of juvenile remorselessness as an aggravating sentencing factor because juvenile expression of remorse, or lack thereof, is necessarily affected by brain development and is subject to misinterpretation at sentencing); *cf.* Jules Epstein, *Silence: Insolubly Ambiguous and Deadly: The Constitutional, Evidentiary and Moral Reasons for Excluding "Lack of Remorse" Testimony and Argument in Capital Sentencing Proceedings*, 14 Temp. Pol. & Civ. Rts. L. Rev. 45, 85 (2004) (criticizing the reliance on remorselessness in capital sentencing due to its focus on the *absence* of evidence elicited from the defendant, and concluding that, "[c]ontrary to accepted practice, remorselessness is a demonstrably dubious criterion for determining death-worthiness").

Other scholars have, through in-depth psychological case studies, "challenge[d] the law's assumption that any decent, redeemable person, regardless of age, will exhibit sorrow and contrition after committing a heinous crime":

> If our legal system were to take seriously the pain of remorse, then it would also have to anticipate a certain amount of resistance to it, especially in children and adolescents, who—as we have seen—are more likely to use denial, to exhibit a short sadness span, to follow the code of the street, and to engage in egotistical and non-empathic behavior.

Martha Grace Duncan, *"So Young and So Untender": Remorseless Children and the Expectations of the Law*, 102 Colum. L. Rev. 1469, 1526 (2002). Relying on remorselessness to enhance punishment is therefore inappropriate as applied to juvenile offenders.

One's "acceptance of responsibility" (subsection (g)) is closely related to one's feeling of remorse. *See* Saper, *Juvenile Remorselessness: An Unconstitutional Sentencing Consideration*, 38 N.Y.U. Rev. L. & Soc. Change at 103, 115 n.124; Michael M. O'Hear, *Remorse, Cooperation, and "Acceptance of Responsibility": The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 Nw. U. L. Rev. 1507, 1510–12, 1560–65 (1997) (Analyzing "acceptance of responsibility" in the federal sentencing guidelines as containing the dual prongs of "remorse" and "cooperation," and questioning the continued use of remorse in sentencing). To the extent subsection (g) would justify a harsher sentence for a juvenile because she, say, went to trial rather than pleaded guilty or lied rather than admitted to every accusation alleged by the State at sentencing, it is a wholly inappropriate sentencing factor given juveniles' innate immaturity and brain development.

Equally troubling is the use of past juvenile delinquency (subsection (m)) as an aggravating factor. Given the less structured and rigorous procedural standards of many juvenile adjudications, it is improper to use these proceedings as the basis for enhancing sentences in a criminal proceeding. *See,*

e.g., Barry C. Feld, *The Constitutional Tension Between* Apprendi *and* McKeiver*: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 Wake Forest L. Rev. 1111, 1177 (2003) (criticizing the use of juvenile delinquency convictions to enhance later criminal sentences because of the regularity with which delinquency convictions occur without the presence of counsel, the "dubious competence of most juveniles to waive their rights," and the overall inability of appellate courts to properly verify waivers of counsel); Ellen Marrus, *"That Isn't Fair, Judge": The Costs of Using Prior Juvenile Delinquency Adjudications in Criminal Court Sentencing*, 40 Hous. L. Rev. 1323, 1330, 1347–57 (2004) (highlighting the relaxed procedures used in juvenile proceedings, and concluding that "any use of juvenile adjudications in criminal sentencing is harmful to both the juvenile and criminal courts"). Using juvenile delinquency and past criminal acts to enhance a punishment for a juvenile further fails to take into account the reality that the hallmark factors of youth permeated those earlier interactions with the law as well, at a time when the juvenile in question was even younger.

Problematic, too, is the potential court's reliance on the "intellectual and mental capacity" (subsection (l)) and "mental health history" (subsection (n)) of juveniles as potentially aggravating factors. In *Atkins v. Virginia*, the U.S. Supreme Court banned capital punishment for the intellectually disabled due to their inherently decreased culpability. 536 U.S. 304, 320–21 (2002). Clearly, any

attempt to use intellectual disability to enhance punishment would violate the Eighth Amendment as well as article 1, section 17 of the Iowa Constitution.

Likewise, mental illness presents, at the very least, the same mitigating considerations as mental disability. *See, e.g.*, Robert J. Smith, *Forgetting Furman*, 100 Iowa L. Rev. 1149, 1203 (2015) ("Severe mental illness, addiction, complex trauma, and youthfulness all tend to reduce both personal culpability and undermine the retributive benefit of the death penalty."); Christopher Slobogin, *Mental Illness and the Death Penalty*, 1 Cal. Crim. L. Rev. 3, 12 (2000) ("[P]eople proven to be psychotic at the time of the offense are as volitionally and cognitively impaired at that crucial moment as children and people with mental retardation who commit crimes. If anything, the delusions, command hallucinations, and disoriented thought process of those who are mentally ill represent greater dysfunction than that experienced by most "mildly" retarded individuals . . . and by virtually any non-mentally ill teenager."); Ellen Fels Berkman, Note, *Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 Colum. L. Rev. 291, 296–304, 309 (1989) (commenting that mental illness is routinely considered as a mitigating factor in death-penalty sentencings, and disapproving of the system's failure to curtail reliance on factors related to mental illness as aggravating). Similarly using mental illness as an aggravating factor at sentencing despite its tendency to reduce culpability is improper.

Section 902.1(2)(b)(2)'s failure to delineate that these factors must only be used in mitigation of punishment permits district courts to sentence juveniles in violation of article 1, section 17.

D. Open-Ended Consideration of Aggravating Factors and Other Inappropriate Factors, Where Such Factors Must be Considered as Mitigating

Iowa Code section 902.1(2)(b)(2)(v) is a catchall provision that permits district courts to consider "[a]ny other information" it considers relevant. There is no instruction as to whether that information may be mitigating or aggravating. Subsection (v) creates an infinite universe of potential sentencing factors, which opens the door to the court's consideration of aggravating factors that may not be clearly established, that may be unconstitutionally vague, that may overlap with or overwhelm mitigating factors, and that, if aggravating and not mitigating, are wholly inappropriate.

As made abundantly clear in the death-penalty jurisprudence, a defendant cannot be restricted in the type of mitigation he or she wishes to offer in support of leniency from the sentencer. *McCleskey*, 481 U.S. at 305–06. This does not detract, however, from the requirement that those aggravating factors that may be used to render a sentence of death must be statutorily enumerated. *Zant*, 462 U.S. at 890–91; *Gregg*, 418 U.S. at 206–07; *see also* Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 Wm. & Mary Bill Rts. J. 345, 380

(1998) ("[M]uch depends on the creativity of the prosecutor to raise and style the nonstatutory aggravating circumstances.").

Giving district courts such unbridled discretion in the types of potentially aggravating factors they may consider fails to adequately safeguard against disproportionate juvenile sentencing required under article 1, section 17. Constitutional restraints on juvenile sentencing with respect to the consideration of aggravating and mitigating factors requires that subsection (v) be limited to any other *mitigating* information the sentencing court wishes to consider.

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Together, these changes to Iowa Code section 902.1(2)(b)(2)–(3) are necessary to comport with the constitutional prohibition against the disproportionate, and therefore, cruel and unusual punishment of juveniles enshrined in article 1, section 17 of the Iowa Constitution.

V. ZARATE WAS SENTENCED IN VIOLATION OF ARTICLE I, SECTION 17 OF THE IOWA CONSTITUTION

The district court resentenced Zarate to life in prison with the possibility of parole after serving twenty-five years. Judgement and Sentence at 1. Prior to resentencing, the court entertained Zarate's challenge to the factors listed in Iowa Code section 902.1(2)(b)(2). The court held that the inclusion of additional aggravating factors, as well as any other relevant factors, was

permissible under section 902.1(2)(b)(2). Ruling Re: Def.'s Suppl. Mot. to Correct Illegal Sent., December 9, 2015, at pp. 14–18. The Court concluded that section 902.1(2) was constitutional and "shall be used by this court in conducting the resentencing hearing." *Id.* at p. 18.

Resentencing occurred on December 18, 2015. Sent. H'rg. Tr. 1:1–25. In resentencing Zarate, the district court, as instructed by section 902.1(2)(b)(2), considered "the 25 factors [it's] now supposed to consider under the existing statute." Sent. H'rg. Tr. 9:4–7. While the court explicitly considered these factors as "mitigating," it ultimately concluded that Zarate must serve an additional ten years before becoming parole eligible, indicating that the court implicitly considered at least some aggravating factors. *See* Sent. H'rg. Tr. 11:25–12:16. This is compounded by the fact that the district court deemed the factors listed in section 902.1(2)(b)(2) to be appropriate factors to consider at sentencing. Ruling Re: Def.'s Suppl. Mot. to Correct Illegal Sent., December 9, 2015, at pp. 14–18.

At the very least, in reaching its sentence the district court considered at least some sentencing factors which, as identified above, are unconstitutionally vague or otherwise improper, and was permitted to consider any additional factors it desired as aggravating factors. In Iowa, judges must now essentially pick a number of years after which a juvenile is eligible for parole. Without safeguards in place, such a scheme is especially subject to arbitrariness. Failing

to exclude consideration of these factors as aggravating and mandate that the '*Miller* factors' both must be considered and must be mitigating yields unconstitutionally ambiguous and arbitrary sentences for juveniles. In Zarate's case, while the court undoubtedly considered some circumstances as mitigating of punishment, the court's reasons for imposing a mandatory minimum term of incarceration of twenty-five years, as opposed to twenty or fifteen years, remains a mystery.

Because the district court sentenced Zarate under an unconstitutional statute, and further failed to expressly indicate how it considered factors as mitigating to reduce the term of years before which Zarate will be eligible for parole, Zarate was sentenced in violation of article 1, section 17 of the Iowa Constitution. To be sure that Zarate, and all other juvenile offenders, are sentenced or resentenced proportionally to both the crime committed and the attending characteristics of youth that necessarily mitigate the severity of the offense, district courts must be properly directed how to so consider each of those factors. Section 902.1(2)(b)(2)–(3) fails to do just that. As a result, Zarate must be given an opportunity to be resentenced only after the district court has fully and fairly considered the necessary factors limited to their proper scope.

CONCLUSION

For the foregoing reasons, *amicus* ACLU of Iowa respectfully requests that this Court find Iowa Code section 902.1(2)–(3) unconstitutional, vacate

Defendant-Appellant Zarate's sentence, and remand this case to the district court for resentencing.

Respectfully submitted,

/s/ Joseph Fraioli

Joseph Fraioli (AT0011851)
Counsel for Amicus Curiae
ACLU of Iowa
505 Fifth Ave., Ste. 901
Des Moines, Iowa 50309
PHONE: (515) 259-7047
FAX: (515) 243-8506
EMAIL: joseph.fraioli@aclu-ia.org

/s/ Rita Bettis

Rita Bettis (AT0011558)
Counsel for Amicus Curiae
ACLU of Iowa
505 Fifth Ave., Ste. 901
Des Moines, Iowa 50309
PHONE: (515) 207-0567
FAX: (515) 243-8506
EMAIL: rita.bettis@aclu-ia.org

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/s/Joseph Fraioli
Joseph Fraioli (AT0011851)
Counsel for Amicus Curiae
ACLU of Iowa
505 Fifth Ave., Ste. 901
Des Moines, Iowa 50309
PHONE: (515) 259-7047
FAX: (515) 243-8506
EMAIL: joseph.fraioli@aclu-ia.org