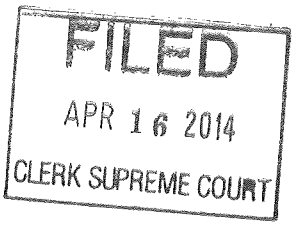
SUPREME COURT NO. 14-0175
POLK COUNTY CASE NO. FECR013311

IN THE SUPREME COURT OF IOWA



STATE OF IOWA,
Plaintiff-Appellant,

vs.

YVETTE MARIE LOUISELL,
Defendant-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT FOR STORY COUNTY
HONORABLE JAMES C. ELLEFSON

BRIEF OF *AMICI CURIAE:*

AMERICAN CIVIL LIBERTIES UNION OF IOWA
AMERICAN CIVIL LIBERTIES UNION
NATIONAL JUVENILE JUSTICE NETWORK
IOWA COALITION FOR JUVENILE JUSTICE

IN SUPPORT OF YVETTE MARIE LOUISELL

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CERTIFICATE OF FILING

I, Rita Bettis, hereby certify that I will file eighteen (18) copies of the attached brief with the Clerk of the Supreme Court, Judicial Branch Building, 1111 East Court Avenue, Des Moines, Iowa, on 4/16/2014.

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I, Rita Bettis, hereby certify that on 4/16/2014, I served a copy of the attached brief on all other parties to this appeal by mailing one (1) copy thereof to the respective counsel for said parties at the following addresses and by E-mail at the following E-mail addresses where indicated:

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INTEREST OF *AMICI 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 the Constitution. The ACLU of Iowa, founded in 1935, is its statewide affiliate. Together, the two organizations (collectively "ACLU") work in the courts and legislature to safeguard the rights of all citizens. The ACLU is dedicated to protecting the constitutional rights of juveniles in the prison system, and takes an interest in the important question invoked in this case as to the authority of the district court to resentence an inmate convicted as a juvenile to a term of years following the U.S. Supreme Court case *Miller v. Alabama*, 132 S.Ct. 2455, 567 U.S. ___ (2012) and this Court's trilogy of opinions *State v. Ragland,* 836 N.W.2d 107 (Iowa 2013), *State v. Null,* 836 N.W.2d 41 (Iowa 2013), and *State v. Pearson*, 836 N.W.2d 88 (Iowa 2013), where the legislature has failed to enact a constitutional sentencing scheme in either the 2013 or 2014 legislative sessions and the Board of Parole has in the last four years failed to promulgate any procedures that would comply with the mandate of *Graham v. Florida*, 130 S.Ct. 2011 (2010), *Bonilla v. State*, 791 N.W.2d 697 (Iowa 2010) *Miller, Ragland, Null*, and *Pearson.*

The National Juvenile Justice Network (NJJN) leads and supports a movement of state and local juvenile justice coalitions and organizations to secure local, state and federal laws, policies and practices that are fair, equitable and developmentally appropriate for all children, youth and families involved in, or at risk of becoming

involved in, the justice system. NJJN currently comprises forty-three members in thirty-three states, all of which seek to establish effective and appropriate juvenile justice systems. NJJN recognizes that youth are fundamentally different from adults and should be treated in a developmentally appropriate manner that holds them accountable in ways that give them the tools to make better choices in the future and become productive citizens. Youth should not be transferred into the adult criminal justice system where they are subject to extreme and harsh sentences such as life without the possibility of parole, and placed in adult prisons where they are exceptionally vulnerable to rape and sexual assault and have much higher rates of suicide. NJJN supports a growing body of research that indicates the most effective means for addressing youth crime are age-appropriate, rehabilitative, community-based programs that take a holistic approach, engage youth's family members and other key supports, and provide opportunities for positive youth development. The NJJN joins this brief conditionally upon the Court's grant of the ACLU's Motion for Leave to add additional *Amici Curiae* as signatories to this brief.

The Iowa Coalition 4 Juvenile Justice (IC4JJ) is a focus group of the Iowa Citizens United for the Rehabilitation of Errants. The mission of IC4JJ is to eliminate the sentence of life without the possibility of parole for juveniles in the State of Iowa and to address other issues related to justice for juveniles. We work to continually increase public awareness of, and commitment to, those imprisoned for crimes committed as juveniles. The Iowa Coalition for Juvenile Justice joins this brief

conditionally upon the Court's grant of the ACLU's Motion for Leave to add additional *Amici Curiae* as signatories to this brief.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

In 1988, Yvette Louisell was convicted of first degree murder after a jury trial and sentenced to life without the possibility of parole under Iowa Code § 902.1 (1987). Resentencing Order at 1. She was seventeen years old at the time of the commission of the underlying offense. *Id.* She was convicted of stabbing an adult disabled man who had hired her to work as a nude model in his private residence under "circumstances that, given [her] immaturity and personal family background, may have triggered her behavior." *Id.* at 10 (quoting a 2009 statement made by the original trial judge in her case, the Honorable Allan L. Goode). During her incarceration in the 26 years since her conviction, she has earned a bachelor's degree, learned a trade, has taken part in available counseling, support, and religious groups, and garnered wide support within and outside of the prison system, including the former Story County Attorney who prosecuted her. *Id.* at 11-12.

Her conviction was affirmed by the Iowa Court of Appeals in 1990, and the Iowa Supreme Court denied certiorari the same year. *Id.* at 1. All of her state and federal applications for postconviction relief were denied over the course of 17 years from 1990 to 2007. *Id.* at 1-3. Finally, in 2011, Louisell filed a Motion to Correct an Illegal Sentence pursuant to Iowa R. Crim. Pro. 2.24(5), which was pending at the

time the U.S. Supreme Court decided *Miller v. Alabama*, 132 S.Ct. 2455 (2012). Resentencing Order at 3. She immediately renewed her motion for a hearing under Iowa R. Crim. Pro. 2.24(5) and sought resentencing. *Id.* at 4. Within a matter of weeks, Governor Branstad issued a blanket commutation order to all 38 juvenile offenders serving life sentences without the possibility of parole, declaring that all 38 former juveniles would be required to serve a term of 60 years prior to becoming eligible for parole, with no credit for earned time. *Id.* In February 2013, the district court, after a hearing, denied Louisell's Motion to Correct an Illegal Sentence, finding that *Miller* was not retroactive. *Id.* In August 2013, this Court decided *Ragland*, which gave retroactive application to *Miller* and held that the Governor's commutation order did not satisfy the requirements of *Miller* under the U.S. and Iowa constitutions. *Id.* In October 2013, this Court reversed the district court's prior denial of Louisell's Motion to Correct an Illegal Sentence, remanding the case for further proceedings. *Id.* at 4-5.

On February 3, 2014, after holding an evidentiary hearing and applying the *Miller* factors to Louisell's case, the Story County District Court resentenced Louisell to a term of 25 years, with credit for time served, and immediate supervised release. Resentencing Order at 13. The Court alternatively sentenced her to life with the possibility of parole after a term of 25 years with credit for time served and immediate eligibility for parole consideration should this Court vacate the primary sentence. *Id.* at 13-14. The state asked for a stay of Louisell's sentence pending appeal, and sought

discretionary review of the sentence, which this Court granted on February 6, 2014 and February 24, 2014, respectively.

ARGUMENT

I. Introduction and Background on Existing Case Law

Children are different. This fundamental, empirically demonstrated fact serves as the scientific foundation for the U.S. and Iowa Supreme Courts' decisions in both the Miller trilogy of cases (*Roper, Graham*, and *Miller)* and, in Iowa, the *Ragland, Null*, and *Pearson* cases, with *Bonilla* implementing *Graham* retroactively before them. Citing the scientific research of Steinberg concerning the developing brains of juveniles, this Court adopted the findings of the scientific community cited in the *Miller* cases. *State v Null*, 836 N.W.2d 41, 54-56 (Iowa 2013). In *Null*, this Court explained that the influence of peers replaces that of parents; risk evaluation is not developed; adolescents lack the ability to self-manage, and control impulsive behavior; and identity development, often accompanied by experimentation of risky, illegal or dangerous behavior, occurs in late adolescence. *Id.* at 55. Further, the human brain continues to mature into the early twenties. *Id.*

The Eighth Amendment to the U.S. Constitution states that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. In *Graham*, the U.S. Supreme Court held that punishment of non-homicide juvenile offenders to life with the possibility of parole

was categorically prohibited as cruel and unusual punishment, and that the state must provide those incarcerated juvenile offenders a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham v. Florida*, 130 S.Ct. 2011, 2030 (2010). Two years later, in *Miller*, the U.S. Supreme Court held that mandatory sentences of life without the possibility of parole violated the Eighth Amendment prohibition on cruel and unusual punishment. *Miller v. Alabama,* 132 S.Ct. 2455 (2012).

Article I, section 17 of the Iowa Constitution similarly provides "Excessive bail shall not be required; excessive fines shall not be imposed, and cruel and unusual punishment shall not be inflicted." In *Null*, this Court found that under the Iowa Constitution, the imposition of mandatory minimum sentence of 52.5 years triggered *Miller* protections. *Null*, 836 N.W.2d at 71 ("The prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release. . . "). In *Ragland*, this Court held that a mandatory 60 year term, as part of a commutation order issued by the Governor to all 38 individuals who were sentenced to life without the possibility of parole as children, violated Article I, section 17 of the Iowa Constitution. *State v. Ragland,* 836 N.W.2d 107, 122 (Iowa 2013). The Governor's Commutation Order was invalidated by the Iowa Supreme Court because it denied to these defendants the individualized sentencing required by *Miller* under the U.S. and Iowa constitutions and was the functional equivalent of a life sentence. *Id.* at 119, 121.

The Court also made it clear that the holding of *Miller* applies retroactively. *Ragland,* 836 N.W.2d at 117.

In *Null,* the Court provided clear guidance to the lower courts to apply the *Miller* factors at resentencing. Under *Null,* when a district court resentences a juvenile, it must "recognize and apply the core teachings of *Roper, Graham,* and *Miller.*" *Null,* 836 N.W.2d at 74. This means:

1. The district court "must recognize that because 'children are constitutionally different from adults,' they ordinarily cannot be held to the same standard of culpability as adults in criminal sentencing." *Id.* at 74. If a district court judge believes that an exception exists in a particular case, she "should make findings discussing why the general rule does not apply." *Id.* at 74. This must go beyond a "mere recitation of the nature of the crime," and characteristics inherent to youth, including "immaturity, impetuosity, and poor risk management," must be regarded as mitigating, not aggravating, factors. *Id.* at 74-75.
2. The district court "must recognize that 'juveniles are more capable of change than are adults' and that as a result, 'their actions are less likely to be evidence of irretrievably depraved character'" *Id.* at 75 (internal citations omitted). Further, the district court must recognize that most juveniles who engage in criminal activity are not destined to become lifelong criminals." *Id.*

3. The district court "should recognize that a lengthy prison sentence without the possibility of parole . . . is appropriate, if at all, only in rare or uncommon cases." *Id.* at 75.

In *Ragland*, this Court listed five factors of a juvenile defender that the district court must consider when sentencing: (1) "the 'chronological age' of the youth and the features of youth including 'immaturity, impetuosity, and failure to appreciate the risks and consequences'"; (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". *Ragland,* 836 N.W.2d at 115 n.6, *quoting Miller,* 132 S.Ct. at 2468.

The Court summarized that "...the upshot of *Miller* was to render state statutes such as *Iowa Code section 902.1 unconstitutional as applied* to juvenile offenders tried as adults and convicted of a class "A" felony because of the mandatory nature of the sentence...The *Miller* procedure cures the constitutional aspect of such statutes as applied to juvenile offenders *until amended by the legislature to establish a different constitutional procedure." Id.* at 119 n.7 (emphasis added).

While not categorically prohibiting the "unusual" sentence of life without parole, "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*, 123 S.Ct. at 2474-75 (emphasis added).

Louisell's case represents the first resentencing of a juvenile convicted of a homicide offense to a lengthy term of years rather than life with parole eligibility after a mandatory minimum term of 25 years. Paul Stageberg et al., *Status Report: Juvenile Offenders Serving Life Sentences in Iowa*, Iowa Dept. Human Rts., Div. Crim. and Juvenile Justice Planning (Mar. 12, 2014), at (hereinafter "Stageberg et. al, *Status Report*"). In its appeal, the state argues that the district court violated the separation of powers doctrine in sentencing Louisell to a determinate sentence. Br. of Plaintiff-Appellee (hereinafter "State's Br.") at 8. However, Louisell's sentence was proper on two intersecting and complementary bases. First, the excised portion of the sentencing statute governing class "A" felonies, Iowa Code § 902.1, does not prohibit the imposition of a determinate sentence. Consequently, the sentence to a term of years did not conflict with the statute. Second, both the legislative and executive branches have failed to give effect to the constitutional requirements of sentencing and paroling juveniles. As a result, the district court's only means to ensure a constitutional outcome for Louisell was to provide for a term of years and specify the terms of Louisell's parole at resentencing. For these reasons, Louisell's sentence should be upheld on appeal.

II. Standard of Review

Constitutional claims are reviewed de novo. *Ragland* at 113; *Bonilla v. State*, 791 N.W.2d 697, 700 (Iowa 2010), *citing Formaro v. Polk County*, 773 N.W.2d 834, 838 (Iowa 2009).

III. There is no Separation of Powers Violation, Because the Sentence Imposed by the District Court is Authorized Under the Existing Iowa Code, Once the Unconstitutional Language is Excised.

A. The District Court's Sentence Does Not Present a Separation of Powers Issue.

This Court need not decide the State's separation of powers argument, because the sentence imposed by the District Court in Louisell's case is entirely consistent with the Iowa Code, once the offending language imposing a non-individualized mandatory minimum sentence is struck as to juvenile offenders. The State argues that the district court erred by sentencing Louisell to a *determinate* sentence—25 years, in violation of Iowa Code § 902.3. State's br. at 8-9, *passim*. However, the determinate sentencing statute specifically and expressly does not apply to class A felonies. Iowa Code § 902.3 (2013) ("When a judgment of conviction of a felony *other than a class "A" felony* is entered against a person . . .") (emphasis added). Since Louisell was convicted of first degree murder, a class "A" felony, section 902.3 does not pertain to her resentencing.

B. The District Court's Sentence Is Consistent With a Constitutional Reading of Iowa Code § 902.1-3.

The District Court's resentencing order stemmed directly from a properly excised reading of the Code that severed the non-constitutional portions of Iowa Code § 902.1-3. "When parts of a statute or ordinance are constitutionally valid, but other discrete and identifiable parts are infirm, the Supreme Court may sever the offending portions from the enactment and leave the remainder intact." *Bonilla*, 791 N.W.2d at 702 (quoting *Am. Dog Owners Ass'n, Inc. v. City of Des Moines*, 469 N.W.2d 416, 418 (Iowa 1991)(per curiam). In deciding *Bonilla,* this Court applied the holding of *Graham* to class "A" felony kidnapping, finding the rule substantive rather than procedural and thus requiring retroactive application. *Id.* There, the Court severed the portion of the statute that deprived juvenile offenders of the right to parole, but left the remaining statute intact. *Id.* The Court found that "[s]everance is appropriate if it does not substantially impair the legislative purpose, if the enactment remains capable of fulfilling the apparent legislative intent, and if the remaining portion of the enactment can be given effect without the invalid provision." *Id.*

Bonilla also found that the potential for juveniles to be sentenced to a lesser term than persons convicted of less serious offenses, or to face earlier release or availability of parole, does not in and of itself frustrate the purpose of the statute or the remedy available to the Court to excise offending portions of the code. *Bonilla*, 791 N.W.2d at 702. Where severing creates internal inconsistency between levels of

crimes—in *Bonilla*, between kidnapping in the second degree and kidnapping in the first degree—it is left to the legislature to revise the code in response:

> By striking the unconstitutional statutory provisions which prevent Bonilla from ever receiving consideration for parole, Bonilla will become eligible for an annual case review immediately. He will therefore be eligible for a parole case review before an individual convicted of second degree kidnaping. When a portion of a statute is unconstitutional, we sever the offending portions from the enactment and leave the remainder intact. *Am. Dog Owners Ass'n*, 469 N.W.2d at 418. We leave to the legislature whether and how to correct this apparent inconsistency.

Id. at 702 n.3.

The State argues that in excising the unconstitutional portions of Iowa Code § 902.1 for the purpose of Louisell's resentencing, the district court must sentence her, "to the extent possible, pursuant to the 1987 version of § 902.1, because it was the statute in effect at the time of her crime." State's Br. at 25. However, excising the unconstitutional portions of *either* the 1987 or 2013 Iowa Code leaves identical operative language in force, and neither properly severed statute prohibits the district court from imposing a term of years in Louisell's case.

In fact, the only change to Iowa Code § 902.1 since 1983 was made in response to the *Graham* and *Bonilla* decisions. Acts 2011 (84 G.A.) ch. 131, S.F. 533, § 147, eff. July 27, 2011. That act added the following (underlined) language to the existing (non-underlined) Code:

> 902.1. Class "A" felony

> 1. Upon a plea of guilty, a verdict of guilty, or a special verdict upon which a judgment of conviction of a class "A" felony may be rendered, the court shall enter a judgment of conviction and shall commit the defendant into the custody of the director of the Iowa department of corrections for the rest of the defendant's life. Nothing in the Iowa corrections code pertaining to deferred judgment, deferred sentence, suspended sentence, or reconsideration of sentence applies to a class "A" felony, and a person convicted of a class "A" felony shall not be released on parole unless the governor commutes the sentence to a term of years.
>
> 2. a. Notwithstanding subsection 1, a person convicted of a class "A" felony, and who was under the age of eighteen at the time the offense was committed shall be eligible for parole after serving a minimum term of confinement of twenty-five years.
> b. If a person is paroled pursuant to this subsection the person shall be subject to the same set of procedures set out in chapters 901B, 905, 906, and chapter 908, and rules adopted under those chapters for persons on parole.
> c. A person convicted of murder in the first degree in violation of section 707.2 shall not be eligible for parole pursuant to this subsection.

2011 Ia. Legis. Serv. Ch. 131 (S.F. 533) (West); Iowa Code Ann. § 902.1 (West). Either version—the 1987 code (portion of the text above that is not underlined), or the 2013 code (including both the underlined and non-underlined text above)—imposes unconstitutional lengthy mandatory sentences without individualized consideration of *Miller* factors required under *Ragland.*

When the language imposing mandatory, non-individualized sentencing is excised from *either version*, the following language remains:

> 902.1. Class "A" felony

> 1. Upon a plea of guilty, a verdict of guilty, or a special verdict upon which a judgment of conviction of a class "A" felony may be rendered, the court shall enter a judgment of conviction and shall commit the defendant into the custody of the director of the Iowa department of corrections ~~for the rest of the defendant's life. Nothing in the Iowa corrections code pertaining to deferred judgment, deferred sentence, suspended sentence, or reconsideration of sentence applies to a class "A" felony, and a person convicted of a class "A" felony shall not be released on parole unless the governor commutes the sentence to a term of years~~.
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> ~~b. If a person is paroled pursuant to this subsection the person shall be subject to the same set of procedures set out in chapters 901B, 905, 906, and chapter 908, and rules adopted under those chapters for persons on parole.~~
> ~~c. A person convicted of murder in the first degree in violation of section 707.2 shall not be eligible for parole pursuant to this subsection.~~

2011 Ia. Legis. Serv. Ch. 131 (S.F. 533) (West); Iowa Code Ann. § 902.1 (West) (strike-out of constitutionally offensive language added).

The argument that a determinate sentence of a juvenile convicted of a class "A" felony homicide is not permitted by the excised Code is contradicted by a plain reading of the statute. While Iowa Code § 902.1 imposes a mandatory determinate sentence—life without the possibility of parole—that term is unconstitutional as applied to juvenile offenders, as is the imposition of any lengthy, mandatory minimum of 25 years that does not provide for an individualized sentence and deprives judges

of the ability to impose a sentence providing a meaningful opportunity for release. *Graham; Miller; Ragland; Null; Pearson.* Additionally, Iowa Code § 902.3, which requires indeterminate sentencing, specifically exempts class "A" felonies. *Id.* ("When a judgment of conviction of a felony other than a class "A" felony is entered against a person, the court, in imposing a sentence of confinement, shall commit the person into the custody of the director of the Iowa department of corrections for an indeterminate term . . ."). Thus, the imposition of a determinate sentence following an individualized sentencing hearing for a juvenile offender is not prohibited by a plain reading of the text of the Code when properly excised.

Yet the State contends that the District Court went too far, stating, "The court's role is simply 'to give effect to the law as written.'" State's Br. at 9 (citing *State v. Wagner*, 596 N.W.2d 83, 88 (Iowa 1999)). However, that statement is incomplete. As this Court recognized in *Null*, "the Eighth Amendment is designed to curb legislative excesses. Its very function is, at the margins, to prevent the majoritarian branches of government from overreaching and enacting overly harsh punishments." *Null*, 836 N.W.2d at 58. While the court's role is to give effect to the law as written, the court must construe the law as written in accordance with both the U.S. and Iowa constitutions, and where such interpretation is impossible, strike the offending law as unconstitutional on its face or as applied. *Bonilla*, 791 N.W.2d at 702.

C. The State's Assertion that the Only Permissible Sentencing Options are Life Without the Possibility of Parole, Life With the Possibility of Parole, or Life With the Possibility of Parole after 60 Years Ignores this Court's Decisions in Ragland, Null, *and* Pearson.

As the district court noted in its resentencing order, the State's persistence in arguing for the application of the Governor's commutation to 60 years with no earned time to Louisell is inconsistent with this Court's holding in *Ragland.* Resentencing Order at 5 ("The State continues to contend, even at this stage, that the governor's power to commute is absolute and that his commutation order in this case brings this matter to a close, or that the defendant must seek resentencing from the commutation order. That contention was rejected in *Ragland*, and is not open for debate here.") The State repeats this request in its brief. State's Br. at 29. The express language of *Ragland* forecloses the imposition of the 60 year commutation. *State v. Ragland*, 835 N.W.2d at 122 ("Ragland's commutation did not remove the case from the mandates of *Miller.* The sentence served by Ragland, as commuted, still amounts to cruel and unusual punishment under the Eighth Amendment to the United States Constitution and article I, section 17 of the Iowa Constitution."). Although the State does not expressly ask this Court to overturn its decision in *Ragland*, there is no way to uphold the sentence imposed by the Governor's commutation without reversing *Ragland.*

The State also suggests that the holdings of *Ragland, Null,* and *Pearson* were merely "discussion" about the diminished culpability of juvenile defendants. State's Br. at 14. The State also asserts that "[t]he language [of *Ragland*] outruns *Miller.*"

State's Br. at 13. That characterization fails to recognize that this Court expressly stated that the Iowa Constitution provides protection for juvenile defendants independently from the protection afforded by the Eighth Amendment. *Ragland,* 836 N.W.2d at 122; *Null,* 836 N.W.2d at 74 ("[W]e conclude article I, section 17 requires that a district court recognize and apply the core teachings of *Roper, Graham,* and *Miller* in making sentencing decisions for long prison terms involving juveniles."). As is true of every U.S. Supreme Court Eighth Amendment decision, the federal constitutional standard articulated in *Miller* sets the floor, not the ceiling, for protection from cruel and unusual punishment in the form of excessive sentencing. *Null,* 836 N.W.2d at 71 n.7 ("A decision of this court to depart from the federal precedent arises from our independent and unfettered authority to interpret the Iowa Constitution"); *State v. Ochoa,* 792 N.W.2d 260, 267 (Iowa 2010)("[T]he Supreme Courts jurisprudence regarding freedom from unreasonable searches and seizures under the Fourth Amendment—or any other fundamental, civil, or human right for that matter—makes for an admirable floor, but is certainly not a ceiling."). Consistently with Iowa's proud history as a leader in the protection of individual rights, this Court held in *Ragland* that Article I, section 17 of the Iowa Constitution provides greater protection for juveniles than its federal counterpart.[1] *Ragland,* 836 N.W.2d at 122.

[1] Indeed, the Iowa Supreme Court has a long history of being ahead of the Federal curve on constitutional protections. *See, e.g., Coger v. North Western Union Packet Co.,* 37 Iowa 145 (Iowa 1873) (holding that the Iowa Constitution prohibited denying access

Finally, the State cites two scholarly articles to argue that this Court's "earlier conclusions that a juvenile is 'all gas and no brakes' may not be right," and seems to imply that Louisell's juvenile characteristics made her *more* culpable than an adult committing the same offense. State's Br. at 22-23. This interpretation of the cited studies is questionable, but here it need only be said that, as the U.S. Supreme Court made clear in *Miller,* the characteristics of youth are mitigating factors, not aggravating factors. *Miller,* 123 S.Ct. at 2467-69. This Court articulated the same view in *Null,* stating "[T]he typical characteristics of youth, which include immaturity, impetuosity, and poor risk assessment, are to be regarded as mitigating, not aggravating factors." *Null,* 836 N.W.2d at 75.

Moreover, the *Ragland* decision signals that the function of individualized sentencing *is* to craft a sentence that is *individualized* to the particular child and the circumstances of that child and the underlying crime, as the district court in Louisell's case has done. The language of the *Ragland* decision even contemplates the imposition of a term less than life. *Ragland,* 836 N.W.2d at 122 ("While such a review process might still permit a life-without-parole sentence to be imposed in a murder case, *it might also result in a sentence far less than life without parole.*") (emphasis added).

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to a public accommodation based on race nearly twenty years before the U.S. Supreme Court held the opposite in *Plessy v. Ferguson.*

IV. Given the Failure of the Legislative and Executive Branches to Comply with the Decisions in Graham, Miller and Ragland, Null, and Pearson, the Only Means to Impose a Constitutional Sentence was to Impose a Determinate Sentence of Years and Supervised Release.

Given the inaction taken by both the Iowa legislature and Iowa Board of Parole to give effect to the *Graham* and *Bonilla* decisions, as well as the *Miller* and *Ragland* decisions, the district court had no constitutional option before it other than to excise those portions of the Iowa code governing sentencing of Class "A" felonies that have been declared unconstitutional as applied to Louisell and sentence her according to the remaining text. That option is the course the district court properly elected to take. Resentencing Order at 5 ("Again, the supreme court's mandate to this court is to proceed in a manner consistent with *Ragland.* That means this court is directed to proceed to resentencing using the *Miller/Ragland* analysis and this court intends to do that. Anything else would simply defy the Iowa Supreme Court.").

The Iowa Legislature has failed to pass legislation to address the sentencing or resentencing of juveniles convicted of Class "A" felony homicide offenses, and the Board of Parole has failed to take any action regarding procedures to treat prisoners convicted of crimes committed while they were children since *Graham.* Following the *Graham* and *Bonilla* decisions, the Iowa Legislature amended Iowa Code § 902.1 to provide that juveniles convicted of non-homicide offenses must be eligible for parole after serving a minimum period of 25 years, and subjecting them to the existing parole procedures in place. Acts 2011 (84 G.A.) ch. 131, S.F. 533, § 147, eff. July 27, 2011.

As the district court noted in its opinion, following *Miller, Ragland, Null,* and *Pearson,* the Iowa legislature failed to pass at least two bills proposed during the 2013 session, House Study Bill 33 (2013) and Senate Study Bill 1089 (2013). Resentencing Order at 5. It has similarly failed to pass legislation introduced in the 2014 session, Senate Study Bill 3146 (2014) and Senate File 2309 (2014). Though the legislature remains in session at the writing of this brief, the legislation has failed to meet procedural requirements necessary to stay 'alive' (eligible for debate and passage by either chamber.). The Iowa legislature did pass legislation affecting *some* juveniles and to some degree effectuating some of the principles underpinning the *Null* and *Pearson* decisions. *See* Iowa Code § 901.5(14) (Iowa Supp. 2013)(providing that juveniles convicted of crimes *other than* Class "A" felonies may have their sentence and any mandatory minimum term suspended in whole or in part and receive a deferred judgment in lieu of a sentence.)(emphasis added). However, that legislation expressly exempts those convicted of Class "A" felonies, and was not given retroactive application. *Id.* Because § 902.1(2)(as amended in 2011) provides for a lengthy mandatory minimum sentence of 25 years for non-homicide felony offenses, without an individualized sentence taking into account the mitigating *Miller* factors, it is unconstitutional under *Miller* and *Ragland,* and did not provide a constitutional option for the district court.

The district court also took into account the failure of the board of parole to act to give effect to the juvenile sentencing cases. *See* Hr'g Tr. at 51-53. Unfortunately,

but in accord with Iowa Code § 902.1(2)(b), the Board of Parole never created additional procedures to consider people who were convicted of non-homicide offenses for parole according to demonstrated maturity and rehabilitation, or in any manner differently than all other prisoners. *See generally* Iowa Admin. Code r. 205 (2014). Nor was any legislation passed providing for an alternative system to deal with those youth affected by *Graham* and *Bonilla*. *See* Iowa Code §§ 901B, 905, 906, and 908 (2014). Existing statutes governing parole are similarly unconstitutional as applied to juveniles. Iowa Code § 906.5, for example, specifically provides that "The Board at least annually shall review the status of a person *other than a class "A" felon*, a class "B" felon serving a sentence of more than twenty-five years, or a felon serving an offense punishable under section 902.9, subsection 1, paragraph "a", or a felon serving a mandatory minimum sentence other than a class "A" felon, and provide the person with notice of the board's parole or work release decision. *Id.* (emphasis added.)

Yet *Miller*—and *Ragland*—require that juvenile homicide offenders be provided with individualized sentencing taking the circumstances of their youth into account and that sentencing judges be provided an option of imposing a sentence that allows for a meaningful possibility of release. *Miller*, 132 S.Ct. at 2460, 2469. The Supreme Court did not specify what constitutes a meaningful opportunity to obtain release, leaving that, at least in the first instance, to the states. *See Graham*, 130 S. Ct. at 2030. Recent scholarship, when examining the constitutional dimensions of the requirement, has identified three distinct elements. Sarah French Russell, *Review for*

Release: Juvenile Offenders State Parole Practices, and the Eighth Amendment, 89 Ind. L. J. 373 (2014). They are "(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." *Id.* at 375-76. Simply put, the Iowa Board of Parole has not, since *Graham*, much less since *Miller*, met any of these elements in regard to the affected former juveniles.

Current Board of Parole administrative rules similarly fail to account for the need to provide a process for inmates convicted for crimes committed when they were children pursuant to the *Graham-Bonilla, Miller-Ragland, Null,* and *Pearson* line of cases. Current factors that the board *may* consider, but is not required to consider, are as follows:

> The board may consider the following factors and others deemed relevant to the parole and work release decisions:
>
> *a.* Previous criminal record;
> *b.* Nature and circumstances of the offense;
> *c.* Recidivism record;
> *d.* Convictions or behavior indicating a propensity for violence;
> *e.* Participation in institutional programs, including academic and vocational training;
> *f.* Psychiatric and psychological evaluations;
> *g.* Length of time served;
> *h.* Evidence of serious or habitual institutional misconduct;
> *i.* Success or failure while on probation;
> *j.* Prior parole or work release history;
> *k.* Prior refusal to accept parole or work release;
> *l.* History of drug or alcohol use;
> *m.* A parole plan formulated by the inmate;

n. General attitude and behavior while incarcerated;
o. Risk assessment.

Iowa Admin. Code r. 205—8.10 (906) (2014). No separate process exists that would consider the *mitigating* factors pertaining to youth or ensure the hallmarks of a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation as required under *Miller*, *Ragland, Null*, and *Pearson.*

In practice, in the four years since *Graham* and the two years since *Miller*, the Board of Parole has not provided for parole to any of the offenders convicted of Class A felonies committed while they were children, save the parole of Christina Fetters for the limited purpose of hospice care, with the proviso that the board will reconsider should her health improve. Stageberg et. al, *Status Report*, at App. Notice has not been given to inmates or their attorneys of upcoming parole consideration, they have not been afforded the opportunity to present evidence to demonstrate their maturity and rehabilitation, and denials have been summary in nature. The Board's failure to even create a parole process that would provide juveniles with a meaningful opportunity for release in light of *Graham* and *Miller* has led to recent litigation. *E.g., Grieman v. Jason Carlstrom, Iowa Board of Parole, John R. Baldwin, and the Iowa Dept. of Corrections,* No. CVCV046704, Pet. For Declaratory and Injunctive Relief (filed 11/22/2013); *Ragland v. State,* No. PCCV110690, App. For Postconviction Relief Pursuant to Iowa Code Ch. 822 (filed 1/13/2014).

Unfortunately, the failure of the political branches of government to comply with the mandate of *Graham* and *Miller* is symptomatic of a larger trend in the states. *See* Cara H. Drinan, Commentary, *Misconstruing Graham and Miller*, 91 Wash. U. L. Rev. 785, 787 (2014). As of August 2013, only eleven states have enacted laws to comply with *Miller*, and of those that have, much of the legislation fails to effectuate "the vision of *Graham* and *Miller* courts." *Id.* at 787-90. In Iowa, as across the country, it is incumbent on the judicial branch of government to ensure that the state and federal constitutional protection against the imposition of cruel and unusual punishment is afforded to juveniles. *See also* Coleman and Coleman, *Getting Juvenile Life Without Parole "Right" After* Miller v. Alabama, 8 Duke J. Const. L. & Policy Special Issue 61 (2012).

When faced with the intransigence of the political branches, the district court in Louisell's case crafted a constitutional sentence that is not in conflict with any plain reading of the excised Iowa Code, as was required to do. Accordingly, the District Court did not err in sentencing Louisell to a term of years.

CONCLUSION

Amici Curiae respectfully request that this Court affirm the decision of the district court and uphold Louisell's sentence to a term of twenty five years with credit for time served and immediate supervised release.

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