Mary E. Chicchelly Writing Samples

IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY

STATE OF IOWA,	)	
	)	No. FECR104263
Plaintiff,	)	
	)	**Ruling on Daubert Issue**
vs.	)	
	)	
JOSHUA P. VENCKUS,	)	
	)	
	)	
Defendant.	)	

This matter came before the Court on June 23, 2016, for hearing on the Defendant's Motion to Exclude DNA and Serology Test Results. Defendant appeared in person and with his Attorney, Victoria Cole. The State appeared by Assistant Johnson County Attorney Anne Lahey. Evidence was received and the matter was submitted. The Court now makes the following ruling.

In this matter, the Defendant, along with co-Defendant Ryan Markley, is charged by Trial Information with the crime of Sexual Abuse in the Second Degree alleged to have been committed upon L.M. in the early morning hours of February 16, 2013, at 516 South Van Buren Street in Iowa City, Iowa. In the course of the police investigation of this alleged assault, police collected a number of items for purposes of DNA testing. Those items included a pair of Big Star jeans seized from Defendant Markley's apartment, a White Sox blanket seized from the scene of the alleged assault, and LM's dress and underwear. In addition, the Iowa Division of Criminal Investigations (DCI) tested several items of evidence submitted for testing in this case, including the items listed above, as well as fingernail swabs and scrapings, and a bite mark swab. As a result of their testing, the DCI issued a number of reports relative to the DNA analysis of the items tested. Defendant Venckus now challenges the methodology which serves as the basis for interpreting the data generated by these DNA tests.

Specifically, Defendant Venckus does not challenge the qualifications of the State's experts, but rather challenges the statistical method by which the DCI interprets data generated in DNA mixture testing, arguing that the method is unreliable, not supported by the scientific community, and should thus be found inadmissible under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579. Further, Defendant Venckus argues that testimony about the interpretation of data using this method should be deemed by the Court to be inadmissible under Rule 5.702 in that (i) the testimony is not based upon sufficient facts or data, (ii) the testimony is not the product of reliable principles and methods, and (iii) the State's DNA criminalist has not applied the principles and method reliably to the facts of the case. Further, Defendant Venckus argues that the evidence is more prejudicial than probative and it is a legal question of admissibility for the Court to decide rather than a weight of the evidence question.

The State resists Defendant Venckus' Motion to Exclude DNA and Serology Test Results, arguing that the Iowa DCI is an accredited laboratory and the methodology at issue herein concerning the Mixture Interpretation process utilized by the Iowa DCI is both valid and reliable. Moreover, the State argues that the trier of fact may give whatever weight they should to the testimony of each expert, and that Defendant Venckus' contentions at this time go to the weight of the evidence and not to its admissibility.

To support his contentions at the time of hearing, Defendant Venckus presented the testimony of Elizabeth Johnson, Ph.D., a private forensic consultant from Thousand Oaks, California. Dr. Johnson is a forensic scientist who currently provides private consultations on DNA testing and analysis. In her career, she has reviewed thousands of DNA reports, and has been found qualified to testify as an expert witness in the field of forensic DNA analysis around 100 times in both Federal and State Courts. That said, Dr. Johnson has not worked at a lab since 2003, and the last lab she did work for was not accredited. Dr. Johnson has been involved in this case since the summer of 2015, and has reviewed more than 17 DCI lab reports in this matter.

Through her testimony, Dr. Johnson related that DNA, or deoxyribonucleic acid, is the genetic building block of living things. Human DNA from one person to another is nearly the same, so that every person, for instance, has one head, two arms and two legs. However, some regions of the DNA have variables which can be viewed to differentiate between one person's DNA and that of another. Humans have 23 pairs of chromosomes within their cells, and in DNA testing, testing is done to look for variations on different chromosomes, and specifically at different locations (loci) on chromosomes. Alleles are genetic markers which are represented as peaks on an electropherogram, which are essentially graphs upon which forensic DNA experts make determinations of the presence of an individual's DNA.

On electropherograms, the height of a peak is relative to the amount of DNA in a sample. Peaks of higher numeric values represent more of that particular DNA than peaks of lower numeric values. Also, peaks of higher numeric values would be considered a major contributor versus those with a lower numeric value being considered a minor contributor. There can also be mixtures of DNA in a tested DNA sample, and sometimes those mixtures are indistinguishable. In addition, at times if two people have some of the same alleles, those alleles can, in essence, stack together at one peak to make a larger allele peak on the electropherogram.

To demonstrate these phenomenons, Dr. Johnson utilized a number of electropherograms obtained in this case. Electropherograms are essentially graphs which are created with computer software known as Genemapper ID. A special kit known as PowerPlex 16HS is used by the scientist to put in small DNA extracts from specific sources and amplify them, thus amplifying the loci. The resulting amplified sample is then run through the Genemapper ID which creates the electropherogram. Those utilized by Dr. Johnson for purposes of her testimony included Defense Exhibit C (electropherogram from LM's back right underwear, as noted in corrected exhibit D), Defense Exhibit D (from LM's back right underwear), Defense Exhibit E (bite mark swab), Defense Exhibit F (sperm fraction from LM's underwear), Defense Exhibit G (fingernail swabs), Defense Exhibit O (sperm fracture midcenter brown dress), Defense Exhibit H (DNA profile of LM), Defense Exhibit I (DNA profile of Defendant Venckus) and Defense Exhibit J

(DNA profile of Defendant Markley). Dr. Johnson explained that on each electropherogram, the gray boxes at the top are the names of specific loci, and the graphs and white boxes below those loci show the relative fluorescent unit (RFU) heights at that location. To demonstrate the concept of allele stacking, Dr. Johnson pointed to locus D3 allele 18 on Exhibit C, which showed an RFU value of 1728, and explained that because Defendants Markley and Venckus, as well as LM, have allele 18 at that locus, the RFU values for each would stack together on the graph to show a larger RFU number.

In viewing the electropherograms noted as Exhibits C, D, E, F and G, Dr. Johnson opined that the DCI DNA interpreter of these electropherograms used the reference samples (Exhibits H, I and J) to assist. Dr. Johnson opined that this is not ideal, insofar as using reference samples as a crutch for interpretation of the evidence can lead to bias in the interpretation results. Dr. Johnson further opined that she concluded the reference samples were used in the interpretation results noted on Exhibits C, D, E, F and G because whoever interpreted them color coded the results, with the color red denoting LM, the color yellow denoting Defendant Venckus, and the color green denoting Male B.

Dr. Johnson further testified about the stochastic threshold in DNA measurement and analysis. Every lab establishes this threshold which is the RFU level at which they expect to see dilution effects in the DNA, where you might see a complete loss of alleles occur or peak imbalance. At the Iowa DCI, this level is established at 300 RFU. In a mixed sample of DNA, if any peaks fall below that level, the DNA is said to be in the stochastic range, and may be unreliable to make a valid conclusion about.

Defense Exhibit B was identified at hearing as the Iowa DCI's standard operating procedure DNA 58, revision 3. This standard operating procedure proposes to provide the DCI guidelines for the interpretation of DNA profiles developed with Promega's PowerPlex 16HS STR amplification kits with data collected on a 3130 Genetic Analyzer. Dr. Johnson was critical of the Iowa DCI's lack of reference within this standard operating procedure on how to exclude a person's DNA from a mixture DNA sample.

Dr. Johnson went on to discuss SWGDAM, the Scientific Working Group on DNA Analysis, in her testimony. This working group is a non-governmental entity comprised of a group of scientists from different institutions who put out guidelines for forensic labs. Dr. Johnson emphasized that accredited labs are expected to follow the SWGDAM guidelines, though there are no consequences for labs that do not follow them. Per Dr. Johnson, the Iowa DCI lab does not follow SWGDAM guidelines insofar as, in her opinion, nothing in the DCI lab's standard operating procedures establishes guidelines for inclusion or exclusion of a person from a mixed sample of DNA.

Dr. Johnson went on to discuss ASCLD/LAB, the American Society of Crime Laboratory Directors Laboratory Accreditation Board. Though crime labs are not required to be accredited by ASCLD/LAB, most government labs are. In July 2015, ASCLD/LAB published in a newsletter that labs must clarify their mixture interpretation policy. This was mandated by that body in March 2016. ASCLD/LAB's requirement 5.4.5.2 requires that procedures for DNA profile interpretation must be based on validation data. The interpretation of a DNA profile

containing a mixture of two or more individuals must be guided by a procedure that includes specific defined steps that will enable different analysts in the same laboratory to reach the same conclusion; and a competent person from outside the laboratory using the same procedure to understand how the conclusion was reached.

Dr. Johnson opined that in reviewing Exhibit C, even though DCI's interpreted result was that Defendant Venckus was a "possible contributor" to the mixed DNA sample present, she felt that Defendant Venckus should be excluded, as some of Defendant Venckus' alleles in his known sample were not observed in this mixture. In coming to this conclusion, Dr. Johnson stated that the scientist must look for indications in the shorter alleles, as shorter loci are freer from amplification artifacts, and further that the scientist should look at whether any loci fall below the stochastic threshold. She opined that, for instance, at locus D16, the 4th locus in the 2nd trace on Exhibit C, peaks for alleles 11 and 13 were over 2000 RFU high. At that locus, Defendant Venckus has a 10 and a 13 allele, and LM has an 11 and 13. LM's 13 allele at that location would mask anyone else's 13 at that locus, but according to Dr. Johnson, it would be expected to see Defendant Venckus' 10 allele there. Since it is not seen on Exhibit C, Dr. Johnson opined he should be excluded. Moreover, many of Defendant Venckus' alleles don't appear in Exhibit C, but most of those that do not appear are those that fall below the stochastic range of 300 RFU. At D16, however, Dr. Johnson opined that Venckus' 10 allele was well above the stochastic range, and the lack of it in the sample in Exhibit C should therefore rule him out as a contributor.

With regard to Exhibit E, bite mark swab, Dr. Johnson again opined that Defendant Venckus should be excluded, as eight of his alleles are missing. Two of those loci were above stochastic levels, including D16 where an 11 and 13 were observed, but Venckus' 10 was not, and D5 where 12 and 13 were observed, but Venckus' 11 was not. However, using the DCI lab's "all with" statistical method, Venckus was not excluded. Dr. Johnson attributes this to an "incredible amount of subjectivity" in the interpretation.

With regard to Exhibit O, Dr. Johnson again opined that Defendant Venckus should be excluded as Defendant Venckus' 14 allele was missing at Pinta E, his 10 allele was missing at D16, and his 24 was missing at FGA, and all of these areas were well above the stochastic threshold. As to Exhibit G, as to areas she believed were above the stochastic threshold, Dr. Johnson opined that Venckus' 12 allele was missing at locus TPOS, and his 20 and 24 alleles are missing from the last trace.

Though according to the indications as set forth in the preceding paragraphs, Dr. Johnson argues that Defendant Venckus should be excluded, Dr. Johnson opines that DCI's lab does not have guidelines that allow for such exclusion. Rather, DCI uses a Combined Probability of Inclusion statistic, and modifies it with an "all with" statistical modification. The Combined Probability of Inclusion, in Dr. Johnson's opinion, is not appropriate for use when you have data that falls below the stochastic threshold because it is not equipped to take into account the drop out of alleles. Dr. Johnson contends that data that is derived from an amount of DNA that falls below the stochastic threshold is "low copy" and therefore should not be used.

The DCI modifies the Combined Probability of Inclusion with a statistical spreadsheet they refer to as "all with" in situations where the sample is below the stochastic threshold, wherein they plug in observed alleles and say they can be paired with anything else that is not observed. DCI also uses this at loci above the stochastic threshold where there may not be evidence of allelic drop out. Using this hybrid approach, according to Dr. Johnson, the DCI is not able to exclude anyone from a DNA mixture. Even so, Dr. Johnson notes that the DCI *does* exclude several males tested within this case, but in doing so DCI does not explain in any notes or other materials how those conclusions to exclude were reached. Dr. Johnson opines that the DCI should specifically spell out in its standard operating procedures how the decisions to include or exclude are made. In a nutshell, it is the argument of the defense, based upon Dr. Johnson's testimony, that the DCI's interpretation method, including the "all with" modification, is unreliable with regard to the interpretation of DNA mixtures in this case, and further, that use of this methodology is not generally accepted in the scientific community.

In response to the criticisms of the defense, the State presented two expert witnesses: Michelle Beckwith, a DNA analyst and mathematician who has provided an external review of the DCI's "all with" methodology, and Mike Halverson, a criminalist and head of the DNA division at Iowa's DCI.

Ms. Beckwith has been a scientist at Paternity Testing Corporation, an accredited lab, for the past twenty years. Specifically, her lab has ASCLD/LAB accreditation as well as international DNA accreditation, and generally adheres to SWGDAM guidelines. As a DNA analyst and mathematician in that lab, her primary responsibility is statistical analysis. While she does not typically handle DNA analysis on the front side at the current time, Ms. Beckwith does assist forensic analysts with mixtures and does provide population statistics to DNA analysis, including DNA mixture analysis.

According to Ms. Beckwith, SWGDAM accepts three methods of DNA mixture analysis, one of which being the CPI (Combined Probability of Inclusion) which is referenced above herein. The goal of this method is to ultimately try to determine how much of the population can be excluded from the DNA mixture by trying to make an estimate of how much of the population can or cannot be included in that mixture. CPI as a method, according to Beckwith, is easy to understand and reproduce. That said, this method has limitations when used in the stochastic range, where there may be potential allele drop out. In this range, CPI may not provide you with statistics because you may not be including all of the alleles. Iowa's DCI uses the CPI method in some cases in analyzing mixtures. In any cases where the DCI is reviewing a DNA mixture with alleles that are below the stochastic threshold, however, they use a modification of the CPI method, a more encompassing method referred to as the "all with" method.

Beckwith described in her testimony that over the years, DCI began to use calculations to try to find extremely conservative ways to apply a value for inclusion in mixture situations which included some alleles are below the stochastic level. This was done to ensure that an overestimation would not occur. In 2015, Ms. Beckwith reviewed the "all with" methodology of DCI and found it was conservative, was modified in places where there were low stochastic levels, and she found it to be, in her external review, a valid method for DNA mixture interpretation. She further assessed that the mathematical formula used by DCI was valid and

was being used correctly. Moreover, Beckwith opined that, converse to Dr. Johnson's opinion, using this methodology, it was still possible to exclude potential DNA contributors from a DNA mixture.

In specific examples provided to the Court via State's Exhibits 14 through 19, Ms. Beckwith was able to demonstrate mathematical calculations to show how the "all with" methodology would work to mathematically and statistically exclude less of the overall population in low stochastic level analyses than would have been excluded using only the CPI method. This served to demonstrate to the Court how the "all with" method would actually provide a mathematical/statistical and reproducible analysis of the DNA data which would actually serve to provide the defense with more beneficial calculations to show that far more of the general population would be included in the probabilities ultimately calculated than the CPI method would generate without this modification.

Ms. Beckwith did discuss low copy numbers as a concept, and disagreed with Dr. Johnson's definition of low copy numbers. While Dr. Johnson defined "low copy" as below the stochastic threshold (which, again, is 300 RFUs pursuant to DCI's internal criteria), Ms. Beckwith considers "low copy" to be below the analytic threshold (below 75 RFU pursuant to DCI's internal criteria), a threshold below which true alleles cannot be differentiated from "noise" on the spectrometer. Ms. Beckwith's review of the "all with" methodology found that it provided predictable, reliable and reproducible data analysis below the stochastic threshold, yet above the analytic threshold. Below the analytic threshold would be considered by Beckwith to be the low copy range, and is a range not used by DCI.

In summary, it was Ms. Beckwith's testimony that CPI methodology is generally accepted in the scientific community for analyzing DNA mixture data when the data is all above the stochastic threshold. In fact, nearly half of all labs use the CPI methodology. In the area between the stochastic level and analytical level, however, some labs call this area "inconclusive" while others such as Iowa's DCI apply statistics to give weight, or value, to the information found between these levels. SWGDAM encourages labs to look at *all* data, and the "all with" methodology used by DCI does that. Per Ms. Beckwith, use of a statistical base such as the "all with" methodology for that data is acceptable, and falls within acceptable scientific community standards. She found the statistical calculations of the "all with" approach to be reproducible, comprehendible, and valid.

Mike Halverson also testified. He is a criminalist at Iowa's DCI, is the DNA technology leader at that lab, and is responsible for quality control. He explained that Iowa's DCI is accredited both by ASCLD/LAB and by international standards. The accreditation process occurs once every four years, and is conducted by one lead assessor working for ASCLD/LAB, and they bring in other scientists from other labs to assist in that audit. Standards adhered to by DCI are those of ASCLD/LAB, as well as FBI Quality Assurance Standards relevant to forensic DNA testing. Most recently, DCI was reaccredited in the fall of 2015.

In addition, the DNA section of the lab goes through accreditation, or quality assurance audit, every other year by individuals outside DCI's lab, and those results are sent to the FBI. If there are any negative findings, DCI is required to respond to the FBI. This is an external review

and auditing process on 17 standards, each representing a different area of forensic DNA analysis. DCI underwent this FBI QAS audit in 2014 as a regular external audit, then again in 2015 as part of its regular ASCLD/LAB assessment. There were no negative findings of DCI in these audits. DCI has been accredited since the year 2000.

Further, all DNA labs that participate in FBI QAS go through 100% of technical review of their cases. That is, a second analyst looks through the case file and agrees with the work done and the interpretations made by the DNA analyst *in every case.*

Mr. Halverson went on to explain that the DCI does have DNA mixture interpretation protocols within its Standard Operating Procedures standards. Quality Assurance Standard 9.64 addresses data interpretation including DNA mixture interpretation, including analysis and interpretation methods and analytical procedures for single source and mixtures of DNA. DCI as a part of its protocols subjects methods used by DCI to a validation process before using methods on actual case files. For instance, before using the PowerPlex 16HS DNA amplification kit, the kit used by DCI in this case, it was subjected to validation by Bode Technologies, an outside lab, from October through December of 2011. A validation of DCI's mixture interpretation was also part of the overall evaluation of PowerPlex 16HS kit.

With regard to DNA interpretation, Mr. Halverson went on to explain that the DCI does not perform low copy number testing. This is defined at the DCI as testing of DNA below the analytic threshold of 75 RFU. DCI does, however, distinguish low template DNA from low copy. Low template occurs below the stochastic level of 300 RFU, which was a level also established through a validation process at the DCI. The setting of the 300 RFU stochastic level by the DCI was approved in the FBI quality assurance (QAS) audit in 2015.

The "all with" variation of Combined Probability Inclusion (CPI) used by the DCI is a variation of CPI which accounts for all DNA seen at a locus, and also accounts for partial allelic drop out below the stochastic threshold (300 RFU) but above the analytic threshold (75 RFU). The "all with" variation that DCI uses was subject to the validation process in 2015, and was validated by Ms. Beckwith at that time.

Mr. Halverson explained that State's Exhibit 2 provides an overview of the DCI's DNA mixture interpretation procedure. The SOP provide criteria for determining major and minor DNA contributors. However, when a major or minor contributor cannot be pulled from the sample, and additionally there is no intimate sample (such as a body swab from a known donor) as part of the mixture, the Combined Probability of Inclusion (CPI) method is used when *all* alleles are above the stochastic level (300 RFU), and the "all with" variation to CPI is used when *any one* allele in the picture is at or below the stochastic level.

Mr. Halverson went on to show how this process worked on the DNA mixture profiles in this matter. On State's Exhibit 3, for instance, Mr. Halverson demonstrated that, as to two cuttings of the same White Sox blanket in this case, both provided similar DNA mixture profiles, except one 28 allele dropped out from one of the two samples. Halverson explained that this may occur because the mixing ratios are different in each of the samples. When this occurs, Halverson would not eliminate a person from one allele drop out.

The results using an "all with" interpretation, which by DCI protocol is only used in interpretations where there is not a lot of DNA present (between 75 and 300 RFU), appear in the DCI's reports as indicating that an individual is a "possible contributor" to the DNA mixture present. This is further shown in DCI's reports by use of statistical ranges such as "fewer than one out of ten unrelated individuals would be included as possible contributors to the mixture" or "1 out of 8", "1 out of 42", and so on. These results are not considered DNA "matches", as in "one out of one billion", and are certainly not described by DCI scientists as such. They merely denote "possible contributors."

Mr. Halverson did agree that analyst bias as complained of by Dr. Johnson can be a real thing. However, he stated that just because there are colored marks made by an analyst on an electropherogram does not mean that the analyst used the known DNA profiles to make her interpretations. In this case, the analyst first determined that she had a DNA profile mixture, and next determined that she could interpret it. Only after making those first determinations would the analyst have made the decision to compare the mixture profile to known profiles. Mr. Halverson noted for the record that the analyst in this case, Tara Scott, has been proficiency-tested every other year, and has never failed a proficiency test.

Ultimately, Mr. Halverson credibly testified that the DCI lab's DNA mixture analysis protocols have been subjected to review within the past year, and have been found to be in compliance with ASCLD/LAB as well as FBI QAS standards. Further, the CPI method for analyzing DNA mixtures above 300 RFUs, was easily validated utilizing FBI population statistics. Also, the "all with" method was subjected to validation by an outside lab, and was validated by Michelle Beckwith, a DNA analyst and mathematician, to be reliable, comprehensible, and the results of said method were able to be reproduced. Mr. Halverson was quick to point out that the "all with" methodology may not be commonly used, but that certainly isn't an indication that it is not scientifically accepted.

Generally, Iowa Courts have been committed to a liberal view on the admissibility of expert testimony. See Leaf v. Goodyear Tire & Rubber Co., 590 N.W.2d 525, 532 (1999) (citing the Court's history of maintaining liberal view on admissibility). Our broad test for admissibility of expert testimony has two preliminary areas of judicial inquiry that must be considered before admitting expert testimony. See Iowa R. Evid. 5.702. The Court must first determine if the testimony " will assist the trier of fact" in understanding "the evidence or to determine a fact in issue." Id. This preliminary determination not only requires the court to consider the existence of a reliable body of "scientific, technical, or other specialized knowledge," but it also requires the Court to ensure the evidence is relevant in assisting the trier of fact. See Johnson v. Knoxville Cnty. Sch. Dist., 570 N.W.2d 633, 637 (Iowa 1997)(stating that, to be relevant, the evidence must be reliable, and reliability is an implicit requirement of admissibility under Iowa Rule of Evidence 5.702 because "unreliable testimony cannot assist the trier of fact"); see also Bonner v. ISP Techs., Inc., 259 F/3d 924, 929 (8th Cir. 2001) ("The rule's concern with 'scientific knowledge' is a reliability requirement, while the requirement that the evidence ' assist the trier of fact to understand the evidence or determine a fact in issue' is a relevance requirement."). Second, the Court must determine if the witness is qualified to testify "as an expert by knowledge, skill experience, training, or education." Iowa R. Evid. 5.702.

In assessing the reliability of scientific evidence, the Court is to essentially utilize an ad hoc approach to decide if the scientific area of expertise produces results that are reliable enough to assist the trier of fact. State v. Hall, 297 N.W.2d 80,85 (Iowa 1980) rejecting *Frye* test of general scientific acceptance). When the scientific evidence is particularly novel or complex, however, Iowa Courts are to consider the relevant factors identified by the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc. 509 U.S. 579, 593-94. These factors are:

> (1)whether the theory or technique is scientific knowledge that can and has been tested, (2) whether the theory or technique has been subjected to peer review or publication, (3) the known or potential rate of error, or (4) whether it is generally accepted within the relevant scientific community. Leaf v. Goodyear Tire & Rubber Co., 590 N.W.2d 525, 532 (1999)

Doubts about whether an expert's testimony will be useful to a fact finder should generally be resolved in favor of admissibility. Williams v. Security Bank of Sioux City, Iowa 358 F. Supp. 782 (N.D. Iowa 2005).

Analysis

In this case, Iowa's DCI is an accredited lab which is audited annually for FBI Quality Assurance Standards with regard to its DNA section. It has been through external audits as recently as 2015 and has received no negative findings. These FBI QAS audits include seventeen standards to ensure quality and integrity of the work done by the lab, and include specifically that a lab have a documented procedure for DNA mixture interpretation. DCI does have a Mixture Interpretation protocol as set forth in State's Exhibit 2. Validation of DCI's DNA Mixture protocols was conducted by an outside lab, Bode Technologies, as a part of DCI's 2012 QAS audit. This audit covered DCI's DNA mixture protocols, including the CPI methodology which is used in mixtures above the stochastic threshold.

With regard to DNA mixture protocols involving samples below the stochastic threshold (300 RFUs) and above the analytic threshold (75 RFUs), DCI uses a variation of the CPI methodology known as "all with." This methodology too was subjected to outside validation in 2015, which was conducted by Michelle Beckwith. This methodology generally can be described as statistical analysis application to DNA testing results. Michelle Beckwith determined that the "all with" methodology provided statistical calculations that were reproducible, comprehendible and valid. Also, she found the "all with" variation to CPI to give weight to the DNA information found between the stochastic and analytic levels, and looking at all data is encouraged by SWGDAM. Ms. Beckwith found that use of a statistical base such as the "all with" methodology for the DNA data within that stochastic range is acceptable, and falls within acceptable scientific community standards.

It is clear to the Court that the "all with" methodology at issue herein has been scientifically scrutinized and subjected to external validation. Also, the Court finds Ms. Beckwith's testimony to be credible and persuasive in showing that this methodology is generally accepted in the relevant scientific community, that of forensic DNA analysis and statistics. The Court further specifically finds that this evidence can assist the trier of fact in understanding the DNA evidence in this case which falls between the analytic and stochastic levels. As such, the Court finds that this evidence is admissible. The trier of fact may certainly give whatever weight they choose to the testimony of each of the experts they will hear from in this case. The Court finds that Defendant's contentions with regard to the DNA mixture analysis evidence herein go to the weight of the evidence rather than to its overall admissibility. Moreover, the Court does not find that this evidence would be more prejudicial to the Defendant than probative.

Accordingly, Defendant Venckus' Motion to Exclude DNA and Serology Test Results is DENIED.

DATED: July 1, 2016. Clerk to notify.

IN THE IOWA DISTRICT COURT FOR LINN COUNTY

PAIGE M. TELECKY PETITIONER	)	CASE NO. CDDM042740
VS. KYLE R. TELECKY RESPONDENT.	)	DECREE OF DISSOLUTION

On March 20, 2018, trial in the above-captioned matter commenced pursuant to assignment for a period of three days. Attorney Janette Voss represented the Petitioner and Attorney Frank Nidey represented the Respondent. Evidence was received, and the Court took this matter under advisement.

FACTS

1. The Court has jurisdiction of the parties and the subject matter of this marriage.

2. There has been a breakdown of the marriage relationship to the extent that the legitimate objects of matrimony have been destroyed, and there remains no reasonable likelihood that the marriage can be preserved. Counseling or conciliation procedures would be to no avail in preserving the marriage.

3. The parties were married September 9, 2000, and separated in July 2016.

4. The parties have four children, N.A.T. age 14, V.A.T. age 12, S.E.T. age 9, and A.M.T. age 7. Although they agree upon having joint legal custody of their children, the parties dispute who should have primary care of the children and further dispute what the arrangements should be relative to a care schedule for the children. Remaining issues for the Court to decide relative to the children include determination of physical care of the children as well as visitation, child support, tax dependency exemptions, provision of health insurance and uncovered medical expenses, and holiday and summertime visitation.

5. The parties further dispute the division of property, including disposition of the parties' real estate as well as distribution of other property and retirement assets. The parties further dispute whether the Court should award attorney's fees herein, as the Petitioner has requested that the Respondent contribute to the payment of her fees.

6. Petitioner (Paige) is age 40 and was born October 27, 1977. Paige resides at 502 East South St., Lisbon, IA 52253 with her mother, Ava Stamp, and all four of the parties' minor children. This residence is her mother's home, and the children, with Paige, have

resided there since July 2016. After the parties separated, a Temporary Order was entered in this matter on September 7, 2016 by the Hon. Judge Kevin McKeever, ordering that the parties would enjoy temporary joint legal custody of their children, and that Paige would have temporary primary physical care of the children subject to Kyle's right to reasonable visitation. That visitation included alternating weekend visitation from 6 PM on Friday until 6 PM on Sunday, every Wednesday night overnight from after school until Thursday morning, and an alternating holiday visitation schedule.

Paige, the daughter of two educators, Gary and Ava Stamp, is a graduate of Lisbon High School where she was involved in a number of activities including band, chorus, piano, softball, cross-country, basketball and volleyball. In high school, Paige was a gifted softball pitcher, assisting her high school softball team in winning state titles in two of her four years. She was a decorated athlete, winning all-conference awards as well as holding a national record. Paige went on to attend the University of Illinois at Chicago on a softball scholarship for one year, and ultimately received her Bachelor of Arts in Business Administration from Coe College in Cedar Rapids after transferring there for the remaining three years of her post-secondary education. Her senior year in college, Paige was named the conference player of the year, and was an All-American. Paige has three brothers, Tait, Quinn and Shea, with whom she enjoys a close relationship. She also has one half-sister with whom she has limited contact. Paige's father passed away in 2011.

Paige is in excellent physical health at the current time. She is employed as an assistant softball coach at Cornell University in Mount Vernon, Iowa, earning $5,100 per year in this position. She has held this position for the past ten years. She does engage in recruitment activities as well as team travel in her coaching position. Paige also is self-employed, providing private softball pitching lessons to clients based in the Cedar Rapids and Mount Vernon area. She conducts approximately twelve such lessons per week at $35 per lesson for approximately 45 weeks a year. She approximates her gross annual income in this employment at $18,000 to $18,900. Paige is able to maintain a very flexible schedule in both of her employment positions, and the children are able to attend practices, events and team travel with her, aiding her ability to minister to the children while engaged in her employment endeavors.

7. Respondent (Kyle) is age 44 and was born July 24, 1973. Kyle resides at 517 3rd Ave. S., Mount Vernon, IA 52314, a home purchased for his use by his parents, some of the time. This house is referred to by the parties and the children as "the gray house". Kyle also continues to reside at 1005 S. 5th St., Fairfield, Iowa, the parties' marital home. This home was purchased by the parties in 2014, and Kyle continues to reside there at the present time on at least a part-time basis. Though Kyle testified that he is now residing at the Mount Vernon address on more of a full-time basis, his credibility on this point is undermined by the fact that he has taken no steps to sell the Fairfield property despite Paige's urging to sell the residence for more than the past year. It is also clear that Kyle continues to spend some of his care periods with the children at the Fairfield home. This

leaves the Court to conclude that it is as likely that Kyle will continue to reside at the Fairfield home after the Decree is entered herein as it is for him to choose to reside at the gray house in Mount Vernon.

Kyle graduated from Mount Vernon High School where he participated in football and basketball. He went on to Emmaus Bible College, and in 1996 he graduated with a degree in Science and Biblical Studies. Because Emmaus Bible College was not an accredited school, Kyle went back to school to obtain an accredited degree. He received a Bachelor of Arts degree in Business Administration at Clarke College in Dubuque, Iowa in 2013. Kyle's parents, Ron and Gloria Telecky, reside in Mount Vernon, Iowa. Kyle has a number of siblings, including his brother Aaron who is a pastor at Maranatha Bible Church, his sister Meagan Sheehan, who resides in St. Louis Park, Minnesota, and his brother Andrew who resides in Kentucky.

Kyle is in excellent physical health at the present time. He is employed presently at the Waterfront Hy-Vee in Iowa City, Iowa, having been transferred to that store from the Fairfield store in January 2018. He has a fluctuating work shift, but most often it appears that he works from 3:00 PM until midnight approximately five nights per week. Kyle's days off of work also appear to fluctuate in his current position on a weekly basis. Paige speculates that Kyle's transfer to the Iowa City store may not be a permanent transfer based on comments made by the parties' children, and that Kyle may possibly return to the Fairfield store in the near future. The Court presumes that the transfer is permanent, but in light of Kyle's lack of transparency within the record concerning his employment and concerning the parties' financial holdings including his various retirement assets and bank accounts, the Court is not entirely sure that this is the case. Further, it appears that Kyle's annual gross income from his employment with Hy-Vee is $39,892.96 from his 2017 W-2 which was introduced into evidence at trial by Paige. It is notable to the Court that Kyle did not present any wage stubs, tax documents or any other financial documentation into evidence at trial.

Both Paige and Kyle are strong Christian adults. They were each brought up with strong faith commitments, and they have both maintained their faith throughout the years of their marriage, though neither appears to attend church every weekend. Over the years of the parties' marriage, the parties frequently attended church together and taught summer Bible School as well as Sunday School. They were also involved in a Christian mentoring group which met on alternating Sunday evenings in Anamosa, Iowa. In recent years, Kyle has maintained strong ties to his Christian Church in Fairfield. It appears, however, that Paige never felt entirely welcomed at that church, likely in light of the parties' internal marital difficulties. Even so, she and the children attended church at Fairfield until the time of the parties' separation. Both Kyle and Paige strive to give their children a strong Christian upbringing, fostering their children to have good hearts and good character, to love and bring glory to God, to be kind and to serve others.

The parties have four minor children at issue in this marriage. The oldest, N.A.T., is described as a focused and dedicated, kindhearted deep thinker. She is a quiet girl who is a good student and a very gifted athlete. Like her mother, she has a passion for softball, but she also plays basketball, runs cross-country and track and is in the school band. Diagnosed with dyslexia in 2016, N.A.T. does not allow this to hold her back. She is a good student academically. N.A.T. struggles to be open with Kyle as she feels she has been, at times, betrayed by him. Kyle reports that he feels that his relationship with her, however, is growing in strength.

The parties' second oldest child, V.A.T., is described as a lively, feisty and fierce competitor. She, due to her 5 foot 11 inch frame, appears older than she is but she handles that well. V.A.T. participates in basketball, softball and volleyball, often playing with teams that are older than her chronological age due to her size. She is naturally athletic and driven, and is an excellent athlete. She is also an excellent student. Like her older sister, V.A.T. is somewhat shy. Though V.A.T. has a very open and unfiltered relationship with Paige, Paige reports that, perhaps because she looks similar to her mother, V.A.T.'s relationship with Kyle is quite strained, with V.A.T. often being on the receiving end of Kyle's anger and frustration. Kyle does not deny that his relationship with V.A.T. is difficult, but that acknowledgement does not come easily to him, and he further struggles with how he personally can take steps to address it.

The parties' youngest daughter, S.E.T., is described as the most outgoing of the parties for children. She is self-confident, joyful, very bright, and a friend to everybody. Kyle describes her as "the nicest person I know". She is upbeat and positive, and Kyle indicated in his testimony that it is easy for him to find things he can enjoy doing with her. S.E.T. is involved in basketball and also would like to start playing softball like her older sisters. She is an avid reader and an excellent student.

The parties' youngest child, and only son, A.M.T., is described as a strong, sweet boy who likes to adventure and explore. He, like his two oldest sisters, is described as somewhat shy and quiet until comfortable in any given setting. Due to his age, A.M.T. has not begun to participate in a wide range of extracurricular activities as of yet. He did, however, try the sport of wrestling over the winter. Though he did not participate in tournaments, it appears he enjoyed engaging in that sport.

8. The parties met in late 1999 when Paige was in her senior year at Coe College. At the time, Paige was 22 and Kyle was 26 years old. Kyle was, at the time, the Eastern Iowa Director of the Fellowship of Christian Athletes. They went on their first date on New Year's Eve, December 31, 1999, and they continued dating thereafter. Paige graduated from Coe College in May 2000 and became employed by True North Life Insurance. The parties were married in September 2000. When they were first married, the parties lived at Mount Vernon, Iowa. Paige later became employed with Bosch Financial in Cedar

Rapids as a director of marketing, and obtained part-time employment working at JCPenney's in Cedar Rapids.

In the early years of their marriage, it was clear that the parties wished to start a family. Paige had wanted to be a mom since she was a child. The parties were in agreement that Paige would stay home with their children so long as Paige could pay off her college loans prior to them starting a family. Paige worked one full-time and two part-time jobs to accomplish this.

Kyle's employment with the Fellowship of Christian Athletes ended in 2000. Thereafter he worked for a number of different nonprofits and in customer service positions, as well as a landscaping position, a position as a campus security officer at Mount Mercy College, and even as a sheriff's deputy in Cedar County during the years of the parties' marriage. Though Kyle exhibited an excellent work ethic, always maintaining some level of employment in attempts to make financial ends meet for the family, he struggled to maintain consistent employment for a variety of reasons. Thus, as the parties started their family in 2003 with the birth of N.A.T., during the years ensuing, the parties moved frequently as Kyle continuously shifted his employment. Paige recounted that over the course of their marriage, the parties resided in ten different homes, including homes at Mount Vernon, Robins, Cedar Rapids, Deep River, Kyle's parents' home in Mount Vernon, a friend's home in Mount Vernon, an apartment in Lisbon, the parties' marital home in Fairfield, and now at Lisbon/Mount Vernon once again. Paige described that the parties sometimes moved every couple of months, and that it was hard and scary, never knowing how long they would stay in any given place.

N.A.T. was born in 2003 and V.A.T. was born in 2005. During the years when N.A.T. and V.A.T. were infants, Paige continued to be employed part-time at JCPenney's in Cedar Rapids, working a few evenings each week. While Paige stayed home with the children during the day, Kyle would often take care of them during the evenings and bring the children to Paige, who would breast-feed them on her employment breaks. Paige was also engaged in teaching private pitching lessons at that time, and frequently took the children with her to those sessions.

By the time S.E.T. was born in 2009, Kyle had been working as a night security officer at Mount Mercy College in Cedar Rapids, and Paige had started her part-time assistant coaching position at Cornell. While eventually this employment allowed Paige to leave her employment at JCPenney's, there were times that Kyle cared for all three of the parties' young girls while Paige was working. As that year progressed, Kyle went on to work as a sheriff's deputy in Cedar County on third shift. Kyle found this position to be very stressful and more than he could handle.

Ultimately, because he did not find the Cedar County position to be a good fit for him, Kyle only stayed in the deputy sheriff position for seven months, and left to begin a

call center job at Aegon in Cedar Rapids. He also began to take classes at Clarke College in Dubuque at night. As of 2010, Kyle was spending very little time in the family home due to employment and school commitments. Contemporaneously during that timeframe, it had become apparent to the parties that N.A.T., who by then was approximately seven years old, was struggling with schooling due to then-undiagnosed dyslexia. The parties were residing in Cedar Rapids at the time, and in part due to N.A.T.'s struggles, were not comfortable that the school district in which they resided would be able to meet her needs. They visited Isaac Newton School, but were dissatisfied with the lack of services that could be provided to assist N.A.T. at that school. After some discussion with each other and with Kyle's mother Gloria, who was also an educator, the parties jointly agreed that Paige would homeschool their children.

By the end of 2010, the parties had four children in their home, and Paige was providing homeschooling instruction for the older two while simultaneously caring for the younger two who were then infants. Paige was responsible for all of the cooking, all of the grocery shopping, all of the laundry, most of the cleaning, and all of the childcare within the home. In addition, Paige was also maintaining her employment with Cornell and providing pitching lessons on the side. Kyle's full-time employment at Aegon and his educational pursuit at Clarke College left him little time to spend at home. As a result, the parties began to grow distant to each other, each becoming accustomed to their individual responsibilities within this framework. Paige maintained house and home, maintained her employment, paid the bills and provided primary care for the parties' children and all of their needs. Kyle did what he felt was necessary in order to financially support the family, but this left him with little time to be physically present for them. While he did assist Paige by at times teaching certain aspects of the children's homeschooling, his involvement in this endeavor was intermittent. Even so, Paige always ran the curriculum for the children by Kyle for his approval, which he generally gave.

Kyle received his degree from Clarke College in 2013. Shortly thereafter, he obtained employment at the Target store in Ottumwa, Iowa, as an Executive Team Leader. This position promised a higher income for Kyle than he had ever previously enjoyed, but would require the parties to move once again. In light of her ongoing employment with Cornell in Mount Vernon, Paige sought a compromise from Kyle with regard to where they would reside. Ultimately the parties decided to move to Fairfield, Iowa, which is approximately one half hour closer to Mount Vernon than is Ottumwa. This compromise allowed Paige to continue not only her employment with Cornell, but also allowed her to continue teaching private pitching lessons.

It is apparent from the record that by this point in time in the parties' marriage, they operated quite independently from one another for the most part. Though they maintained a façade of a happy marriage, clearly neither was happy within the marriage, and the parties had little communication with each other even prior to their move to Fairfield. Nonetheless, the parties completed the move and forged ahead with Kyle in his

management position at Target and Paige continuing to commute on Wednesdays to Mount Vernon to continue her employment with Cornell as well as to conduct pitching lessons, often with the parties' children in tow.

In his position at Target, Kyle oversaw four departments. He had supervisory responsibilities over the heads of each of those departments. At some point, he was asked by his superiors to terminate the employment of one of those department heads. Kyle struggled with having to terminate this individual, as this individual had become a friend of his, and Kyle was disciplined by his superiors as a result. This occurred within five months of him commencing employment at Target. About a year later, in 2015, Kyle received a final warning and ultimately resigned, leaving his employment at Target for a much lower paying position.

Kyle next obtained employment at the Fairfield, Iowa Hy-Vee store. Things went well for Kyle in that employment for awhile, but in May 2015, for reasons not clarified to the Court, he received a two-week suspension from that employment. When she learned of suspension, Paige testified that she felt like she had been "kicked in the gut." By this point in time, Paige had become accustomed to independently caring for and providing for the children with little assistance from Kyle, and had become very frustrated with the instability associated with Kyle constantly changing jobs. Simultaneously, it appears that Kyle was becoming more and more resentful of Paige for the amount of time that she was able to spend with and devote to the children. The parties attempted marital counseling, but things did not improve. The couple simply continued to coexist in the same household, having little communication with each other, and with their frustration and resentment growing toward the other.

In July 2016, Paige made the decision to separate from Kyle. By this time, the parties had such a fractured relationship with each other that they appear to have been functioning as a separated couple within the same household for years prior to that time. Also, this alienated and uncommunicative relationship between the parties is unfortunately what the children had become accustomed to between their parents by that time. Paige had grieved the loss of her marital relationship with Kyle well prior to that time, and likely Kyle had as well. Thus, while it is not surprising that Paige made the decision to physically separate from Kyle, when she did so by removing the children and many belongings from the marital home without notice to Kyle, the same remained a shock to Kyle and created within him an even greater deal of anger and resentment.

Having made the decision to physically separate from Kyle, with the assistance of her siblings her mother and friends, Paige relocated with the children to the home of her mother in Lisbon, Iowa. Paige continues to reside with the children in her mother's household, and has no intention of relocating. This is a stable residence for the children, and Paige is able to meet the financial responsibilities of the household and for the children with the assistance of her self-employment income and her income from Cornell as well as

from receipt of child support from Kyle. Since July 2016, Paige has continued to provide for the children's primary care. This was formalized by the Court's Temporary Order herein in September 2016. Paige also continues to provide homeschooling for all four of the parties' minor children. The children are also now dual-enrolled in the Mount Vernon School District, where the older two children participate in band and physical education. Also, N.A.T. is enrolled in math and V.A.T. is enrolled in language arts and reading. S.E.T. is dual-enrolled at Washington Elementary in Mount Vernon and receives her language arts and math instruction there. A.M.T. receives language and math instruction there as well. All four of the children are thriving academically. N.A.T. has a cumulative grade point of 3.7 and V.A.T. has a cumulative grade point of 4.0 in public school instruction.

Since the entry of the Court's Temporary Order, Kyle has continued to reside in the marital home at Fairfield, Iowa. He has been resistant to Paige's requests to sell the home, and has made no effort whatsoever toward doing so. Also, until January 2018, Kyle continued to maintain his employment at the Fairfield Hy-Vee store. It was only in January 2018 that he transferred his employment to a Hy-Vee store in Iowa City, Iowa. Though Kyle's parents had purchased the gray house in Mount Vernon many months earlier, Kyle made no attempt to move there until January 2018. That said, even though Kyle claims to have moved to Mount Vernon, it is clear that he has spent some of his weekend visits with the children in Fairfield since January 2018, and it therefore remains unclear to the Court as to what Kyle's intentions are. While Kyle complains that Paige was not forthcoming and transparent in her decision to separate into 2016, it is clear that Kyle has likewise been less than forthcoming with regard to a number of other things bearing upon the parenting of the children and this divorce.

Specifically, Kyle has been unwilling to share his work schedule with Paige to allow for smoother transitions in parenting time with the children. He has been unwilling to share his employment involvements with Paige, including officiating of football and the schedules associated with that. He has been unwilling to share details of his location of employment with Hy-Vee, his fluctuating work schedule, and of his alleged move to the Mount Vernon area. Because Kyle has been secretive about such details, the children and Paige are often left not knowing whether Kyle would show up for his Wednesday or Friday visits, what time he might show up, where he might exercise the visits, and even what activities the children might engage in during the visits so that they would know how to pack for the visits. This has led to a great deal of frustration on Paige's part, as well as anger and frustration on the part of the children. Further, in recent years it appears that Kyle has been more focused upon the parties' two younger children which has also in turn caused some degree of disappointment and disillusionment between Kyle and the older two children especially. Even so, Kyle struggles to see how his strained relationships with the two older children, especially V.A.T., may in part be caused by this.

Paige provided to the Court two multipage exhibits consisting of approximately 800 pages of emails between the parties. Because both parties acknowledge that almost all of

their communications are solely by email, these 800 pages constitute almost the entirety of the parties' total communications with each other since the time of their separation in 2016. In fact, in the Court's review of these email exhibits, the Court found many of the emails to be duplicated such that the total of 800 pages actually overstates the amount of the parties' communications.

Though the Court expressed reluctance to do so, the Court has reviewed all of these emails and finds that, in general, the emails tend to be issue and event-oriented, and most pertain to the children. In light of the children's multiple athletic and academic involvements, many of the emails revolve around their schedules and activities. While the parties do not call each other names or use profane language within their emails, the Court finds that the bulk of their communications with each other are terse, with Paige expressing her frustration with Kyle for not providing adequate specificity, not being forthcoming with his schedule and only providing planning and information at the last minute, and with Kyle expressing anger and resentment towards Paige, as well as a desire to dictate the children and their schedules. Throughout the emails it is clear that Paige does solicit Kyle's opinion with regard to activities for the children, and does attempt to elicit specificity from Kyle about his schedule and visits so that she can adequately prepare the children for them. For this reason, the Court has no concern or reservation that Paige will continue to solicit Kyle's input regarding the children moving forward. Unfortunately however, Kyle's responses to Paige's inquiries often fall short of having the requisite specificity, giving some information about his schedule but not all that is necessary in order to facilitate smooth transitions for the children. For example, at times Kyle will advise Paige of the days that he will work in a coming week, but he fails to provide his hourly work schedule. Because Kyle's hourly work schedule often fluctuates due to its retail nature, his lack of specificity often leaves Paige and the children scrambling at the last minute when Kyle's visits are to commence.

Further, the emails between the parties provide evidence of Kyle's yearning to gain control, and of his viewpoint that his care time with the children subjects them entirely and solely to his authority. Kyle states "my care time means my decisions" in one email. In another email, he dictates with whom the children will sit with at an event while on "his care time" even though he would not be attending the event, and even though their mother would be in attendance. Kyle's testimony also provided evidence of this viewpoint. At one point, Kyle testified that he "released the children" to go and sit with their mother at an event during his care time. While Kyle is generally correct that he has authority over the children and their care while they are with him, it strikes the Court that Kyle lacks insight into how his attitudes and actions in this regard have negatively impacted his relationships with the children.

Kyle also appears to lack insight into how his lack of transparency impacts the children and their relationship with him. The record demonstrates that Kyle has missed a number of his scheduled visits with the children. Granted, many of the times that Kyle has

missed visits, it was due to the fact that he had employment obligations either at Hy-Vee or officiating high school football games, but on other occasions he has missed visits to attend movies and other activities that did not involve the children. That said, because Kyle refused to communicate his schedule to Paige and the children well in advance, the children and Paige lost faith that Kyle would consistently attend his visits, and further would become frustrated that Kyle's last-minute approach frequently left them ill-prepared for visits or alternatively resulted in the children missing activities that would not have needed to be missed when he failed to show up for visits. Because of Kyle's persistent refusal to provide adequate notice to Paige as to whether and when he intended a visit to begin, Paige developed a "go with what you know" approach for the children's visits with him. That is to say, Paige and the children would not plan for a visit to occur unless and until Kyle communicated a clear intent to exercise the visit. In short, it appears that Kyle's unwillingness to share his work schedule and intentions with Paige to facilitate the visitation schedule has ultimately resulted in growing disappointment and even anger especially on the part of the parties' two older children.

9. Throughout the trial, the Court found that Kyle lacked a certain degree of credibility at times in particular due to his noted lack of transparency as set forth above. The fact that Kyle presented the Court with no financial documentation supporting his position also detracts from Kyle's credibility with the Court. Last, Kyle's evasive answers when asked directly about whether he had entered the children's bedrooms and deleted text messages from their phones greatly impacted his credibility with the Court. When he was specifically asked whether he had come into the children's room while they were sleeping, taken their phones and erased messages, Kyle admitted only to entering the children's rooms and looking at their phones. As to the question of whether he erased messages he could only state "I could not say for sure" that I erased messages. Clearly Kyle recalls the event. Either he did or did not erase the messages. His answer here rings of complete falsehood with the Court. This is not to say that the Court found him to be entirely lacking in credibility, but it was very clear to the Court that Kyle wanted to present his own certain version of the facts which comported with his own self-view of being the victim herein, rather than owning up to his responsibility for his part in the demise of his relationship with both Paige and the parties' two older children in particular.

To the contrary, the Court found Paige to be quite credible throughout her testimony. Her unreserved and immediate willingness to admit to her own shortcomings underscores this credibility finding. Paige was not shy in admitting that she could have handled the physical separation of the parties in a better manner, and when confronted with Kyle's allegations of her striking him on three occasions, Paige readily admitted to her transgressions.

10. Each of the parties presented a number of witnesses to provide testimony herein. At Paige's request, Keri Christensen, the children's family therapist, provided testimony. She has a Masters of Social Work degree from the University of Iowa, and is a

licensed independent social worker (LISW). She is trained to work with children, teens, families and couples. She has been working with the parties' four children since the summer of 2017 when Kyle contacted her to provide family therapy for them.

As of the time of trial, Ms. Christensen had an established therapeutic relationship with each of the children, having met with each of them for eleven sessions and with N.A.T. for twelve. While Paige was initially somewhat resistant to the counseling, likely because Kyle had selected Ms. Christensen, Paige has nonetheless been instrumental and consistent in getting the children to their therapy sessions with Ms. Christensen. According to Ms. Christensen, each session looks a little different, with a parent (either Paige or Kyle) being present at the beginning of sessions followed by individual time that she spends with the children in each session. To date, Ms. Christensen has not incorporated both Paige and Kyle together within any of the children's counseling.

Ms. Christensen testified that currently the focus of her therapy with the children is to improve their relationships with Kyle and to process the divorce with them. She testified that N.A.T. is a very mature and good communicator, but is a little more closed off. She has a closer relationship with her mother than with Kyle. Though progress has been made on N.A.T.'s relationship with Kyle, Ms. Christensen continues to believe that that relationship needs further improvement. N.A.T. has reported to Ms. Christensen that she is frustrated that Kyle does not use all of his care time and does not communicate when he will be exercising his care time. Ms. Christensen did not believe that this had greatly improved as of the date of trial.

Ms. Christensen testified that V.A.T. is a spunky, outgoing and open child who is mature for her age. V.A.T. is close to her mother, but she too has a strained relationship with Kyle. In her therapy with Ms. Christensen, V.A.T. has identified that she feels singled out by Kyle and that she believes the other children are treated better than she is. She feels that she is the scapegoat and that Kyle yells at her more frequently than he does the other children. Like N.A.T, V.A.T. shares that she is concerned that Kyle does not seem to use all of his care time with them. While V.A.T. is open and engaged in her therapy sessions, Ms. Christensen does not believe much progress has been made yet between V.A.T. and Kyle in their relationship with each other. V.A.T. does not speak with her dad about her concerns, but because V.A.T. and Kyle do not have a lot of one-on-one time with each other, she does not have a lot of time to connect with him.

Ms. Christensen reports that S.E.T. is an open child who is mature for her age. She does not appear to have any difficulties in her relationship with either parent, other than that she is concerned that Kyle is not always being honest. This particularly appears to revolve around Kyle not coming for visits or not effectively communicating the time and location when his visits may occur.

Ms. Christensen reports that A.M.T., who was initially reluctant to participate in counseling, has become more comfortable within his therapy sessions with her. A.M.T. has shared with her that he enjoys a close relationship with both Kyle and Paige, but that he would like to spend more time with his dad than he is currently able. That said, Ms. Christensen reports that all three of the parties' daughters are generally happy with the present care schedule and prefer that it remain unchanged.

Ms. Christensen further testified that the children are very close and bonded to one another, and get along well with each other. Though they are involved in numerous extracurricular activities, she also testified that she does not believe the children seem overwhelmed or that either parent appears to be pushing them. The activities that they are involved in appear to be activities that they each want to participate in. They report that their mother is supportive of them in their activities, but the older two children report that Kyle is not always supportive in that he does not come to their activities and often does not take them to practices and events on his weekend care periods with them.

Ms. Christensen has never seen Paige and Kyle interact with each other. In fact, she observes them to work very hard at not interacting with one another. When they are in the same location, their communication is poor and does not provide a calm environment. She does not believe that they exhibit good enough communications to carry out a shared care schedule with the children, and for that reason she does not recommend it. Moreover, Ms. Christensen believes that, based upon her experience and work with the children, that the parties' two older children would be very stressed and upset by a shared care schedule though the younger two children would likely be accepting of such schedule. That said, Ms. Christensen does recommend that the Court allow for Kyle to have some one on one time with each child within any care schedule that is imposed herein. Additionally, she notes that all four children report that they would like their homeschooling schedule to remain as is, despite Kyle's wish that the children spend more time in the public school setting.

Paige's mother, Ava Stamp, also provided testimony on Paige's behalf. Ms. Stamp is a retired schoolteacher who taught for 40 years in the Vinton, Monticello Sacred Heart and Olin school districts. She taught physical education, as well as third, fourth and fifth grades. Ms. Stamp is a widow. She has four children and eight grandchildren including the four children at issue herein.

Ms. Stamp testified that through the years she was supportive of her daughter Paige's marriage to Kyle, but she had concerns in that the family moved around a lot. She tried not to intervene, but was aware that Kyle struggled to maintain steady employment, and as such the couple endured the insecurity of him not having a steady income.

Ms. Stamp testified that her daughter, Paige, is a strong-willed, trustworthy and strong Christian woman who is extremely dedicated to the children, a hard worker, always

on time, and is a good mother to the parties' children. She has observed Paige to juggle work, homeschooling, and the children's activities, and that she gets it all done and keeps the family organized. Over the years, she has regularly observed Paige with the parties' four children, and she observes that the children have done well in Paige's care.

After their family moved to Fairfield, Ms. Stamp testified that she would go down to Fairfield to observe the children in their activities. Paige would attend all of them, but Kyle would only attend sporadically sometimes due to work, and other times due to non-work-related activities. For instance, one time she recalls that Kyle did not attend an event because he had to clean the fridge, and on another occasion he was late to a game because he wanted to clean the yard and put a garden hose away.

Ms. Stamp testified that Paige and Kyle hid the fact that they were having difficulties in the relationship very well. It was not until 2014 or 2015 that one of Ms. Stamp's other children called and advised her that he felt there might be problems in the marriage. Initially, Ms. Stamp and the rest of Paige's family "jumped on Kyle's bandwagon" and encouraged Paige to work it out. However, at the suggestion of a mutual friend, Ava was encouraged to give Paige the opportunity to present her side of the story. Ms. Stamp encouraged the couple to participate in counseling, but observed that that did not work. By the time that Paige had made the decision to physically separate from Kyle, Ms. Stamp reports that it was the only viable option that she and Paige could see at that time.

In July 2016, Ms. Stamp was present when Paige made the decision to physically separate from Kyle. The children were not present for the move. That said, Ms. Stamp assisted Paige and other family members and friends in moving many of Paige and the children's belongings into her home at Lisbon, Iowa. Paige and the children have consistently lived with her in her home since that time, with Paige providing primary care for the children for the duration.

Ms. Stamp testified that Paige provides for all the children's needs in her home. Paige and the children have their own space in the lower level of her home. Paige does most of the grocery shopping and all of the cooking, and also continues to juggle the children's schedules and get them to their activities as well as provide for their homeschooling needs.

While the children have resided at her home, they have had a visitation schedule with their father, Kyle. Ms. Stamp has observed Kyle to be inconsistent in his exercising of his care time with the children. Ms. Stamp has observed that the children never seem to be disappointed when they find out that Kyle is not coming for a visit. They are, however, angry when Kyle does not communicate ahead of time that he will not be visiting.

Ms. Stamp has also observed times when Kyle was to have visitation time with the children, that he was not able to provide that care and so delegated his care time to others. For instance, Ms. Stamp recalled that on one occasion, N.A.T. had a tournament in Des Moines. Though Ms. Stamp planned to attend the tournament, and though Kyle did not plan to attend, Kyle nonetheless dictated that he wanted N.A.T. to spend "his time" with another family and stay with that other family at their hotel in Des Moines rather than allow N.A.T. to spend time with her grandmother.

Ms. Stamp has observed the children to be insecure and unsure when they have to go for visitation with their father. She indicated that this is because the children do not know where they will be spending their time, do not know whether Kyle will show up or what time Kyle may come for his visit, whether they will be able to participate in their extracurricular activities during the visit, and what clothing and equipment they need to take with them, because they do not know what they will be doing during their visit with him.

Though Ms. Stamp clearly had every reason to be biased in her daughter's favor, the Court found her testimony to be quite credible. This was in large part due to her large role within the children's present lives, as well as her overarching interest in their best interests over and above those of her daughter. The fact that Ms. Stamp initially took Kyle's side when the parties began to experience marital difficulties (a fact that was corroborated by the testimony of Kyle's mother), underscored Ms. Stamp's capacity to put the needs and interests of her grandchildren over the needs of her own daughter.

Ms. Kimberly Steele also testified. She is a sixth grade reading teacher at Mount Vernon Middle School. Ms. Steele has been teaching at that school for approximately 15 years, and met Kyle through his employment many years ago when he presented in her classroom regarding a faith-based abstinence program. She knew Kyle as a charismatic, engaged presenter. As years passed, Kyle changed employment and therefore stopped presenting in her classroom. She would see Kyle and Paige thereafter in the community. She was also an acquaintance of Kyle's mother, Gloria, and did not become well-acquainted with Paige until she began teaching the parties' child. Thus, though Paige called this witness to testify, in light of her previous relationship with Kyle and his family, as well as her position as a teacher of one of the parties' children, the Court found this witness to be of neutral bias and high credibility.

Currently, as the parties' children are dual-enrolled in public schools, Ms. Steele teaches V.A.T. during her first hour reading classroom. Ms. Steele observes V.A.T. to be an engaged, purposeful, articulate and focused student who speaks up and ask questions. She is conscientious about getting homework done, and advocates for herself in the academic setting. Ms. Steele observes that this type of self-advocacy is uncommon among other students, and is a very mature behavior. Further, she observes V.A.T. to have a very large friendship group which is also uncommon for a homeschooled child. This is

especially so in light of the fact that this family has undergone many residential moves during the course of the children's early years. Ms. Steele views homeschooling is working well for V.A.T.

Ms. Steele reported that both Paige and Kyle have attended conferences with her, but they have chosen to attend separately from each other. At conferences, Paige has typically inquired about V.A.T.'s academic behaviors and how she might be able to support her. Though Kyle initially expressed to Ms. Steele last fall that he would like to see V.A.T. enrolled full-time in the public school setting, he did not reiterate these concerns during her February 2018 conference with him.

Dr. Gerald Barker testified on behalf of Kyle. He and his wife, Maureen, have known Kyle and Paige through their faith mentoring group with the Maranatha Bible Church in Cedar Rapids. Prior to the time that Paige and Kyle moved to Fairfield, Iowa, they, along with their children, frequently attended mentoring meetings at the Barker home on alternating Sunday nights. Dr. Barker testified that he was very surprised to hear that things were not going well for the couple after they moved to Fairfield, as he and other group members had never suspected that the parties had any marital discord during the years that they attended the group.

Dr. Barker testified that he believes Kyle to be a man of integrity and a man of honor. He sees Kyle at church in Cedar Rapids once a month perhaps, but other than there and at Iowa football tailgates has not spent time with him socially. Dr. Barker testified that Kyle was not "allowed" to have the kids at Iowa football games, but admits that he has only heard things through Kyle and his parents. He believes that Paige has the children involved in a lot of activities which he thinks is generally a good thing. That said, he testified that he does not really care to speak to Paige, which the Court finds is likely due to the fact that Dr. Barker receives all of his information about the parties and their children through Kyle and his parents and his friendship with them.

Maureen Barker, Dr. Barker's spouse, also testified. Like her husband, Ms. Barker got to know the parties and their children through a faith mentoring group through church. In addition, she taught Sunday School with Kyle and found him to be involved, supportive and fun, and that he had great ideas and was amazing with the kids. She testified that Kyle and Paige have both spent time with the children out at the Barker farm engaging in various activities with the family, including canoeing and campouts. She believes Paige to be a good mom, but admits she has not seen the parties other than limited contact since the time of their separation.

Brian Dunlap also testified on behalf of Kyle. He is in his 23rd year as an elementary physical education teacher in Fairfield, Iowa. His daughter is a good friend of N.A.T.'s, and both V.A.T. and S.E.T. have attended his physical education classes in the past. He knows Kyle as a parent through the children's activities. He has observed Kyle caring for

A.M.T. and S.E.T. and entertaining them while Paige was coaching the older girls in their athletic activities. He observes Kyle to be a good parent and a hard worker. He is interested in the children's character and how they get along with others. He also knows Paige and has observed her to be a very good coach while coaching his daughter. Also, while Paige did not attend regular school conferences with him, she did then volunteer at the school and regularly checked up on the children.

Pastor John Wilbur also testified on behalf of Kyle. He is an associate pastor at the church that the family attended while residing in Fairfield, Iowa. He came to know Kyle when Kyle was a youth pastor in Cedar Rapids. He first met Paige many years later when the family moved to Fairfield.

While the family lived in Fairfield, Pastor Wilbur was able to observe Kyle interacting with the children at church and sometimes at the local rec center pool. He did not get to know Paige well as she always seemed to be busy and in a rush. He observed the parties to be more distant with each other over time, and recommended counseling. It was his understanding that Paige was not willing to engage in counseling, but he only received his information through Kyle and from Kyle's point of view.

Kyle contacted Pastor Wilbur on the day that Paige was moving the family out of their Fairfield home. Kyle was panicked and shocked on that day, and Pastor Wilbur believes that it has taken quite some time since then for Kyle to adjust and focus on the future. Kyle has told him many times that Fairfield is his children's home and it was clear that Kyle did not want to be uprooted from that community. Though the Court believes Pastor Wilbur to be a credible person, it is clear to the Court that this witness was highly biased in Kyle's favor in that he had a pre-existing close relationship with Kyle and had little interaction with Paige. It was also notable to the Court that this witness was only able to recall one of the four Telecky children by name, which underscores the fact that he has had relatively limited contact with them as well.

Likewise, Pastor Wilbur's wife, Janice Wilbur also testified. She too testified that she has observed Kyle to be a kind and friendly person. She testified that she has observed Kyle at the local pool with the parties' children. That said, she acknowledged that she does not know Paige well, but that on one occasion when Paige volunteered to decorate the church with the children for Vacation Bible School, she found Paige to be friendly. While the parties resided in Fairfield, it became clear that they were struggling in their marriage. Ms. Wilbur testified that she had attempted to reach out to Paige to ask her to lunch. Paige appeared confused as to her sudden invitation to go to lunch to which Ms. Wilbur advised that she was simply offering support. Paige advised Ms. Wilbur that she had no idea how horrible things were and she further advised that she had friends in Cedar Rapids that she could rely upon for support.

Kyle's parents, Ron and Gloria Telecky, also testified. Ron testified as to how devastated Kyle was when Paige left Fairfield with the children. He also testified that he does not believe it is healthy for Paige and the children to be residing with her mother. It was clear to the Court from Ron's testimony in particular that he is very angry with Paige for having made the choice to separate from his son. Ron takes the position, without any supporting proof, that Paige has actively sought to instruct the children to be rude, insolent, disrespectful, fearful and anxious. Ron has also been highly involved in his son's divorce process including attending meetings with attorneys with him. Gloria, on the other hand, observed that she believes there is a lot of hate in this matter, but she proposes that healing can come through forgiveness and starting anew.

Contrary to Ron's point of view, the Court finds the record devoid of any evidence that Paige has in any way actively fostered the children having a negative relationship with their father. Paige has consistently sought Kyle's input through her emails, and has attempted to keep him involved. The Court, rather, finds that it has been Kyle and his actions and inactions that have largely alienated him from the children. Kyle has made the choice at times not to visit, to shorten his visits, to forfeit his visit time to his parents and others, and to provide late notice of his visits with the children. Paige is not to blame for these failings. Unfortunately, Ron has allowed his own emotions to color his interpretation of the events and relationships herein, resulting in him seeing Kyle as more of a victim and less of an active participant in what has led to his current state of affairs. That said, the Court wholeheartedly agrees with both Ron and Gloria on one point: the children need both of their parents, and that each parent should give influence to the children's lives.

11. Kyle has asked the Court to consider an award of shared physical care in this matter. Paige requests that the Court leave the care schedule intact as it has been since the Temporary Order herein, save for removing the Wednesday evening visitations as they are disruptive to the children's academic and activity schedules in light of Kyle's sporadic attendance. As a whole, the record reflects that both parties are parents who have struggled in their relationship and communications with each other for many years. As the Court noted at the conclusion of trial, it isn't so much that the parties have had poor communications with each other over the past two years in particular, it is that they have had almost no communication, save for occasional emails, with each other at all. While the Court notes that these communication difficulties have not escalated to domestic abuse (the Court specifically finds that the three occasions on which Paige struck Kyle during the marriage were minor, isolated in nature, and were not intended to cause nor did they actually cause any injury, thus did not rise to the level of a "history of domestic violence), the parties' poor communications nonetheless would not serve the parties well in a shared or joint care arrangement. The Court, therefore finds that a shared parenting arrangement would not be in the overall best interests of the children herein. Further, Kyle's fluctuating work schedule, his frequent changes in employment and residence, his reluctance to vacate the Fairfield home, and his lack of consistency and transparency that he has exhibited in

meeting his visitation obligations with the children all mitigate against a shared care arrangement herein.

Because Paige has at all times been the children's primary care parent during the marriage, and because the Court finds her to be the more stable, consistent, organized and involved parent, the Court finds that placement of the children in her primary care is in their best interests at this time, as Paige's environment will most likely bring the children to healthy, physical, mental and social maturity. The Court also finds that Paige is the parent most likely to seek and consider the input of the other parent in parenting decisions herein, again in light of Kyle's ongoing issue with transparency. In addition, the Court finds that, in Paige's care, the children have been thriving and doing quite well. They are excellent students, have many friends, and are successful in a myriad of activities. They are comfortable and have been doing quite well in Paige's primary care leading up to this trial, and the Court can find no cogent reason to uproot them from this structure and progress at the current time.

This award of primary care is, however, subject to the joint legal custody of the children in both parties. Additionally, though the Court has some concerns about Kyle's overall lack of consistency herein as well as the strained communications he has with V.A.T. in particular, the Court does find that Kyle is a loving parent, and should be encouraged to spend time with the children. To that end, the Court finds that placement of the children in Paige's primary care shall be subject to Kyle's right to alternating weekend visitation with them, as well as time during each week (individually to maximize one-on-one time with the children as recommended by their therapist), and additional summertime visitation. The Court also finds that it is in the children's best interest for Kyle to be required to provide Paige with a minimum of 24 hours' notice of when he intends to or does not intend to exercise his periods of visitation with the children.

12. With regard to property, Paige provided the Court with a number of financial documents as well as a detailed proposed property distribution. To the contrary, Kyle provided the Court with no financial documentation whatsoever. The sum total of his testimony with regard to the parties' financial divorce was summed up by him testifying that he relies on the requests he has made in the parties' joint pretrial statement relative to property issues. With regard to the filing of the parties' 2017 tax return, Kyle requests that the parties each calculate their taxes as though they would be filing single, and also calculate their taxes as filing jointly, and choose which approach best serves both of the parties. Kyle further requests that any refund or payment of taxes for the 2017 tax year be made by the parties on a 50-50 basis.

Paige provided a tax assessment value of the parties' home of $139,000, and a tax assessment value of the attached lot in the amount of $7,600.00. The home is subject to a mortgage, and the dollar value of that encumbrance at the present time is unknown, but it was $98,724.59 as of June 2016. Now, Paige believes the encumbrance is likely in the

range of $95,000. Kyle has not refuted these figures. Paige has asked that the Fairfield property be awarded to Kyle in light of his refusal to take active steps to cooperate with her and sell it with her assistance. The Court agrees that the same would be equitable under the circumstances of this case. Thus, the Court finds that Kyle should be awarded the Fairfield home and lot, and should be required to refinance the encumbrance upon the same into solely his own name within a reasonable amount of time.

With regard to vehicles, Kyle drives a 2001 Honda Accord which Paige believes has a value of $1,663. Paige drives a 2004 Honda Odyssey which she believes has a value of $3,103. There are no encumbrances on these vehicles. Paige suggests that the Court award each of the parties their own vehicles. Kyle does not refute the figures Paige utilizes, and finds Paige's request to be equitable under the circumstances of this case.

Paige and Kyle each have a term life policy through Allstate American Heritage. Each of the parties shall be awarded their own life insurance policies. Further, Kyle has an SBLI policy which he should receive, and the Genworth term life policies for N.A.T. and V.A.T. shall be awarded to Paige for her to continue to hold on their behalf.

Paige should be awarded her Capital One savings account ending in 027 which had a value of $5,936.72 as of December 31, 2017. Kyle should be awarded the Hills Bank joint checking and savings accounts ending in 9713 and 1550. These were joint accounts at the time that Paige moved out and had values of $7,329.22 (account ending in 9713) and $2,358.89 (account ending in 1550) as of the time of the parties' separation. Kyle provided no evidence as to the current value of those accounts. However, it is clear to the Court that Kyle has had sole control of these accounts since the parties' separation, and therefore the Court finds it equitable to place those values on Kyle's side of the ledger. Kyle is also awarded the Hills Bank checking and savings accounts that he listed on his financial affidavit in the amount of $2,861 and $994. Paige is awarded her Hills Bank checking account ending in 9713 in the amount of $2,047. Further, the Court finds that the parties' furniture and appliances have been equitably divided.

Paige also presented at trial statements relative to values of various retirement assets of the parties. As of December 31, 2017, Kyle's Hy-Vee 401(k) account ending in 056 had a value of $42,540.80. As of 2013, Kyle's VanMeter 401(k) account had a value of $6,712.77. Paige's FOIA nonqualified account ending in 556 had a value of $6,668. Kyle's Vedic Roth IRA account had a value of $59,056 as of February 28, 2018. Paige's FOIA Roth account ending in 555 had a value of $68,434 as of December 31, 2017. Though Kyle has a 401(k) through Target, neither party provided any information to the Court with regard to that asset. Paige has asked the Court to divide all of these retirement accounts on a 50-50 basis. Though this is not an optimal approach, because the Court does not have up-to-date information with regard to values on all of these accounts, the Court finds that Paige's request is equitable under the circumstances of this case.

Kyle does have a health savings account through Hy-Vee which appears to have a value of $4,611. Kyle should be awarded this account. Any other health savings accounts that have not been disclosed by Kyle, however, shall be divided 50-50 between the parties.

To their credit, Kyle and Paige have not amassed a large amount of debt during the course of their marriage. Other than the encumbrance on the marital home, Paige was only aware of Kyle's Nelnet student loan in the amount of $6,984, as well as an outstanding liability to her mother, Ava Stamp in the amount of $10,000. The Court finds specifically that both of these liabilities are marital liabilities, and the fact that Paige has already paid her mother back a substantial portion of the original $20,000 borrowed evidences her intention to continue to repay this debt. Accordingly, the Court requires Paige to repay her mother and requires Kyle to repay his student loan. The Court believes that each of the parties may have credit cards in their own names. To the extent that they do have such accounts, each of the parties shall be responsible for paying their own credit card debts and shall hold each other harmless for the same.

The Court adopts Paige's proposed property distribution as outlined at Exhibit 6 herein. In light of the foregoing distribution of the parties' assets and liabilities, Paige is due and equalizing payment from Kyle in the amount of $29,859.45. Recognizing that Kyle does not have the present ability to pay this sum to Paige without making the proper financial arrangements, the Court orders that Kyle shall pay this amount to Paige within 18 months of the entry of the Decree herein.

CONCLUSIONS OF LAW

1. Chapter 598 of The Code of Iowa governs dissolutions of marriage.

2. The Court, in arriving at its Decree of Dissolution, has considered all of those factors set forth in Section 598.21 of The Code of Iowa as amended.

3. The fault concept as a standard for granting dissolution of marriage relationships has been eliminated in Iowa, and fault is not a factor to be considered in determination of property settlement, alimony or support. In Re Marriage of Williams, 199 NW2d 339 (Iowa 1972).

4. The best interests of the children is the primary consideration to be followed in determining the issues of child custody, primary care and visitation. Section 598.41, The Code. The factors to be considered are set forth in Iowa Code Section 598.41(3)(a) to (I). These factors include whether each parent can support the other parent's relationship with the children. Id. The critical issue in determining the best interests of the children is which parent will do better in raising the children. In Re Marriage of Harris, 530 NW2d 473, 474 (Iowa App. 1995). Gender is irrelevant and neither parent should have a

greater burden than the other in attempting to gain custody in a dissolution proceeding. Id. The objective in resolving a custody dispute is to place the children in the environment most likely to bring them to healthy, physical, mental and social maturity. In Re Marriage of Knight, 507 NW2d 728, 730 (Iowa App. 1993). The grant or denial of custody should not be made to reward one parent or to punish the other. Wells v. Wells, 168 NW2d 54 (Iowa 1969). Physical care issues are not to be resolved based upon perceived fairness to the spouses, but primarily upon what is best for the children. In re Marriage of Hansen, 733 N.W.2d 683, 695 (Iowa 2007).

5. "Joint physical care" means an award of physical care of the minor child to both joint legal custodial parents under which both parents have rights and responsibilities toward the child, including, but not limited to, shared parenting time with the child, maintaining homes for the child, providing routine care for the child and under which neither parent has physical care rights superior to those of the other parents. The distinction between joint legal custody and joint physical care has been recognized by the legislature and by the Iowa Supreme Court. See, e.g., In re the Marriage of Hansen, 733 N.W.2d 683, 690 (Iowa 2007). "Legal custody" carries with it certain rights and responsibilities, including but not limited to decision-making related to the child's legal status, medical care, education, extracurricular activities and religious instruction. *Id.* "Physical care," on the other hand, involves "the right and responsibility to maintain a home for the minor child and provide for routine care of the child." *Id.* The parent who is awarded physical care is charged with the obligation to maintain the primary residence for the child and to determine the myriad of details associated with routine living, including such things as clothing, sleeping arrangements, etc.

Iowa Code § 598.41(5)(a) provides as follows:

If joint legal custody is awarded to both parents, the court may award joint physical care to both joint custodial parents upon the request of either parent . . . . If the court denies the request for joint physical care, the determination shall be accompanied by specific findings of fact and conclusions of law that the awarding of joint physical care is not in the best interests of the child.

Iowa Code § 598.41(5)(a) (2007). The objective of a physical care determination is to place the children in an environment most likely to bring them to health, both physically and mentally, and to social maturity. Accordingly, the statute clearly requires the Court to consider joint physical care when a party has requested it, and further requires that the Court make specific findings when joint physical care is rejected.

6. Each case must be decided on its unique facts. The traditional factors set out in Iowa Code § 598.41(3) and cases like In Re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974), still control; and physical care issues must focus not on what is fair for the *parents*, but primarily what is best for the *child.* The Court identified four primary

factors to be taken into consideration. Stability and continuity of caregiving, the first factor, has traditionally been primary in the Court's analysis of an award of physical care. In re Marriage of Bevers, 326 N.W.2d 896, 898 (Iowa 1982). Past primary caregiving is a factor given weight in custody matters. In re Marriage of Decker, 666 N.W.2d 175, 175-180 (Iowa App. 2003). Other factors the Court must consider include: (1) the ability to communicate and show mutual respect; In Re Marriage of Hynick, 727 N.W.2d 575, 579 (Iowa 2007) at 580; In Re Marriage of Ellis, supra.; and Iowa Code Section 598.41(3)(c); (2) the degree of conflict in the parties' relationship, and (3) agreement about childrearing practices. The degree to which the parents are in general agreement about their approach to daily matters is important, especially when the past relationship has been turbulent. In Re Marriage of Burham, 283 N.W.2d 269 (Iowa 1979) (citing Dodd v. Dodd, 93 Misc.2d 641, 647, 403 N.Y.S.2d 401 (S.Ct. 1978).

The statute has been held to reiterate the traditional standard – any consideration of joint physical care must still be based upon Iowa's traditional and statutorily required child custody standard – the best interests of the children. Hansen at 695. In this matter, the Court has considered the issue of joint physical care and has determined joint physical care is not in the best interests of the children. Moreover, neither party has requested joint physical care herein.

7. Generally, liberal visitation with the noncustodial parent is in the child's best interests. In re Marriage of Stepp, 485 N.W.2d 846, 849 (Iowa App. 1992). Section 598.41(1) of the Code of Iowa provides: "The Court, insofar as is reasonable and in the best interest of the child, shall order the custody award, including liberal visitation rights where appropriate, which will assure the child the opportunity for maximum continuing physical and emotional contact with both parents after the parents have separated or dissolved the marriage, unless direct physical harm or significant emotional harm to the child, other children, or a parent is likely to result from such contact with one parent . . ." The Court should place conditions on a parent's visitation rights only when visitation without the placement of conditions is likely to result in direct physical harm or significant emotional harm to the child, other children, or a parent. Any conditions which are so imposed must be in the best interests of the child. In re Marriage of Rykhoek, 525 N.W.2d 1, 5 (Iowa App. 1994).

8. Visitation should include not only weekend time, but time during the week when not disruptive to allow the noncustodial parent the chance to become involved in the child's day-to-day activities as well as weekend fun. In re Marriage of Ertmann, 376 N.W.2d 918, 922 (Iowa App. 1985); see also In re Marriage of Muell, 408 N.W.2d 774 (Iowa App. 1987). The Court of Appeals has held that the nonphysical custodian is entitled to midweek visitation with the child in addition to visitation on alternating weekends in accordance with the statutory preference for maximum contact. In re Marriage of Toedter, 473 N.W.2d 233 (Iowa App. 1991.)

9. There is a rebuttable presumption that the amount of child support which would result from application of the guidelines prescribed by the Supreme Court is the correct amount of child support to be awarded. Section 598.21(3), The Code.

10. One of the primary purposes of uniform child support guidelines is to provide an efficient, equitable and predictable method of determining child support. In Re Gilley v. McCarthy, 469 NW2d 666, 667 (Iowa 1991). Also, "Before the amount of support can be fixed in accordance with the guidelines, an honest and complete revealment of income must be made." In re Marriage of Lux, 489 N.W.2d 28, 30 (Iowa App. 1992). It is not the Court's responsibility to search the record for the proper figures to use for applying the Child Support Guidelines. When a child support payer provides no reliable information to the Court regarding his income, he has little room to complain. In re Marriage of Hansen, 514 N.W.2d 109 (Iowa App. 1994).

11. Distribution of property of the parties in dissolutions should be equitable under all circumstances after considering the statutory criteria. In Re Marriage of Hanson, 475 NW2d 660 (Iowa 1991). In Re Marriage of Stewart, 356 NW2d 611 (Iowa 1984).

12. The Court has considerable discretion in awarding attorney fees. In re Marriage of Grady-Woods, 577 N.W.2d 851 (Iowa App. 1998). An award of attorney fees is not a matter of right, but rests within the Court's discretion and the party's financial positions and, in determining whether to award attorney fees, the Court is required to consider the needs of the party making the request and the ability of the other party to pay. In re Marriage of Russell, 473 N.W.2d 244 (Iowa App. 1991). Any amount awarded should be fair and reasonable and based upon the party's respective abilities to pay. In re Marriage of Coulter, 502 N.W.2d 168 (Iowa App. 1993).

DECREE

1. **Custody:** Paige shall have primary physical care of the minor children, subject to Kyle's right of visitation.

a. Both parents shall have access to all medical, school, law enforcement, and other records concerning the minor children without the necessity of obtaining a release of information from the other parent.

b. The school, sports, musical and social activities of the minor children shall be paramount and both parties agree that if the children are with them or are scheduled to be with them at the time of any activity, they will cooperate in providing transportation and allowing the children to attend the activity.

c. In the event there is an activity or event that is scheduled to occur during either parent's care time, the parent scheduling the event shall give the other parent notice of the event. The parent receiving notice shall have twenty-four (24) hours to respond to the notice, and either give their consent to the child's participation in the event or their disagreement. In the event the parent fails to provide a response to the notice within twenty-four (24) hours, the parent providing the notice shall be allowed to schedule the event for the child.

d. Neither parent shall attempt or condone any attempt, directly or indirectly, to estrange the children from the other parent or to injure or impair the relationship existing between the children and each parent. Neither party will make or allow others to make negative comments about the other parent or the other parent's past or present relationships, family, or friends within hearing distance of the children.

e. Each parent shall keep the other advised of their present address and telephone number and shall notify the other parent promptly of any changes in address or telephone.

f. The children shall be permitted to call the parent they are not with at their request at any time. The parent the children is not with shall be permitted to call the children during their waking hours at times which will not interrupt the children's or the other parent's schedule.

g. Each parent shall ensure that the children are not exposed to others that are emotionally, verbally or physically abusive to the children.

h. In the event Kyle is working during his care time with the children, and not expected to return home prior to the conclusion of his care time, Paige shall be allowed to pick the children up no later than 15 minutes prior to the time Kyle will need to leave for work, and have the children in her care from that point forward.

i. N.A.T., V.A.T., S.E.T., and A.M.T. shall continue to be dual enrolled in home and public school programs. Paige shall continue to provide the instruction to the children with respect to the home schooling component of the children's schooling.

2. **Visitation:** Kyle shall be entitled to the following minimum visitation:

a. Every other weekend, commencing on Friday at 5:00 p.m. and ending on Sunday at 2:45 p.m.

b. Every Wednesday, commencing at 3:30 p.m. until 9:00 p.m. During the school year, Kyle shall enjoy this mid-week visitation with each of the parties' children on a one-on-one basis, starting with the parties' oldest child and rotating weekly thereafter with each child having one visit with Kyle in each four week period.

c. During the summer and while school is not in session, Kyle shall exercise his midweek visits with all four children at the same time, and these visits shall commence at 3:30 p.m. on Wednesdays and conclude at 8:00 a.m. the following morning.

d. With the exception of Kyle's midweek visitation, Kyle and Paige shall equally be responsible for providing all transportation to and from visitation, with Kyle providing the transportation at the commencement of visitation and Paige providing the transportation at the conclusion of visitation. For the midweek visitation, Kyle shall be responsible for all transportation. Both parties shall be diligent in having the children ready and available at the appointed times and the transporting party shall be prompt in picking up and delivering the children.

e. The parties shall alternate the following holidays:

1. January 1 (8:00 a.m. to January 2 at 8:00 a.m.);
2. Easter (8:00 a.m. to 8:00 a.m. the following day);
3. Memorial Day (Friday before Memorial Day at 4:00 p.m. until Memorial Day at 4:00 p.m.);
4. July 4 (8:00 a.m. to July 5 at 8:00 a.m.);
5. Labor Day (Friday before Labor Day at 4:00 p.m. until Labor Day at 4:00 p.m.);
6. Thanksgiving (including the weekend following);
7. New Year's Eve (8:00 a.m. to 8:00 a.m. New Year's Day).

In even numbered years, Kyle shall be entitled to have the children with him on the odd numbered holidays, and in even numbered years, Paige shall be entitled to have the children with her on even numbered holidays. In odd numbered years, Kyle shall be entitled to have the children with him on even numbered holidays; and in odd numbered years, Paige shall be entitled to have the children with her on the odd numbered holidays. If not otherwise specified, holiday visitation shall be from 8:00 a.m. to 5:00 p.m. Holiday visitation shall take precedence over normal weekend visitation.

f. Kyle shall have the children with him every Christmas Eve (8:00 a.m. Christmas Eve Day to 8:00 a.m. Christmas Day).

g. Paige shall have the children with her Christmas Day (8:00 a.m. on Christmas Day to December 26 at 8:00 a.m.).

h. Kyle shall have visitation on every Father's Day whether it falls on his visitation or not from 8:00 a.m. to 5:00 p.m. Paige shall have the children with her on Mother's Day every year commencing at 8:00 a.m. whether it falls on Kyle's visitation or not.

i. Both parents may spend time with the children on their birthdays. In the event the parents cannot agree to spend time together on the children's birthdays, the parent having custody of the child on the child's birthday will allow the other parent a minimum of 2 hours of uninterrupted visitation time with all of the children on the respective child's birthday.

The holiday, Father's Day, Mother's Day, and birthday visitations shall have precedence over the regular visitation schedule but shall not otherwise modify it (for example, if the holiday granted in any particular year to Kyle falls between the regular weekend visitation, Kyle will have visitation three (3) weekends in a row at that time).

j. Each parent shall have the option of spending two weeks of vacation time with the children during the time of summer school vacation. This shall be exercised in two instances of one week. These vacation weeks shall be designated by June 1 of the year in which the vacation is to be taken and shall extend from Monday morning at 9:00 a.m. until the following Monday morning at 9:00 a.m. unless different times are agreed upon by both parties.

k. Absent a mutual agreement between the parties, the children shall continue to be dual enrolled in home and public school programs.

l. If Respondent does not plan to use his parenting time, he will provide Petitioner with notice 24 hours in advance of his scheduled parenting time.

m. Each parent shall provide adequate personal belongings, clothes, and personal hygiene items for the children while they are in their care.

n. Both parents shall support the children's extracurricular activities. The parties shall ensure the children attend their extracurricular activities, practices, meetings, or events. If a parent is unable to take the child to one of her/his activities during their parenting time, they will consider altering their care schedule for that day to ensure the child can attend.

3. **Child Support:** Kyle shall pay as and for child support the sum of $1,167.73 per month for the minor children which shall be payable on the 15th day of each and every month, commencing on the 15th day of the first month following the entry of the Decree of Dissolution

Kyle's child support obligation shall continue for each child until the child graduates from high school, or until the minor child should die, marry or otherwise become emancipated at an earlier date. It is contemplated that children will be 19 at the time of their graduation, and it is expressly ordered that the child support obligation shall continue until the children graduate from high school, regardless of their age.

There shall be a step-down in the monthly child support obligation as the number of children entitled to support changes as set forth below:

Number Of Children	Amount Of Support
3	$1,040.80
2	$887.75
1	$606.52

Support payments shall be paid to the Linn County Clerk of Court, Linn County Clerk of Court, PO Box 1468, Cedar Rapids, or to the Collection Services Center, of the Department of Human Services, PO Box 9125, Des Moines, Iowa 50306-9125, if the parties are so notified by that department.

Immediate income withholding is ordered pursuant to Iowa Code § 252D.8. In the event that the child support obligation becomes delinquent in the amount exceeding one month's obligation, the court may, upon declaring a default, order an assignment of income sufficient to pay the support obligation. The amount of the assignment of income shall not exceed the amount specified in 15 U.S.C. § 1673(b).

Each party shall file with the clerk of court upon entry of this order a) their full name; b) social security number; c) driver's license number, if different than the social security number; d) residential address; e) mailing address, f) telephone number; and g) name, address and telephone number of his/her employer, all in compliance with Iowa Code section 598.22B. The information filed will be disclosed and used only pursuant to that code section. It should be updated as appropriate. The parties are each notified that in any subsequent child support action initiated by either party or the child support recovery unit, if it is shown that a diligent effort has been made to ascertain then location of a party without result, the due process requirement for notice and service of process will be

complete upon delivery of written notice to the most recent residential or employer address filed as herein provided.

4. **Health Insurance and Uncovered Medical Expenses:** Kyle shall maintain health insurance coverage on each of the parties' children so long as a child is eligible for coverage, and as long as the cost of the coverage remains reasonable, as determined by the Child Support Guideline Worksheets.

Paige shall pay the first $250.00 per year per child of uncovered medical expenses up to a maximum of $800.00 per year for all children. Uncovered medical expenses in excess of $250.00 per child shall be paid by the parents in proportion to their respective net incomes 38% by Paige and 62% by Kyle. "Medical expenses" shall include, but not be limited to, the cost for reasonably necessary medical, orthodontia, dental treatment, physical therapy, eye care, including eyeglasses or contact lenses, mental health treatment, substance abuse treatment, prescription drugs, and any other uncovered medical expenses. Uncovered medical expenses are not to be deducted in arriving at net income. The party incurring the non-covered expense shall provide a copy of the billing to the other party who shall pay their share of the billing within fifteen (15) days of the receipt of the bill unless the parties shall agree otherwise.

5. **Post Secondary Education Expenses**: In the event any child of the parties is regularly attending a course at a vocational/technical training school either as part of a regular school program or under special arrangements adapted to the child's needs, or is in good faith a full-time student in a college, university, or community college, or has been accepted for admission to a college, university, or community college, the parties shall each contribute one-third of the cost of the post-secondary education. Each party's contribution shall be determined pursuant to the guidelines set forth in Iowa Code Section 598.21(f) and shall be limited to one-third of the cost of attending an in-state public institution for a course of instruction leading to an undergraduate degree and shall include the reasonable costs for only necessary post-secondary education expenses.

6. **Driver's Education Classes**: Kyle and Paige shall each pay one half of the cost of driver's education classes for each of their children.

7. **Life Insurance**: Kyle shall maintain his current life insurance coverage, with the intention that said coverage will secure the support of the minor children of the parties as contemplated in this decree. The beneficiary under said life insurance coverage shall be a trust created under the Last Will and Testament of Kyle for the benefit of the minor children. Kyle shall provide Paige with proof of insurance on an annual basis. The child support obligation which has arisen under the terms of this document shall be a binding obligation upon Kyle's estate and the trust which is created under the Last Will and Testament of Kyle. The Trust shall provide that the monthly child support be payable to

Paige. Kyle shall have the insurance coverage in place within sixty (60) days after the entry of a decree herein.

8. **Income Tax Deductions:** While four children remain eligible to be claimed as dependents on the parties' State and Federal income tax returns, Kyle shall be allowed to claim N.A.T. and S.E.T. Paige shall be allowed to claim V.A.T. and A.M.T. When only three children remain eligible to be claimed as a dependent on the parties' State and Federal income tax returns the parties shall alternate being allowed to claim the oldest eligible child as a dependent, with Kyle being allowed to claim the oldest eligible child the first year and with each of the parties continuing to claim the remaining child. While two children remain eligible to be claimed as dependents on the parties' State and Federal income tax returns, Kyle shall be allowed to claim S.E.T. Paige shall be allowed to claim A.M.T. When only one child remains eligible to be claimed as a dependent on the parties' State and Federal income tax returns the parties shall alternate being allowed to claim the eligible child as a dependent, with Paige being allowed to claim the eligible child the first year.

However, the parent paying child support or non-covered covered medical support shall only be allowed to claim a child as dependent if he or she is current on his child support and non-covered medical support obligation as of the 31st day of January following the year in which he or she would ordinarily be allowed to claim a child as a dependent. If the parent paying child support or non-covered medical support is not current, the other parent shall be allowed to claim the child the parent paying child support would ordinarily be entitled to claim. Both parties shall cooperate in signing any forms required by the taxing authorities or any other agency to implement the terms of this paragraph.

With regard to the filing of the parties' 2017 tax return, the parties shall work together through a CPA or attorney to each calculate their taxes as though they would be filing single, and also calculate their taxes as filing jointly, and choose which approach best serves both of the parties together. The parties shall then accordingly file their 2017 tax return, and any refund or payment of taxes for the 2017 tax year shall be made by the parties on a 50-50 basis.

9. **Real Estate:** Kyle is awarded all right, title and interest to the following described real estate:

Lot Nine (9) and the South 15 feet of Lot Ten (10) in Block Six (6) of South Park Addition to the City of Fairfield, Jefferson County, Iowa;

AND

Lot Eight (8) in Block Six (6) in South Park Addition to the City of Fairfield, Iowa.

Kyle shall be responsible for payment of all taxes, special assessments, mortgage payments and ordinary expenses related to the maintenance of the property.

Within 60 days of the date a decree is entered in this matter, Kyle shall refinance the outstanding mortgages on this real estate, and remove Paige's name from any of the promissory notes which are secured by a mortgage on this property.

Until such time as the Kyle refinances the mortgage(s) on said property, the parties shall hold the real estate as tenants in common. When Kyle completes refinancing of the mortgage(s) on said real estate, Paige shall execute a quit claim deed to Kyle.

In the event Kyle is unable to refinance the mortgage(s) on the real estate within 60 days of the entry of the Decree herein, said property shall then be sold. He shall chooose a realtor to list the house for sale, determine the listing price and have the property listed within 61 days after the entry of the Decree if Kyle does not obtain refinancing within 60 days after entry of the Decree.

The parties shall cooperate in all aspects of the sale, including that Kyle shall ready the property for sale and make it available for showings. Until such time as the real estate is sold, Kyle shall be allowed to remain living in the residence provided that he shall be responsible for the monthly mortgage payment, taxes, insurance, utility bills and upkeep of the property.

The parties shall not unreasonably withhold their acceptance of any bona fide offer. In the event that the property does not sell within six months after it is listed, the listing price shall be reduced by 3% and continue to be reduced by 3% every six months until the property is sold.

The proceeds from the sale shall first be used to pay off all fees involved in the sale of the property including but not limited to outstanding mortgage, abstracting, realtor's commissions, inspections, and revenue stamps. After the payment of the foregoing from the proceeds, Kyle shall receive the remaining proceeds from the sale.

10. **Retirement Accounts:** The values of the parties' Roth IRAs as of the date of the Decree shall be divided equally between the parties with an equalizing payment from Paige's Roth IRA to Kyle's Roth IRA. The values of the parties' remaining qualified and non-qualified 401(k) and IRA accounts as of the date of the Decree shall be added together and divided equally between the parties with an equalizing payment from Kyle to Paige from Kyle's Hy-Vee 401k. Counsel for Kyle shall prepare any qualified domestic relations orders required to achieve the distribution ordered in this paragraph.

11. **Other property:** Paige shall be awarded, as her exclusive property, all the personal property, household goods, furnishings, and personal effects which are currently in her possession. Kyle shall be awarded, as his exclusive property, all the personal property, household goods, furnishings, and personal effects in his possession.

Paige shall be awarded the 2004 Honda Odyssey, and Paige shall assume all indebtedness thereon and shall indemnify and hold Kyle harmless therefrom. Kyle shall be awarded the 2001 Honda Accord, and Kyle shall assume all indebtedness thereon and shall indemnify and hold Paige harmless therefrom.

Paige shall be awarded all bank accounts held in her name. Kyle shall be awarded all bank accounts held in his name. Kyle shall be awarded his health savings account.

12. **Liabilities:** Paige shall be responsible for the payment of the debt to Ava Stamp and any credit card debt she may have in her name, and Paige shall indemnify and hold Kyle harmless therefrom. Kyle shall be responsible for the payment of his student loans, and any credit card debt in his name and Kyle shall indemnify and hold Paige harmless therefrom. Except as otherwise provided in this Stipulation each party shall assume responsibility for any and all debts incurred in their respective names.

13. **Alimony:** Neither party shall be awarded spousal support.

14. **Equalization Payment.** Kyle shall pay to Paige an equalization payment in the amount of $29,859.45. The payment shall be due within eighteen months of the date of this decree (by September 29, 2019).

15. **Attorney Fees and Court Costs:** Kyle shall pay the remaining court costs in this action. Kyle shall pay $1,500.00 toward Paige's attorney fees and Kyle shall pay his own attorney fees. The $1,500 payment from Kyle to Paige's attorney shall be made within 60 days from this date. Paige shall otherwise pay her otherwise remaining attorney's fees.

Clerk to notify.

IN THE IOWA DISTRICT COURT IN AND FOR TAMA COUNTY

ROBERTO MORALES DIAZ,	)	
	)	No. PCCV007389
Applicant,	)	
	)	**Findings of Fact, Conclusions**
vs.	)	**of Law and Ruling**
	)	
STATE OF IOWA,	)	
	)	
Respondent,	)	

Trial on the Applicant's Application for Post-Conviction Relief was held on April 10, 2015. The Applicant personally appeared with his Attorneys, Julia Zalensky and Dan Vondra, and the State was represented by Tama County Attorney Brent Heeren. Both parties filed post-trial briefs.

Facts

At the time of hearing on Applicant's Application for Post- Conviction Relief, Applicant Roberto Morales Diaz testified. He was born in Meixco and has no legal status in the United States. However, he has been in the United States for the past ten years, and has a child, age 2 ½, here in Tama County. In February 2013, Mr. Morales Diaz was issued a Notice to Appear by the Department of Homeland Security (DHS) alleging that he was removable from the United States. At the time, Mr. Morales Diaz was released from DHS custody on his own recognizance.

Also in February 2013, in case number FECR013772 in the Iowa District Court in and for Tama County, Mr. Morales Diaz was charged with the crime of Forgery, a class D felony in violation of sections 715A.2(1), 715A.2(1)(d), and 715A.2(2)(a) of the Code of Iowa. Initially in that case, Mr. Morales Diaz was held on a $5,000 bond, and was allowed to post ten percent of that amount to bond out of jail. This Forgery charge remained pending well into 2014.

On July 3, 2014, at his pretrial conference in the Tama County forgery case, the Court entered an Order setting his matter for a plea hearing on July 24, 2014. That Order clearly indicated that it was anticipated that Mr. Morales Diaz would enter a guilty plea to Aggravated Misdemeanor Forgery at the time of the July 24 hearing. It is also notable within the FECR013772 file that it was anticipated at that time that Mr. Morales Diaz's federal immigration matter would be concluded before the July 24th plea hearing.

Unfortunately, in July of 2014, before this criminal matter was concluded, Mr. Morales Diaz, for the first time ever, missed an immigration hearing in his federal immigration case. Mr. Morales Diaz became aware of the fact that an arrest warrant had been issued for him relative to

this failure to appear, and that the warrant included that he would be deported if apprehended. Fearing that he would immediately be deported if he showed up at his plea hearing in the Tama County case, Mr. Morales Diaz chose not to appear on July 24 to enter a plea. In reviewing the paperwork he received on the failure to appear warrant that was issued after that failure to appear, Mr. Morales Diaz believed that he would be fined $5,000 if he did not appear in Tama County.

Attorney Frese, for his part, testified that he represented Mr. Morales Diaz in the felony Forgery case noted above. He had known Mr. Morales Diaz previously, and was aware that Mr. Morales Diaz was working in the federal immigration system to try to obtain a green card. Mr. Frese testified that he believed that Mr. Morales Diaz's criminal charges "would have made it difficult, if not impossible" for Mr. Morales Diaz to stay in the United States. Mr. Frese was aware that Mr. Morales Diaz had a federal immigration hearing in July 2014, and that Mr. Morales Diaz was expected to enter a guilty plea to the lesser charge of misdemeanor forgery thereafter in late July 2014. Though Attorney Frese was able to stay in contact with Mr. Morales Diaz's girlfriend throughout July 2014, Frese stated that Mr. Morales Diaz disappeared from his contact and did not show up for the July 24, 2014 plea hearing. Frese sent Mr. Morales Diaz a letter indicating that the money Mr. Morales Diaz had posted for bond was at jeopardy because a bond forfeiture hearing had been scheduled in light of Mr. Morales Diaz's failure to appear at the July 24 hearing.

Based upon the foregoing, Mr. Morales Diaz decided to turn himself in on August 21, 2014. According to Mr. Morales Diaz, his attorney, Chad Frese, advised him that to get out of jail, he should plead guilty, and that he would "get out clean" and without probation. Mr. Morales Diaz testified that Frese gave him a paper to sign (the guilty plea), and he was desperate because his daughter was little at the time. However, Mr. Morales Diaz also testified that Frese told him nothing about any immigration consequences of pleading guilty, and that had Frese told him the guilty plea would affect his immigration status on a long term, he would not have signed it.

Attorney Frese recalled that in the conversation slightly differently, indicating that Mr. Morales Diaz was apologetic for letting Frese down, and that he "just wanted to get this over with." Frese related that Mr. Morales Diaz stated at that time that "if he had to go to Mexico he would go to Mexico." Frese also testified that he told Mr. Morales Diaz that "chances were he'd be deported no matter what happened" and he "knew there was a chance he's be deported."

In any event, Mr. Morales Diaz signed the guilty plea for misdemeanor forgery on August 21, 2014. The guilty plea form which Mr. Morales Diaz signed did include, in English, the statement "I understand that a criminal conviction, deferred judgment or deferred sentence, may result in my deportation or have other adverse immigration consequences if I am not a

United States citizen." A translator, Americo Maldonado, did appear at the jail with Attorney Frese to go over the plea with Mr. Morales Diaz. According to Frese, he told Mr. Morales Diaz that "chances were he'd be deported no matter what."

From his testimony, it was clear that Frese believed that the longer Mr. Morales Diaz was in jail, the more likely there would be a federal hold on his client, which both Frese and Mr. Morales Diaz wished to avoid. Even so, it is clear that Frese did not want Mr. Morales Diaz to be subjected to deportation, and did contact an immigration attorney to try to determine best options for Mr. Morales Diaz under the circumstances. However, it appears that at the time that he was advising Mr. Morales Diaz relative to the plea, Frese's understanding of the ramifications on Mr. Morales Diaz's immigration status of him entering a guilty plea to the misdemeanor forgery charge were either erroneous or incomplete. Specifically, Frese testified that his goal was to shoot for a misdemeanor with less than a year in jail to give his client "a shot" to stay in the U.S. The Court notes that the crime to which Mr. Morales Diaz pleaded guilty, however, was a misdemeanor forgery charge that carried a potential for two years of incarceration.

Once Mr. Morales Diaz entered his guilty plea, Mr. Morales Diaz was released from jail by Tama County. Mr. Morales Diaz was taken into custody by the DHS in November 2014.

Mr. Morales Diaz claims that attorney Frese provided him with ineffective assistance of counsel in that Mr. Morales Diaz states that he was not advised that his guilty plea would have serious immigration consequences and that, when he entered said plea, Mr. Morales Diaz was not advised what the consequences for his plea would be.

Mr. Morales Diaz also provided to the Court four exhibits at the time of trial. These included a Notice to Appear in Mr. Morales Diaz's immigration case; a I-213 Record of Deportable/Inadmissible Alien; an Administrative Removal Order; and an Expert's statement relative to the impact of the misdemeanor forgery guilty plea on Mr. Morales Diaz's immigration status.

Exhibit Four, specifically, is a letter penned by Clinical Visiting Associate Professor Bram T.B. Elias of the University of Iowa College of Law, which addresses the effect of Mr. Morales Diaz's conviction for the aggravated misdemeanor forgery charge to which he pleaded guilty under Iowa Code section 715A.2(b). Professor Elias states in said letter unequivocally that under the federal Immigration and Nationality Act ("INA"), the charge to which Mr. Morales Diaz entered a guilty plea in this matter is an "aggravated felony", and as such he is subject to "severe, automatic, and irreversible" immigration consequences. This is because the charge to which Mr. Morales Diaz plead guilty was an "offense relating to forgery" and involves the potential for a sentence greater than one year, even if the term of incarceration may be suspended. The severe consequences include that the individual would be ordered deported and would neither be eligible for bond or judicial review. Even without being entirely familiar with Mr. Morales Diaz's personal history and immigration status, Professor Elias states that "it is

clear that he is deportable and many of the forms of relief from deportation he might have been eligible for prior to his conviction are now unavailable to him" and "Mr. Morales Diaz is severely prejudiced by his conviction." (Ex. 4, p. 3) Lastly, Professor Elias opines that the immigration consequences to Mr. Morales Diaz were "truly clear," and as such, under Padilla v. Kentucky, 559 U.S. 356, counsel had a duty to give correct advice which was equally clear, and that without having done so, he has failed to provide effective assistance of counsel under the Sixth Amendment.

CONCLUSIONS OF LAW

An applicant in a post-conviction proceeding has the burden of proof by a preponderance of the evidence. State v. Hischke, 639 NW2d 6, 8 (Iowa 2002) and Lopez v. State, 318 NW2d 807, 811 (Iowa App. 1982).

Ineffective Assistance of Counsel.

To prevail on a claim of ineffective assistance of counsel, the applicant must demonstrate both ineffective assistance and prejudice. Ledezma v. State, 626 NW2d 134, 142 (Iowa 2001) citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984). Both elements must be proven by a preponderance of the evidence. Id. If the claim lacks prejudice, it can be decided on that ground alone without deciding whether the attorney performed deficiently. Id. To sustain the burden to prove prejudice, the applicant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 143. To show prejudice "[i]n the context of pleas, a defendant must show the outcome of the plea process would have been different with competent advice." Lafler v. Cooper, 132 S.Ct. 1376, 1384 (2012).

To determine whether a counsel's conduct is deficient, "[t]he court must determine whether, in light of all of the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Lindstadt v. Keane, 239 F.3d 191, 198-99 (2d Cir. 2001). In gauging the deficiency, the court must be "highly deferential," must "consider all the circumstances," must make "every effort . . . to eliminate the distorting effects of hindsight," and must operate with a "strong presumption that the counsel's conduct falls within the wide range of reasonable professional assistance . . ." Id. citing Strickland at 688-89.

Under Padilla v. Kentucky, criminal defense attorneys are required to advise defendants of the clear immigration consequences of their guilty pleas. 559 U.S. 356, 368–69 (2010). When counsel fails to advise of the clear immigration consequences of a plea or affirmatively misadvises a defendant about those consequences, counsel's performance is constitutionally

deficient. *Id.* Where the immigration consequences of a plea are unclear or uncertain, counsel is required only to "advise a non-citizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Id.* But when the "consequence is truly clear . . . the duty to give correct advice is equally clear." *Id.*

It is uncontroverted in the record made at the time of this post-conviction relief proceeding that aggravated misdemeanor forgery in violation of Iowa Code § 715A.2 is without a doubt an aggravated felony under federal immigration law. *See* Applicant's Exh. 4 at 1–2. The immigration consequences of an aggravated felony conviction are "severe, automatic, [and] irreversible." *Id.* at 2. Those consequences include ineligibility for almost all forms of relief from removal; ineligibility for bond during immigration proceedings; and for individuals with no lawful status in the United States, loss of the right to a hearing in immigration court before deportation. *Id.* at 2–3. These consequences are clear, well-established, and highly predictable. *Id.* at 1–3.

RULING

I find the preponderance of the evidence clearly supports a finding of deficient performance in violation of the rule set out in Padilla v. Kentucky. I agree with Mr. Morales Diaz's assertion that the record in the underlying criminal case shows only that Mr. Morales Diaz received affirmative misadvice as to the immigration consequences of his guilty plea. The written guilty plea states that the plea and conviction "may" result in adverse immigration consequences, which is categorically incorrect. *See* Padilla, 559 U.S. at 369; Applicant's Exh. 4. The record at trial also reflects that Mr. Frese was not certain of the effects that the guilty plea could have upon Mr. Morales Diaz's immigration status. Specifically, Mr. Frese testified that "chances were he'd be deported no matter what happened" and he "knew there was a chance he's be deported." However, the conviction in this case had clearly foreseeable and extremely severe immigration consequences, not just a "chance" Mr. Morales Diaz would be deported. The record in the criminal case shows that Mr. Morales Diaz received incorrect advice as to those consequences. *Id.* The record is consistent with Mr. Morales Diaz's testimony that he was not advised that his conviction would have any adverse immigration consequences, and was unaware that the conviction had severe immigration consequences until his detention by DHS in November 2014. Mr. Frese stated that he did not advise Mr. Morales Diaz that his conviction would make him ineligible for most forms of relief from removal, that the conviction would make him ineligible for bond in his immigration case, or that the conviction would make him subject to expedited removal from the United States without a hearing in immigration court. These were clear consequences of Mr. Morales Diaz's guilty plea, and Mr. Frese had an affirmative duty to advise him of those consequences. *See* Padilla, 559 U.S. at 369. Furthermore, Mr. Frese was incorrect that Mr. Morales Diaz was removable from the United States regardless of his conviction, and to the extent that his advice turned on that error, gave Mr. Morales Diaz incorrect advice. *See* Applicant's Exh. 3 (final order of removal dated March 30, 2015, well after the guilty plea in this case).

Finally, Mr. Frese stated that he did not fully advise Mr. Morales Diaz of the immigration consequences of his guilty plea because Mr. Morales Diaz wanted to get out of jail as soon as possible without regard to the immigration consequences of doing so. However, Mr. Morales

Diaz's understandable desire to get out of jail does not obviate counsel's obligation to inform Mr. Morales Diaz of the clear consequences of his immigration plea. *Padilla* requires that the defendant be advised of the immigration consequences of a guilty plea. *Padilla,* 559 U.S. at 369. Counsel does not meet his *Padilla* obligations by merely conducting research and being aware of the immigration consequences of the plea. The crux of *Padilla* is that the defendant has the right to be advised of any clear, adverse immigration consequences of the plea so that he can make a fully informed decision about whether to plead guilty.

Mr. Morales Diaz has established by a preponderance of the evidence that he was prejudiced by his counsel's deficient performance. Mr. Morales Diaz testified that if he had known that his guilty plea would have such severe immigration consequences, he would not have agreed to plead guilty even if it meant he would have had to spend additional time in jail. Importantly, Mr. Morales Diaz was prejudiced by relying upon counsel's advice in giving up his most basic right to a trial on the charges. Mr. Morales Diaz's testimony showed clearly that "the outcome of the plea process would have been different" had he been advised of the immigration consequences of the guilty plea. Additionally, the Court notes that Mr. Morales Diaz is the primary caregiver for his two-year-old daughter Briana, who is a United States citizen. The Court is not convinced that, given a fully informed choice, Mr. Morales Diaz would have chosen to plead guilty and suffer severe immigration consequences that will likely separate him from his child permanently. The Court finds this particularly true given that if not for his conviction, he would be eligible for a form of relief called "cancellation of removal" based on the extreme hardship his removal would cause to Briana. *See* Applicant's Exh. 4 at 2 (discussing ten-year cancellation of removal); Exh. 1 (showing that Mr. Morales Diaz has continuously resided in the United States for over ten years).

IT IS ORDERED that the Applicant's Application for Post-Conviction Relief is SUSTAINED. The Applicant has established by a preponderance of the evidence that his defense counsel's performance was constitutionally deficient and that he was prejudiced by that deficient performance. Further, the Applicant was not advised of the clear, adverse immigration consequences of his guilty plea, and if he had been accurately advised he would not have agreed to plead guilty. Accordingly, the Court DOES NOW allow the Applicant to withdraw his previously entered guilty plea in case number FECR013772, in the Iowa District Court in and for Tama County, and FURTHER ORDERS the Applicant's conviction in that matter be vacated and the matter be set in for a trial setting conference. Court administration is to set said trial setting conference by separate order.

Costs are assessed to the State.

Dated: April 17, 2015.

Clerk to notify.

IN THE IOWA DISTRICT COURT IN AND FOR LINN COUNTY

BRANDY BYRD,	)	No. PCCV076895
	)	
Applicant,	)	
	)	RULING
Vs.	)	
	)	
STATE OF IOWA,	)	
	)	
Respondent.	)	

Trial on the Applicant's Application for Post-Conviction Relief was held on July 21, 2016. The Applicant appeared in person and with her Attorney, Mark Meyer, and the State was represented by Assistant Linn County Attorney Robert Hruska. The Court took judicial notice of the underlying criminal file, Linn County case number FECR044094, as well as the criminal file of her co-defendant, David Keegan, Linn County case number FECR044095, and also reviewed a number of exhibits offered by the Applicant.

FINDINGS OF FACT

The Applicant, Brandy Byrd, was convicted by a jury of murder in the first degree and one count of robbery in the first degree on July 15, 2003. This conviction stemmed from a January 6, 2002, incident wherein Byrd's co-defendant, David Keegan, lured the victim, Greg Wells, into an apartment, and Byrd then struck Wells repeatedly in the head with a hammer, and Keegan cut his throat with a knife. Wells died from injuries sustained in the attack. Byrd, who was not a juvenile at the time of the offense, was sentenced to life in prison without the possibility for parole on her murder charge, and twenty-five years on her robbery charge. Keegan, who was a juvenile at the time of the offense, was likewise sentenced to life without parole for his part in the crime. Keegan, however, was resentenced on August 5, 2016 by the Honorable Judge Lars Anderson to allow for the possibility of parole within his life sentence, in light of recent federal and Iowa case law concerning the constitutional sentencing of juveniles.

Byrd filed an initial application for post-conviction relief alleging that her trial counsel was ineffective in failing to adequately cross examine witnesses and failing to object to certain evidence. She also amended her petition in that matter to allege that her trial counsel was also ineffective for failing to move for a new trial. Her application for post-conviction relief was denied, and this denial was affirmed by the Iowa Court of Appeals on March 14, 2012.

The post-conviction matter in the instant case was thereafter filed by Byrd on October 15, 2012. In this, her second Application, Byrd set forth grounds that her conviction or sentence was in violation of the Constitution of the United States or the Constitution or laws of this state. She further alleged that her conviction or sentence is otherwise subject to collateral attack upon grounds of alleged error formerly available under any common law, statutory, or other writ,

motion, proceeding, or remedy. Byrd went on to explain her grounds and allegations in her Petition, claiming there had been a recent change in the law concerning aiding and abetting for juvenile offenders, and claiming that she was now serving more time for her part in the crime than the "principal offender," as she claimed Keegan to be. Byrd further contended in her Petition that federal law mandates that the sentence of an individual who was an accessory should not exceed half of the maximum sentence a principal receives.

A second ground explained by Byrd in her Petition alleged that the Iowa State Medical Examiner stated two different reasons for the victim's death. The third ground set forth by Byrd in her Petition herein cited the excessive fines clause and alleged the Court did not explain why it imposed a $250,000 victim restitution award.

On October 24, 2012, subsequent to the Court's appointment of counsel to represent Byrd herein, the State of Iowa filed a Pre-Answer Motion to Dismiss. In its Motion, the State argued that Byrd's Petition was untimely pursuant to Iowa Code Section 822.3. The State pointed out in its Motion to Dismiss that Applicant was convicted of Murder in the First Degree and Robbery in the First Degree on September 12, 2003, and the Iowa Court of Appeals upheld her conviction on October 27, 2004, but that her current action for post-conviction relief herein was not filed until October , 2012, well outside of the three years of the issuance of procedendo following Applicant's original appeal of her underlying criminal conviction to the Iowa Court of Appeals. On January 24, 2013, the Honorable Judge Robert Sosalla denied the State's Motion to Dismiss, stating that, in construing the Applicant's Petition in a light most favorable to the plaintiff, with all doubt resolved in the plaintiff's favor, at that time there remained fact questions as to (1) whether Byrd's rights were violated by the Court's imposition of a greater amount of restitution than the minimum, (2) whether the fact that Byrd was now serving a greater sentence than her co-defendant violated her constitutional rights, and (3) whether newly discovered evidence that the medical examiner changed her testimony on the cause of the victim's death violated her constitutional rights. Thereafter, the State filed its Answer to Byrd's Petition denying all allegations set forth therein.

On November 27, 2015, Byrd filed a Motion for Leave to Amend her pro se Petition, arguing that her sentence was illegal because the jury did not find all the facts necessary to enhance the penalty for murder to that for murder in the first degree. In her Motion, Byrd argued that she was convicted of aiding and abetting felony murder, but the jury was not required to make the "additional findings" (an independent forcible felony) in order to enhance the sentence from the maximum for second degree murder to the maximum for first degree murder. The State responded arguing that the Motion was untimely. Thereafter, trial was continued, and the Court allowed Byrd's amended claim to proceed. The State thereafter answered with a general denial of the added claim.

Issues before the Court in this post-conviction action are therefore as follows:

1. Is Byrd's Application for Post-Conviction relief untimely?
2. Was it a violation of due process for the prosecution to present evidence at the co-defendant's trial and subsequently present contradictory evidence at the defendant's trial, to wit, a variation within the Medical Examiner's testimony?

3. Was trial counsel ineffective for not determining the basis for the imposition of the $250,000 victim restitution award at the time of Byrd's sentencing, and alternatively did the Court's imposition of said award violate Byrd's rights under the excessive fines clause?

4. Was Byrd's sentence in violation of the Constitution of the United States or the Constitution or laws of this state, either (a) due to the fact that the jury did not find all the facts necessary to enhance the penalty for murder to that for murder in the first degree, or (b) due to the fact that co-defendant Keegan, a juvenile at the time of the offense, is now sentenced to a lesser extent than Byrd is as he is eligible for parole?

CONCLUSIONS OF LAW

Pursuant to Iowa Code section 822.3, a proceeding for post-conviction relief "must be filed within three years from the date the conviction or decision is final or, in the event of an appeal, from the date the writ of procedendo is issued." This limitation, however, "does not apply to ground of fact or law that could not have been raised within the applicable time period." This law "is firmly established and regularly followed…" Nims v. Ault, C.A.8 (Iowa 2001), 251 F.3d 698. At trial, the Applicant conceded that her claims relative to the testimony of Julia Goodin, the State Medical Examiner, neither presented new facts, as the testimony of the Medical Examiner most certainly was known and available within the three year period subsequent to Byrd's trial, nor did that issue involve any new law. Therefore, the Court finds that said issue is untimely in light of Iowa Code 822.3, and the Court will not address such issue more fully herein.

Insofar as the Iowa Court of Appeals stated in its upholding of the denial of Byrd's first post-conviction relief case that it would preserve the issue of whether Byrd's trial counsel was ineffective for not challenging the $250,000 victim restitution award as excessive, the Court will address that issue more fully, and does not find it to be untimely in that light.

Further, Byrd's allegation concerning illegal sentence does appear to allege a claim of new law in light of the emergence of recent federal and Iowa case law concerning the sentencing of juveniles. Moreover, pursuant to Iowa Rule of Criminal Procedure 24(5)(a), the Court may correct an illegal sentence at any time. Therefore, the Court will also address the illegal sentence issues presented by Byrd more fully below.

The restitution issue brought forth by Byrd herein was, in her first Application for Post-Conviction Relief, originally couched in the argument that her trial counsel was ineffective for failing to determine the basis for imposition of the $250,000 victim restitution award. This issue was specifically preserved by the Iowa Court of Appeals at the conclusion of her appeal in that matter, to be taken up in later proceedings. As pled in this case, Byrd challenges the restitution award on the basis of the excessive fines clause. Accordingly, the Court addresses this issue from both the perspective of an ineffective assistance claim and from the perspective of an excessive fines clause violation.

An applicant in a post-conviction proceeding has the burden of proof by a preponderance of the evidence. State v. Hischke, 639 NW2d 6, 8 (Iowa 2002) and Lopez v. State, 318 NW2d 807, 811 (Iowa App. 1982). To prevail on a claim of ineffective assistance of counsel, the

applicant must demonstrate both ineffective assistance and prejudice. Ledezma v. State, 626 NW2d 134, 142 (Iowa 2001) citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984). Both elements must be proven by a preponderance of the evidence. Id. If the claim lacks prejudice, it can be decided on that ground alone without deciding whether the attorney performed deficiently. Id. To sustain the burden to prove prejudice, the applicant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 143. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "Result" is defined as the decision rendered. Ledezma at 144. This requires a showing of the reasonable probability of a different verdict or that the fact finder would have possessed reasonable doubt. *Id.*

A claim of ineffectiveness of counsel must be premised on more than simply questionable or unsuccessful trial tactics. State v. Risdil, 404 NW2d 130, 133 (Iowa 1987). When trial counsel makes a reasonable decision concerning strategy, we will not interfere simply because the chosen strategy does not achieve the desired result. State v. Wilkens, 346 NW2d 16, 18 (Iowa 1984). State v. Tracy, 482 NW2d 675, 679 (Iowa 1992). If the attorney had no idea why he made a decision, the decision cannot be labeled a "strategic decision." Moore v. Johnson, 194 F.3d 586, 610 (5th Cir. 1999). We require more than a showing trial strategy backfired or that another attorney would have prepared and tried the case somewhat differently. Petitioner must overcome a presumption that counsel is competent. *Id.*

To satisfy the first prong of the Strickland test, Byrd must show that "counsel's representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688, 104 S. Ct. at 2064, 80 L.Ed.2d at 693. To determine whether a counsel's conduct is deficient, "[t]he court must determine whether, in light of all of the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Lindstadt v. Keane, 239 F.3d 191, 198-99 (2d Cir. 2001). We evaluate the attorney's performance against " 'prevailing professional norms.'" Ledezma v. State, 626 N.W.2d 134, 142 (Iowa 2001) (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065, 80 L.Ed.2d at 694). In gauging the deficiency, the court must be "highly deferential," must "consider all the circumstances," must make "every effort . . . to eliminate the distorting effects of hindsight," and must operate with a "strong presumption that the counsel's conduct falls within the wide range of reasonable professional assistance . . ." Id. citing Strickland at 688-89.

In this case, there is no record relative to why the $250,000 restitution fee was imposed rather than an award in some other amount. The record simply reflects that the State requested the award without explanation as to the amount, and defense counsel made no reply to it. That said, it remains that the Applicant has the burden by a preponderance of the evidence in this case to show that she was prejudiced by her attorney's actions and that there is a reasonable probability that, but for counsel's actions, the result of the proceeding would have been different. As to this issue, the Court finds that Byrd has not met her burden. She has made no showing by a preponderance of the evidence that, had her attorney questioned the amount of restitution requested by the State, there would have been any different result than that imposed by the sentencing court.

As to Byrd's constitutional argument concerning the Trial Court's restitution award, the Court notes that Byrd contends that the $250,000 restitution ordered by the sentencing judge is excessive in violation of the excessive fines clause at Article 1, Section 17 of the Iowa Constitution. Byrd appears to claim that the Court should have considered a more lenient restitution award. However, pursuant to Iowa Code section 910.3B, which states that the Court "shall order the offender to pay at least one hundred and fifty thousand dollars in restitution to the victim's estate," the amount of restitution awarded by the Court is clearly a matter of discretion with the sentencing court so long as it is set above the mandated minimum level. In State v. Izzolena, 609 N.W.2d 541, 550 (Iowa 2000), the Iowa Supreme Court has stated that "In the context of the harm caused, the gravity of offenses under section 910.3 is unparalleled." Further, that Court has also held that "a restitution order is not excessive if it bears a reasonable relationship to the damage caused by the offender's criminal act." State v. Bonstetter, 637 N.W.2d 161, 165 (Iowa 2001). In light of the foregoing, the undersigned cannot find that the $250,000 in restitution ordered by the Court in Byrd's underlying criminal case did not bear a reasonable relationship to the violent death she inflicted upon Greg Wells. Therefore, and for the foregoing reasons, Byrd's claim as to this issue is denied.

Lastly, the Court takes up Byrd's allegations that her sentence is illegal. Byrd's arguments here are two-pronged. First, she alleges that her sentence is illegal in light of recent cases holding that mandatory minimum sentences for juvenile violate the Iowa Constitution, and that because of these advancements in the law, she, as an aider and abettor to David Keegan, a juvenile at the time of the offense, should not receive a longer sentence than Keegan who remains eligible for parole under the current status of the law. Second, Byrd alleges that her sentence is illegal in that the felony murder sentencing enhancement is not properly applied to her because the jury did not make a finding on all of the facts necessary to apply the enhancement.

With regard to Byrd's first claim, the Court finds that Byrd was not a juvenile at the time of the commission of the offense, and therefore the recent decisions regarding juvenile sentencing, including State v. Null, 836 N.W.2d 41 (Iowa 2013) and State v. Lyle, 854 N.W. 2d 378 (Iowa 2014), quite simply do not apply to her. Further, though Byrd claims that she was merely an aider and abettor, and as such should not be subjected to a longer sentence than David Keegan received, the Court finds that Byrd was not convicted by the jury of merely aiding and abetting Keegan, but rather, she was charged with and convicted of murder in the first degree, just as Keegan was. Also, the Court notes that Byrd was not convicted as an accessory before the fact, but as an active participant in the murder of the victim. Therefore, her arguments on this issue fall short, and the Court concludes that her claims as to this prong of her illegal sentence argument should be denied.

Byrd also asserts the argument that her sentence was illegal because, pursuant to State v. Heemstra, 721 N.W.2d 558 (Iowa 2006), the jury in her underlying criminal case did not make, but should have been required to make, a finding on all of the elements of the felony murder statute in order to enhance the sentence for felony murder. Byrd essentially is not arguing that her conviction must be reversed in light of the Iowa Supreme Court's ruling in Heemstra, but that her sentence should not be enhanced to life without parole without the necessary findings having been made by the jury. Moreover, Byrd argues that the holding in Heemstra should apply to her

case, notwithstanding the fact that the Court in Heemstra held that its application was not retroactive. Byrd argues that the non-retroactivity holding is a violation of equal protection, due process, and separation of powers under the Iowa Constitution and a violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

The Court finds Byrd's arguments, as they are presented relative to the legality of her sentence, and not as to her conviction itself, are issues of first impression. In Brooks v. Brooks, No. 03-1217, 2004 WL 240207 (Iowa Ct. App. 2004), the Iowa Court of Appeals considered an issue of first impression (i.e., whether Iowa law recognizes or should recognize tort actions filed by a husband against his wife for fraud and intentional infliction of emotional distress, when the actions are based on the wife's misrepresentation of paternity) and whether the Court of Appeals should recognize such cause of action. The Iowa Court of Appeals in that matter states, "We leave it up to the legislature or our supreme court to establish new causes of action even when they appear to have merit." Id., 2004 WL 240207 at *2. In reaching its decision, the Iowa Court of Appeals cited favorably to a decision of the Minnesota Court of Appeals:

> "We are mindful that 'the task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court. It is not the function of this court to establish new causes of action, even when such actions appear to have merit.'"

Id. (citing Flynn v. American Home Prod., 627 N.W.2d 342, 246 (Minn. Ct. App. 2001)). Because this Court concludes Byrd's Heemstra arguments as they apply to her sentence amount to an issue of first impression, this Court will leave such issues to the proper Court.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that for the reasons set forth above, the Applicant's Application for Post-Conviction Relief pursuant to Iowa Code Chapter 822 is denied.

Clerk to notify.

DATED: August 31, 2016

IN THE IOWA DISTRICT COURT, IN AND FOR LINN COUNTY

STATE OF IOWA,	)	
	)	
Plaintiff,	)	No. FECR105915-1013
	)	
vs.	)	SENTENCING RULING
	)	
DAIMONAY RICHARDSON,	)	
	)	
Defendant.	)	

On May 28 and 29, and June 6, 2014, this matter came before the Court for a hearing pursuant to Miller v. Alabama, 567 U.S. ___, 132 S.C.t. 2455, 183 L.Ed.2d 407 (2012), in order to determine the Defendant's sentence in this matter. The State appeared by Linn County Attorney Jerry Vander Sanden, and the Defendant appeared personally and with her attorneys Dennis Cohen, Rachel Antonuccio and John Bruzek. Evidence, including testimony from the Defendant, a number of her family members, her mitigation expert, Dr. Cunningham, and other witnesses, was presented to the Court. The Court also heard victim impact statements, and reviewed a number of exhibits, as well as a Presentence Investigation Report prepared by Jodi Hendrickson of the 6th Judicial District Department of Correctional Services. Further the Court has received a Statement of Pecuniary Damages filed by the State on June 19, 2014, as well as an Amended Statement of Pecuniary Damages filed on June 25, 2014.

The Defendant, Ms. Richardson, is currently sixteen years of age, with a date of birth of November 15, 1997. She has pled guilty to Murder in the Second Degree in this matter, and has no prior criminal record in District Court and no delinquency adjudications as a minor. Ms. Richardson is being held by the Linn County Sheriff in the Jones County Jail without bond.

The Defense urges the Court, pursuant to the Miller case, to consider sentencing alternatives in this matter ranging from a deferred judgment, to a ten year suspended sentence (in full or in part) with five years of probation, or a fifty year suspended sentence (either in full or in part) with five years of probation. The Defense provided to the Court information relative to the Delancey Street Foundation (a residential self-help organization out of San Francisco, California), the North Dakota Department of Corrections and Rehabilitation Juvenile Corrections Facility, the Connecticut Department of Corrections and the Restorative Justice Program for Iowa's Sixth Judicial District.

The Defense also asks that the Court not apply Iowa Code Section 902.12(1) to Ms. Richardson which would require her to actually serve seventy percent of any term of incarceration imposed, and the Defense finally requests that Ms. Richardson be given the ability to earn time toward an earlier release from incarceration pursuant to Iowa Code Section 903A.2(1)(a).

The State argues that Ms. Richardson should serve an indeterminate term of confinement of not more than fifty years, and should serve at least seventy percent of that term before being eligible for parole. The State further argues that imposition of the maximum sentence would not constitute cruel and unusual punishment under the facts and circumstances of this case. Further, the State urges that a maximum sentence would provide Ms. Richardson a "meaningful opportunity" to demonstrate rehabilitation and fitness to return to society and determine the issue of parole eligibility. Last, the State contends that the United States Supreme Court cases Miller v. Alabama, Roper v. Simmons and Graham v. Florida do not apply to Ms. Richardson's sentencing as they involve the death penalty and life imprisonment without parole. It is the State's contention that State v. Null, 836 N.W.2d 41 (Iowa 2013) most closely resembles the case at hand, and that that case essentially entitles a Defendant to an individualized sentencing hearing under the guidelines set by Miller v. Alabama, but does not hold that a maximum sentence such as that argued by the State in this matter constitutes cruel and unusual punishment.

Findings of Fact

Daimonay Darice Richardson was born in November 15, 1997, to her mother, Akilah Abraham, and her biological father, Melvin Richardson. According to her mother's testimony, Melvin, who is believed to be unemployed and struggles with substance use and abuse issues, was generally not involved in raising Ms. Richardson. Ms. Richardson grew up in her mother's care in the Chicago area, as one of several siblings. She has one full sister, Alayah Richardson, age 18, and half-siblings Edna Abraham, age 13, Reggie Abraham, age 20, Mariah Abraham, age 15, and Myanna Robinson, age 18 months. The family resided in many different locations in the Chicago area in Ms. Richardson's younger years, and for much of the time, she was cared for by her maternal grandmother. At some point, her grandmother indicated a desire to gain custody of Ms. Richardson and her siblings, which prompted Ms. Richardson's mother to abruptly move the family to Iowa in 2009 when Ms. Richardson was approximately ten years old. All ties were essentially cut with the grandmother at the time of the move, such that Ms. Richardson was not allowed to even have phone contact with her. With the move, Ms. Richardson's behavior took a turn for the worse, being described as turning

"from day to night." She began fighting at school, and generally acting out toward her siblings and other family members.

Soon after Ms. Richardson and her family moved to Iowa, her grandmother learned she had cancer (2010) and ultimately passed away due to the illness (2011). This death caused much stress within the family household. According to Ms. Abraham, Ms. Richardson, who was tightly bonded to her grandmother, greatly mourned her grandmother's loss. However, Akilah Abraham was also grieving this loss, and was not emotionally available to comfort her daughter. In the meantime, in the months prior to her grandmother's death, Ms. Richardson was sexually assaulted at the North Liberty Recreation Center. She did not reveal this to her mother until many months had passed. These experiences resulted in Ms. Richardson beginning to use and abuse drugs and alcohol to numb her pain. Ms. Abraham testified that these events left Ms. Richardson vulnerable. Her behaviors at school and at home deteriorated even further, and she had to repeat the seventh grade. In 2012, she became more and more involved with D'Anthony Curd, who at eighteen years of age was an older and somewhat controlling figure in her life. According to Ms. Abraham, Curd took advantage of her daughter's vulnerability, getting her to cut school and continue to drink and use drugs. In all, Ms. Richardson lived in eighteen different homes or shelters and endured twelve changes in schools during the course of her youth.

As of May 2013, Ms. Richardson was not living in her mother's home any longer. Though Ms. Richardson felt that she had been "kicked out" of the family home by her family, her step-father, Willie Robinson, and her mother stated that they were willing to keep her in their home, but that Ms. Richardson chose not to abide by the rules of the household, rendering her unwelcome in the family home. After leaving the family home in April 2013, Ms. Richardson lived for a time under a bridge, in an abandoned building, at a shelter, and finally, in the apartment of Julia Butters, an adult who allowed Ms. Richardson to care for her child apparently in exchange for drugs and alcohol.

On or about May 18, 2013, Ms. Richardson assisted her then-boyfriend, D'Anthony Curd in stabbing Ronald Kunkle to death at his apartment in Cedar Rapids, which was in the same apartment complex in which Julia Butters was residing at that time. On February 6, 2014, Ms. Richardson entered a plea of guilty in this matter to the crime of Aiding and Abetting Murder in the Second Degree, in violation of Iowa Code Sections 707.1 and 707.3. At the time of the commission of the crime to which she pled guilty, Ms. Richardson was 15 years old. Though Ms. Richardson entered a guilty plea herein, at the time of sentencing she argued that though Mr. Kunkle was stabbed thirty-

nine times, Ms. Richardson only inflicted three of the thirty-nine stab wounds, none of which were the fatal wounds according to the records of the State Medical Examiner.

That said, photos of the crime scene depict that Mr. Kunkle's death was very violent and very bloody. Stab wounds were located in multiple locations all over Mr. Kunkle's head, face, chest, abdomen, and back, and on his right leg. Blood spatter appeared throughout the apartment, and Mr. Kunkle's body was obviously dragged from the living room where he was originally stabbed, into the bathroom where he was left dead. Though Mr. Kunkle was killed on or about May 18, 2013, it was not until June 10, 2013 that his badly decomposed body was discovered. Prior to that time, Ms. Richardson continued to live in the same apartment complex where his body laid dead, and she continued to victimize him by using his EBT card and attempting to gain financially from his death. Though runaway reports had been filed relative to Ms. Richardson during this time frame, it was Julia Butters, whom she had lived with for various portions of the Spring in 2013, that cleared her through police and took Ms. Richardson again back to her home.

On August 19, 2013, while investigating Kunkle's death, police investigators went to the apartment complex as a part of their investigation. There, they encountered Ms. Richardson, who they asked to come to the police department. In her interview at the Police Department, to her credit, Ms. Richardson ultimately admitted her part in Mr. Kunkle's death. Thereafter, she cooperated with the police investigation, and appears at this point to have taken responsibility for her actions in the matter.

Juvenile Court Officer Julie Martin testified that, as a youth, Ms. Richardson did have juvenile court involvement beginning as early as 2010. She was arrested in October 2010 for allegedly stealing a laptop, and again later was arrested for allegedly stealing money from a teacher, an alleged shoplifting incident and an allegation of disorderly conduct at school. Parenthetically it should be noted that while the Court enumerates these alleged infractions, they are solely noted herein insofar as they explain Ms. Richardson's ensuing involvement with juvenile court services, and are <u>not</u> considered by the Court relative to imposition of sentence herein as Ms. Richardson was never found guilty of any of these alleged crimes. Ms. Martin testified that Ms. Richardson received an informal adjustment for the one matter, and also completed Aggression Replacement Training. Because discord was noted in Ms. Richardson's family, Functional Family Therapy was recommended for the family, but Ms. Richardson's mother declined the intervention. A number of other interventions were also attempted with Ms. Richardson, including a second offering of Functional Family Therapy which was declined by her mother, mental health and substance abuse committals followed by referrals to ASAC

and Abbe Center counselling services, a diversion program (essay) which Ms. Richardson did not return, a move to Indiana to stay with her father (which the Court can only conclude was a poorly conceived plan by Ms. Richardson's family and Juvenile Court services and was doomed from its inception through no fault of Ms. Richardson), as well as two runaway reports.

Initially, interventions with Ms. Richardson were fruitful, but after October, 2011, they ceased being effective. Ms. Richardson was no longer cooperative and did not appear to be motivated. Further, Ms. Richardson's family, who perceived Ms. Richardson was the one who needed the help, was minimally cooperative in engaging family-centered services that were offered to help. Notably, Julie Martin testified that Ms. Richardson lacked respect for her mother, and felt that her mother would always blame her when she had problems. This is why Ms. Richardson did not report her sexual abuse to her mother until many months had passed. That said, Ms. Martin found Ms. Richardson to be engaging, friendly and honest when interviewed for purposes of the juvenile waiver report in this matter. Also, Ms. Martin recalled that Ms. Richardson did tell her that D'Anthony Curd controlled her. In Ms. Richardson's waiver hearing, Ms. Martin testified that in her opinion, based upon Richardson's history and pattern of behavior in the year preceding her charge in this matter, that it would "take far beyond two years of supervision and services to provide her the opportunity of rehabilitation."

Christina Ditch also testified. She stated that she taught Ms. Richardson during her 2012-2013 school year, and has been working with her again while she has been in custody through the Grant Wood Area Education Agency on her IEP in the areas of reading, writing and math. She testified that she finds Ms. Richardson to be well-behaved and is an engaged student. She feels that Ms. Richardson has the drive and motivation to finish high school, and is performing well academically with the individualized attention she is receiving.

Yolanda Clemmons, a family friend also testified. Akilah Abraham and her family resided with Clemmons when they moved from the Chicago area in 2009. Clemmons witnessed the great impact that the death of Akilah's mother had upon the family. She also witnessed Ms. Richardson's attitude dramatically change after that event and the sexual assault had occurred in 2011. She saw Richardson as angry and hurt, and Ms. Richardson stopped taking on responsibility in the home, and started to not care about her appearance. Ms. Richardson's half-sisters, Edna and Mariah Abraham, who also testified, similarly saw Ms. Richardson become withdrawn and sad after their grandmother died. Her sister Mariah stated that Ms. Richardson began arguing with their mother, and started doing whatever D'Anthony Curd wanted her to do.

Ms. Abraham's husband, Willie Robinson, a former professional basketball player and college graduate, mirrored these comments and sentiments. Robinson, who has lived with the family since August of 2011, clearly worked with Akilah Abraham to try to get Ms. Robinson's behaviors into line before the events of May 2013 unfolded. Robinson, who married Abraham in July 2013, has helped to provide structure and support in the family household, and that structure and support predated May 18, 2013. He and Abraham noticed that Richardson was negatively impacted by Curd, and attempted to commit Richardson, and also forbid her from contacting Curd. Robinson testified that sending Richardson to live with her father in Indiana, misguided as it was, was also done in order to put some distance between Ms. Richardson and Curd. However, despite his and Abraham's efforts, Ms. Richardson chose in May 2013 to listen to D'Anthony Curd and not her family, and rather than following rules in the household, found herself living under a bridge and allowing Mr. Curd to call the shots for her.

Ms. Richardson's family clearly wants her to come back into their home. Mr. Robinson feels he can provide structure for her. The family believes she would not be at risk to reoffend and become violent again. Akilah Abraham testified that despite earlier struggles, her home is now a "different place" because her daughter's head is "clear again" and Curd is not "in her ear."

For her part, Ms. Richardson testified about her chaotic and tumultuous youth. She expressed that her grandmother who passed away in 2011 was "like and angel" who cared about everybody and everything. She stated that when her family moved away from her grandmother, it was hard to move. Her relationship with her mom, which wasn't the best, got worse when her grandmother died. Ms. Richardson was hurt, scared and angry. In February, 2011, Ms. Richardson states she was raped, but that she didn't tell anyone because she didn't trust anyone and didn't think they'd care. She had first used alcohol at age ten and up until the time of the rape, but after the rape began using more alcohol plus marijuana to numb her pain. At that point, she was only thirteen years old.

After her grandmother's funeral, Ms. Richardson states that Willie Robinson began seeing her mother, and eventually came to live with the family. She regarded him as respectful, but she wasn't sure about him. It was while Mr. Robinson was living in the home that Ms. Richardson began seeing D'Anthony Curd. Her relationship with her mother continued to deteriorate to the point of a physical altercation, at which point Mr. Robinson and her mother "put her out." Richardson continued to use illegal substances, and was being bullied and also fighting at school. Her mother and Mr. Robinson tried to intervene. Even so, her relationships with them continued in a downward spiral because

she refused to break up with Curd. Richardson recalled that her mother had her committed, and then, when that didn't work, she sent her to her father's home in Indiana for a time. Unfortunately, this was akin to sending her from the frying pan into the fire, as her father's home was full of dog feces and was bedbug infested, and her father was drunk and high on a consistent basis, even offering alcohol and drugs to Richardson regularly. At Richardson's request, her mother and Mr. Robinson intervened and brought her back to Iowa once they were aware of the conditions in her father's home.

When Richardson returned to Iowa in early 2013, she lived in the family home for a very short period of time. Curd had been in Alabama when she returned, but as soon as he came back to Iowa, she began seeing him again. She acknowledges that it was her choice to begin seeing Curd again, and that he didn't force her to make that choice. She described Curd as jealous, not wanting her to spend time with her friends and family. He hit her once, and threatened to hit her on one other occasion. He influenced her to use drugs and alcohol, and to skip school, though she also acknowledges those to have been choices that she made. Eventually, in April, 2013, she says she was "kicked out" of the family home for not following the household rules. Curd took her to live under a bridge, then to an abandoned building, then for a brief time was at the Foundation II shelter. Thereafter, she returned home for "a couple of days," after which she moved to Julie Butters' residence. At Butter's apartment, she spent most days drunk and high, and sometimes cared for Butters' two children.

Ms. Richardson's sworn statement was also received by the Court for purposes of this hearing. In it, Richardson acknowledges that the plan to kill Kunkle was initiated by Curd, and she acknowledged that he did not force her to go along with it. Richardson stated that, when putting Curd's plan into action, Curd looked at her, and she stabbed Kunkle in the neck, at which point Curd jumped on Kunkle and began stabbing him everywhere. Kunkle was screaming during the attack, begging for them to stop, at one point screaming "I love you guys, you guys are friends, you guys are my friends." She stated that Kunkle held his own for a while, and that the fight moved from couch to wall, to the kitchen, and the living room. Richardson acknowledged that although Curd did most of the stabbing, she did nothing to stop him.

In her testimony, Ms. Richardson revealed that it was her decision to stay with Curd, and she admitted that she initially lied and covered for him, but she was glad that she confessed, as it felt good to tell the truth. It was "eating her alive" to not be able to tell anyone about Kunkle's murder. She states that she would have never killed Mr. Kunkle on her own, and that she spends a lot of time "thinking about Ron." When asked how she felt about the situation, she tearfully replied, " I don't feel like a human. I feel

like…I deserve to be down. I should have took his place. I should have stood there and said no to him, but because I was so selfish I stayed there. I caused all of this. And I can't change it. I can't make him come back and as much as I want to I can't …take the pain away. I can say I'm sorry but sorry doesn't -- sorry don't change nothing." Ms. Richardson went on to testify that because of her actions, she wasn't even sure she wanted to ask for her freedom anymore. The Court finds these statements to be genuine and insightful, showing a great deal of remorse, not about being caught, but about the life she took from Mr. Kunkle.

Victim impact statements were received by the Court from Ronald Kunkle's parents. Both felt that a term of incarceration would be appropriate to impose in these circumstances upon Ms. Richardson. Mr. Kunkle's father specified that he did not think that Ms. Richardson should receive as many as fifty years of incarceration.

Mr. Daniel Williams, Case Manager at the Linn County Juvenile Detention Facility, testified at Ms. Richardson's detention hearing, and said testimony was provided to the Court by means of transcript for purposes of this sentencing hearing. He testified that Ms. Richardson was at Linn County Detention from August 19 through October 30, 2013. During that entire time frame, Ms. Richardson was placed in a total of six ten-minute time outs for minor infractions such as playful physical contact with other juveniles, and one self-timeout where she removed herself from a stressful situation on her own. Otherwise, during that time, Ms. Richardson had no violent outbursts, did not put others or herself into dangerous situations, and was never placed under any restraints. Mr. Williams testified that she was easily managed and also received good grades in the school work she completed within that facility.

Mr. Jerry Bartruff, Deputy Director of the Eastern Region of the Iowa Department of Corrections, testified at Ms. Richardson's waiver hearing, and said testimony was provided to the Court by means of transcript for purposes of this sentencing hearing. Specifically, Mr. Bartuff testified that if Ms. Richardson were to be placed within the Iowa Department of Corrections, she would initially be received at the Iowa Medical and Classification Center in Oakdale, Iowa. Though, in general, female inmates would typically be transferred to the Iowa Correctional Institution for Women at Mitchellville, Iowa, thereafter, because of the Prison Rate and Elimination Act of 2003, Ms. Richardson would need to be segregated from other adult inmates until the age of eighteen. This cannot be accommodated at the Mitchellville facility, and therefore, the Department of Corrections has explored placement of Ms. Richardson at a Youth Correctional Center in Mandan, North Dakota in the event she is received by the Department for placement. This facility offers educational programming, psychological and psychiatric staffing and

services, individual and group counselling, cognitive behavioral classes, grief and loss counselling, substance abuse treatment services and physical fitness opportunities. Mr. Bartruff further testified that if the North Dakota facility were not available, similar placement opportunities for Ms. Richardson would be explored by the Department.

Ms. Robin Bagby provided testimony at the waiver hearing in this matter which the Court received at the time of sentencing. Ms. Bagby testified that she is a social worker of treatment at the Iowa Correctional Institute for Women at Mitchellville, Iowa. She testified that inmates at her institution have educational and vocational programming available, including life skills and work readiness classes, substance abuse prevention and programming, anger management and victim impact classes, and mental health treatment and counselling, but not one-on-one counselling or therapy at the current time.

Dr. Luis Rossell, a licensed psychologist, also testified at Ms. Richardson's waiver hearing, and said transcript was made available to the Court by means of transcript at the sentencing hearing herein. He provided testimony that Ms. Richardson's relationship with her family was not a good relationship, describing it as "pretty combative." According to Dr. Rossell, Ms. Richardson tried to rely upon herself as she didn't like the way that things were at home. Ms. Richardson was dependent upon D'Anthony Curd because "she had no one else to depend on. Nobody else was actually providing her shelter and comfort, whether it was good or bad." According to Dr. Rossell's testimony, he did not believe Ms. Richardson would have assisted in killing Mr. Kunkle but for D'Anthony Curd.

Dr. Rossell testified that the juvenile brain is not fully developed, particularly in the frontal cortex which controls decision-making and inhibition. He clearly felt that Richardson's environment and relationship with Curd led to her involvement in the crime, and felt that she could successfully rehabilitate by the age of eighteen or nineteen, such that she could safely return to the community without risk of reoffending.

Dr. Rossell further testified that Mr. Richardson had not lived in a structured environment prior to living in juvenile detention after charges were brought against her in this matter. However, she was doing well in the structured environment of juvenile detention at the time he testified. He noted that her school records were "very positive" while in detention, and that she appeared to be "focused and motivated." He further described Ms. Richardson as able to be rehabilitated, and "bright enough to get through pretty much any program."

Dr. Mark Cunningham also testified. He is a board certified forensic psychologist, and is licensed in twenty-two states including Iowa. He spent thirty-three years in private practice and has authored numerous publications including a series on best practices in forensic psychology. He sits on the editorial board of scientific journals including the Journal of Psychiatry and Law, and has been an invited speaker at many conferences. He was hired by Ms. Richardson's defense counsel to perform an evaluation regarding sentencing considerations, mitigating factors in her background, and her risk of future serious violence in the community. In conducting his evaluation, he interviewed Ms. Richardson at length, as well as many members of her family and friends. He also reviewed photos, videos, police investigation reports, Dr. Rossell's psychological report, Ms. Richardson's school records, sworn statement, waiver investigation report, Pre-sentence investigation report and many other documents herein.

Dr. Cunningham's testimony was largely proffered to illuminate Ms. Richardson's moral culpability for her actions in this case. Different from her "criminal responsibility" and her knowing right from wrong, he described Richardson's moral culpability as being what shaped her choices; what shaped her morality and value system and/or diminished her control. Dr. Cunningham opined that because Ms. Richardson was 15 years old at the time of the crime, her brain was not fully formed, lacking myelination in the frontal lobes which are responsible for higher cognitive functions of problem solving and judgment, as well as impulse control. As a result of these brain deficiencies, he opined that adolescents have less ability to look at situations from another's perspective than adults do, are more reckless and impulsive in their behaviors than adults, and engage in ill-conceived planning without adequate ability to weigh consequences. Dr. Cunningham opined that Ms. Richardson's impulsivity was consistent with her age and level of brain maturity. Moreover, he further found that Ms. Richardson's life disruptions, loss and inadequate support rendered her functionally even less mature than her age. He also opined that the presence of other immature minds at the time a decision is made is key, and that the additive quality of judgment is actually subtracted by the presence of others when teenage offending occurs. It was Dr. Cunningham's opinion that Ms. Richardson would not likely have perpetrated this offense by herself.

Dr. Cunningham went on to list twenty-one adverse developmental factors for Ms. Richardson which he felt reduced her moral culpability herein. Those factors included as follows:

1. Age 15 at time of offense
2. Trans-generational family dysfunction
3. Hereditary predisposition to alcohol and drug use

4. Alcoholism of father
5. Abandonment of father
6. Failure of mother to effectively bond to her
7. Learning disability
8. Emotional and supervisory neglect
9. Amputation of relationship with psychological parent as a pre-adolescent
10. Death of psychological parent
11. Residential transience
12. Household transitions and instability
13. Sexual assault
14. Premature sexualization
15. Target of peer harassment and bullying
16. Early teen onset of alcohol and drug abuse
17. Inadequate mental health interventions
18. Expulsion from the maternal household
19. Victimization in predatory relationship with codefendant
20. Domination by the predatory codefendant in the murder
21. Heavy substance abuse, including synthetic cannabinoid proximate to offense.

With regard to Ms. Richardson's lack of support, Dr. Cunningham cited that she was abandoned by her father, had deficient bonding with her mother, and also experienced emotional and supervisory neglect in her home. With regard to child neglect, Dr. Cunningham opined that it can be more psychologically damaging than physical abuse, in that physical and emotional needs of the child go unmet. Ms. Richardson acted out, he opined, because negative attention was better than no attention at all. Further, he opined that lack of parental discipline contributes to aggressiveness and predisposes to violence in the community. Dr. Cunningham last provided findings that the offense having occurred in the context of a "predatory sexual relationship" with Curd and in the context of substance abuse and dependence reflecting hereditary predispositions also mitigated Ms. Richardson's moral culpability.

Lastly, Dr. Cunningham opined that Ms. Richardson has good potential for establishing a constructive, contributing adulthood and has low likelihood of future serious violence in the community. In support of this contention, he cites Richardson's age of 15 at the time of the offense and that she has no previous history of serious violence. He believes Richardson was "effectively homeless and under the corruptive influence of several adults" and also was negatively impacted by substance use and abuse at the time. He believes Richardson to have the capacity to meaningfully attach to others, exhibits gains in maturity and expresses remorse. He feels that she is a good candidate for therapy intervention, and that her family can provide support and offer her a home.

He notes that the primary limitation with the home previously was Akilah Abraham's "inadequate maternal nurturance and supervision", which Dr. Cunningham feels is less needed by Richardson now because "supervision can be provided by probation, drug testing, and counseling services."

Conclusions of Law and Analysis

A number of United States Supreme Court cases have made it clear that the law recognizes adolescents as constitutionally different from adults. The first in the most recent trilogy of such cases is Roper v. Simmons, 543 U.S. 551 (2005). In that case, the United States Supreme Court forbid the imposition of the death penalty for a juvenile offender. In Roper, the Court recognized that juveniles are different from adults in three important ways. First, juveniles lack maturity and have an underdeveloped sense of responsibility that results in impulsive decision making, and in turn, reckless behavior. Id. at 569. Second, juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. Id. at 569. Third, the character of a juvenile is not as well formed as that of an adult. Id. at 570.

The second recent United States Supreme Court case relevant to the point of juvenile sentencing is Graham v. Florida, 560 U.S. 48 (2010), in which the Supreme Court held that the Eighth Amendment prohibits a sentence of life imprisonment without the possibility of parole for a non-homicide juvenile offender. And finally, Miller v. Alabama, 567 U.S. ___, 132 S.Ct. 2455, 2464(2012), clarified that mandatory imprisonment without the possibility of parole for an offender that is a juvenile at the time of the offense also violates the Eighth Amendment. Though the State in the instant matter argues that these three cases do not apply to Ms. Richardson's sentencing, the Court must disagree.

It was in the light of these cases that the Iowa Supreme Court considered the issue of the imposition of harsh punishments for juvenile offenders in State v. Null, 836 N.W.2d 41 (2013), the Iowa case most akin to the case at hand. In this context, the Iowa Supreme Court considered whether a 52.5 year minimum prison term for a juvenile based on the aggregation of mandatory minimum sentence for second-degree murder and first-degree robbery triggers the protections to be afforded under Miller. The Court ultimately concluded that an individualized sentencing hearing to determine the issue of parole eligibility was necessary under the forgoing trilogy of United States Supreme Court decisions. Specifically, the Court in Null concluded that the principles of the Miller case fully applied to a lengthy term-of -years sentence. Null at 72. The Court in Null reasoned in support of this conclusion that children are constitutionally different from

adults for purposes of the imposition of harsh punishments. Null at 67. Further, the Court, citing Miller, concluded that children ordinarily cannot be therefore held to the same standard of culpability as adults in criminal sentencing. Miller, 132 S.ct. at 2464; Null at 74.

Roper, Graham and Miller require of the District Court "more than a generalized notion of taking age into consideration as a factor in sentencing. Null at 74. "First, 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." Null at 74 (citing Miller, 132 S.Ct. at 2464.) Second, "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. Third, "the district court should recognize that a lengthy prison sentence without the possibility of parole such as that involved in this case is appropriate, if at all, only in rare or uncommon cases." Id. at 75. That said, the Court in Null also is careful to state that "it bears emphasis that while youth is a mitigating factor in sentencing, it is not an excuse," Id. at 75, and "nothing that the Supreme Court has said in these cases suggests trial court are not to consider protecting public safety in appropriate cases through imposition of significant prison terms." Id.

In response to and in the context of the Null case, as well as the Miller case and its progeny, the Iowa Legislature passed Iowa Code Section 901.5(14) which states:

"Notwithstanding any provision in Section 907.3 or any other provision of law prescribing a mandatory minimum sentence for the offense, if the defendant, other than a child being prosecuted as a youthful offender, is guilty of a public offense other than a class "A" felony, and was under the age of eighteen at the time the offense was committed, the court may suspend the sentence in whole or in part, including any mandatory minimum sentence, or with the consent of the defendant, defer judgment or sentence, and place the defendant on probation upon such conditions as the court may require."

This statute allows Iowa Courts to utilize great discretion in considering sentences for juvenile offenders, and allows the Court to consider all of the factors outlined in those cases without limitation.

The United States Supreme Court in Miller v. Alabama requires that the Court, in imposing sentences upon juvenile offenders, consider the following factors: (a)"the

character and record of the individual offender [and] the circumstances of the offense," (b) "the background and mental and emotional development of a youthful offender," (c) a juvenile's "chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate the risks and consequences," (d) "the family and home environment that surrounds" the juvenile, "no matter how brutal or dysfunctional," (e) "the circumstance of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressure may have affected" the juvenile, (f) whether the juvenile "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth," and (g) the juvenile's potential for rehabilitation. Miller 567 U.S. at ___, 132 S.C.t. at 2467. After full consideration of all of these factors, the Court is convinced that an indeterminate period of incarceration would provide for the maximum rehabilitation of Ms. Richardson and would provide for the maximum protection of the community from further offenses by Ms. Richardson and by others.

No doubt the circumstances of this offense were bloody and brutal. Ms. Richardson, who was only 15 years old at the time of the crime, had previous interaction with juvenile court services, but who had no previous convictions of any kind, seems to have been easily persuaded by Mr. Curd to assist him in his plan to violently attack and kill Mr. Kunkle. This would make sense in light of the scientific evidence presented by Dr. Cunningham at the sentencing hearing, as Ms. Richardson's chronological age would explain in part her impulsivity and lack of appreciation of consequences and risks associated with her behavior. Further, Ms. Richardson, who has led a very chaotic, traumatic, and unstable young life, seems to have been a prime candidate for being lured into such activity by the likes of Curd. She was born to an alcoholic father and a mother who has struggled for stability. She lost her grandmother, her primary maternal bond, to cancer, and she was raped at the age of 13. She has moved more than twelve times in her youth, and has attended nine different schools. She began using alcohol at the age of 10 and marijuana at the age of 13. Curd, an older teenager, took advantage of Ms. Richardson's vulnerability by manipulating her. Her interaction with him led her down very wrong paths of behavior, including continued drug and alcohol use, skipping school, and leaving her family home so that she could be with him. Her relationship with her family as of May, 2013, was one of dysfunction. She did not trust or rely upon her family, and discarded any meager assistance or advice they would offer. Certainly, her dysfunctional relationship with her family coupled with her relationship with Curd impacted Richardson's decision-making and her conduct on May 18, 2013, the day that Ronald Kunkle was killed.

That said, since confessing to this offense, Ms. Richardson has been in custody, first at juvenile detention and more recently segregated from the adult population at the Jones County Jail. While in this structured environment, Ms. Richardson has done very well, even excelled, in making educational advancements, has begun to repair her interfamilial relationships, and has not been using drugs or alcohol, which this Court attributes in large part to the fact that these substances are not available to her while in these structured settings. Ms. Richardson has also discontinued her relationship with D'Anthony Curd, though the Court questions whether this would have happened if she had not been in custody. In short, the environment in which Ms. Richardson has been thriving is one of structure, and it is very clear from her progress to date that Ms. Richardson is amenable to rehabilitation.

In light of the foregoing, the Court cannot, however, in good conscience, find that placing Ms. Richardson back into her "home" environment, which by almost all accounts was dysfunctional and lacked structure and consistency, would be any more conducive to Ms. Richardson's rehabilitation than it was slightly more than one year ago. Though the Court embraces much of Dr. Cunningham's testimony as instructive on the moral culpability of this young lady, the Court respectfully must disagree with Dr. Cunningham's assessment that putting Ms. Richardson back into her home environment would either provide her maximum opportunity to rehabilitate or provide necessary protection to the community. Though there are perceived differences in Ms. Richardson since the time of the crime (Ms. Richardson now has an infant son, has not remained in contact with Curd, has not been using drugs or alcohol, and she has perhaps had the benefit of learning from her mistakes herein), none of these perceived differences provide assurances that she would continue on the path of rehabilitation the way that the structured environment of an institutional setting would provide. Nor do these perceived differences provide assurances that Ms. Richardson would continue to refrain from contact with Curd, who has not been convicted and is the father of her child, or get involved with other negative influences in the unstructured setting that her home environment provides. Though Dr. Cunningham opined that Ms. Richardson's family home would be sufficient to provide her support now because "supervision can be provided by probation, drug testing, and counseling services," the Court points out that Ms. Richardson and her family had a number of similar services available and/or offered to them before Kunkle's murder, and the family's and Richardson's follow-through on said services offered was dismal, and the consequences of that lack of follow-through proved to be lethal.

In short, the Court finds that the person that Ms. Richardson was on May 18, 2013, is for the most part the same person that she is today. Also, the home environment that Ms. Richardson claims to have now is essentially the same one that was available to her in May 2013, in which she either chose not to live, or chose not to behave in a way that she would be allowed to live there at that time. The Court has no assurances, therefore, that placing Ms. Richardson back into that environment would lead to continued and maximum opportunity for her to become rehabilitated, and further the Court has no assurance that Ms. Richardson will not become persuaded at some point to engage in negative and perhaps violent behaviors if she were offered the opportunity in the community.

Though the Court fully accepts and embraces the wisdom that the juvenile brain is significantly different from the adult brain, and that Ms. Richardson's brain is more capable of and susceptible to rehabilitative efforts right now than it will ever be again, after reviewing the record as a whole, the Court believes that the programs, facilities and personnel available, together with the structured environment that would be provided within the Correctional System, will more effectively lead to Ms. Richardson's rehabilitation in a way that will eventually lead to her safe reentry into society. That said, the Court feels that an indeterminate term of years herein is appropriate, without any mandatory minimum term imposed. This will allow Ms. Richardson to embrace the services and treatment offered, and will allow her to prove herself to the parole board as time progresses.

Sentencing Ruling

No sufficient legal reason was shown to the Court why judgment and sentence should not now be pronounced and none appeared to the Court upon the record.

On February 6, 2014, Ms. Richardson entered a plea of guilty in this matter to the crime of aiding and abetting of Murder in the Second Degree, in violation of Iowa Code Sections 707.1 and 707.3. Judgment of conviction of the Defendant of the class B felony offense of aiding and abetting of Murder in the Second Degree in violation of Iowa Code Sections 707.1 and 707.3 is hereby entered.

IT IS THE ORDER, JUDGMENT AND SENTENCE OF THIS COURT that the Defendant is committed to the custody of the Director of the Iowa Department of Corrections for an indeterminate term not to exceed fifty (50) years, with all but twenty-five (25) years of the sentence to be suspended.

Pursuant to Iowa Code Section 901.5(14), the Court does not impose the requirements of Iowa Code Section 902.12(5). The Defendant shall be eligible for parole or release without having served any minimum term of confinement. To be clear, in the event that Defendant's suspended sentence is revoked at any time and the 50 year sentence imposed, the Court specifically finds that no mandatory minimum period of incarceration shall be served by the Defendant.

IT IS FURTHER ORDERED that the Defendant shall be given credit for time previously served as reflected in the certified records of the Sheriff. The Defendant shall be given the ability to earn time toward an earlier release from incarceration pursuant to Iowa Code Section 903A.2(1)(a).

Defendant's temporary custody shall be with Linn County pending transfer.

Upon discharge or parole of said term of confinement, Defendant shall be placed on probation under the supervision of the Sixth Judicial District Department of Correctional Services for a period of three years upon such terms and conditions as may be imposed upon her by the appropriate personnel of that agency**.** The Defendant is also placed on the Intermediate Sanctions Continuum pursuant to Iowa Code 901B.1. The Department of Correctional Services shall evaluate the Defendant's risk to public safety and determine the appropriate level of supervision and services necessary for the Defendant, which may include placement at a community correctional facility for a period of 365 days or until maximum benefits are achieved, whichever would occur first. The Defendant shall pay the enrollment fee required by Iowa Code Section 905.14 at the rate established by the Sixth Judicial District Department of Corrections when her period of probation commences.

It is further ordered that the Defendant is assessed the court costs of this action. At the Defendant's request, attorney fees in this matter are not assessed to the Defendant.

Pursuant to Iowa Code Section 910.3B, Defendant is ordered to pay restitution in the amount of $150,000 to the Estate of Ronald Kunkle. Defendant is further ordered to pay restitution in the amount of $7,185.54 to the Crime Victims Assistance Program.

The Defendant shall undergo DNA profiling as required by Iowa Code Sections 81.2 and 901.5(8A).

The reasons and factors considered by the court for this sentence include the Court has considered the entirety of the presentence investigation, the nature and circumstances of the offense, the history and characteristics of the Defendant, especially considering her

age and the fact that she was a juvenile at the time of the commission of the offense, her lack of prior criminal record, the laws of the State of Iowa, the victim impact statements, and the protection of the community. The sentence imposed will offer the Defendant the maximum opportunity for rehabilitation while ensuring the protection of the community.

Defendant was advised of the right to appeal. No appeal bond is set, as the offense is a forcible felony.

DATED: July 18, 2014. Clerk to notify.

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MARY E. CHICCHELLY, JUDGE
SIXTH JUDICIAL DISTRICT OF IOWA