STATE JUDICIAL NOMINATION COMMISSION
AND OFFICE OF THE GOVERNOR
JOINT JUDICIAL APPLICATION

Please complete this application by placing your responses in normal type, immediately beneath each request for information. Requested documents should be attached at the end of the application or in separate PDF files, clearly identifying the numbered request to which each document is responsive. Completed applications are public records. If you cannot fully respond to a question without disclosing information that is confidential under state or federal law, please submit that portion of your answer separately, along with your legal basis for considering the information confidential. Do not submit opinions or other writing samples containing confidential information unless you are able to appropriately redact the document to avoid disclosing the identity of the parties or other confidential information.

PERSONAL INFORMATION

1. State your full name.

Mary Elizabeth Chicchelly

2. State your current occupation or title. (Lawyers: identify name of firm, organization, or government agency; judicial officers: identify title and judicial election district.)

Iowa District Court Judge – Sixth Judicial District

3. State your date of birth (to determine statutory eligibility).

December 1, 1967

4. State your current city and county of residence.

Cedar Rapids, Linn County, Iowa

PROFESSIONAL AND EDUCATIONAL HISTORY

5. List in reverse chronological order each college and law school you attended including the dates of attendance, the degree awarded, and your reason for leaving each school if no degree from that institution was awarded.

College(s) and Law School(s) – and reason for leaving, if applicable	**Dates Attended (Mo/Yr to Mo/Yr)**	**Degree(s)**	**Month/Yr Received**
National Judicial College, General Jurisdiction, Reno, NV	04/14-05/14	Course Completed	May 2014
University of Iowa College of Law, Iowa City, Iowa	08/89-05/92	J.D.	May 1992
University of Iowa, Iowa City, Iowa	08/86-05/89	B.A.	May 1989

6. Describe in reverse chronological order all of your work experience since graduating from college, including:

a. Your position, dates (beginning and end) of your employment, addresses of law firms or offices, companies, or governmental agencies with which you have been connected, and the name of your supervisor or a knowledgeable colleague if possible.

Judicial Experience March 29, 2013 – Present. See Answer to No. 10 below.

January 1997 – February 2013: Beginning in January 1997, I practiced law as a partner with the firm Seidl & Chicchelly, P.L.C. Initially, our offices were located at 776 13th Street Marion, Iowa. On February 1, 2003, the firm moved its offices to 229 Northland Court, Cedar Rapids, Iowa. During my time at this firm, my primary areas of practice were family and juvenile law, as well as civil, criminal and probate. I remained in private practice at Seidl & Chicchelly until my appointment to the District Court bench. Knowledgeable colleagues include my former law partners, Phillip Seidl and Mark Seidl.

April 1995 – January 1997: In April 1995, I began practicing law at Gallagher, Langlas & Gallagher, 405 East Fifth Street, Waterloo, Iowa, as an associate attorney, with primary areas of focus in criminal and family law, probate, personal injury and insurance defense. I left this firm to start my own firm with two of my attorney siblings. Knowledgeable colleagues include Cynthia Sueppel and Jeff Peterzalek.

July 1993 – April 1995: In July 1993, I began practicing law at the Coleman Law Firm, Third Floor, Wells Fargo Center, 800 Central Avenue, Fort Dodge, Iowa, as an

associate attorney, with primary areas of focus in criminal and family law. A knowledgeable colleague at this firm would be Joseph Coleman, Jr.

July 1992 – July 1993: In July 1992, upon my graduation from law school, I began a one-year position as a judicial law clerk for the Second Judicial District of Iowa, Cerro Gordo County Courthouse, 220 North Washington Avenue, Mason City, Iowa. In that position, I performed legal research and drafting for seven District Court Judges on various legal issues. A knowledgeable colleague relative to my work as judicial clerk would be Retired District Court Judge Stephen Carroll.

May 1991 – May 1992: In May 1991, commencing at the end of my second year of law school, I began working as a law clerk for Clark, Butler, Walsh & McGivern, 315 East Fifth Street, Waterloo, Iowa. At that firm, I served as law clerk for multiple attorneys, and performed legal research and writing on insurance defense and civil litigation matters. A knowledgeable colleague at this firm would be Timothy Hamann.

January 1990 – May 1991: In January 1990, during my first year of law school, I began working as a law clerk for the Tom Riley Law Firm, 4040 First Avenue, N.E., Cedar Rapids, Iowa. At that firm, I served as a law clerk for multiple attorneys, and performed legal research and writing relative to personal injury matters. Knowledgeable colleagues include Hugh Albrecht and T. Todd Becker.

May 1989 – August 1989: Immediately upon my graduation from college, I was employed as a congressional intern by Congressman Tom Tauke, Rayburn House Office Building, Washington, D.C. In my position as a congressional intern, I researched issues important to the Congressman and his constituents, attended meetings and briefings and informed the Congressman of any pertinent information received, corresponded with constituents, answered phones and assisted in miscellaneous office tasks. My supervisor was Congressman Tom Tauke.

b. Your periods of military service, if any, including active duty, reserves or other status. Give the date, branch of service, your rank or rating, and present status or discharge status.

I trained with the United States Marine Corps at Officer Candidates School, Quantico, Virginia during the summer of 1988. My rank at the time was Officer Candidate. I injured both of my legs in training, and returned to Iowa to recuperate, receiving a medical discharge from U.S.M.C. in November 1988.

7. List the dates you were admitted to the bar of any state and any lapses or terminations of membership. Please explain the reason for any lapse or termination of membership.

I was admitted to the bar of the State of Iowa in June 1992 with no lapse in membership.

8. Describe the general character of your legal experience, dividing it into periods with dates if its character has changed over the years, including:

a. A description of your typical clients and the areas of the law in which you have focused, including the approximate percentage of time spent in each area of practice.

01/90-05/92 Law Clerk. While in law school, I performed research and writing on various issues for two personal injury law firms. The Tom Riley Law Firm handled plaintiff claims for individual personal injury plaintiffs, and Clark, Butler, Walsh and McGivern handled primarily insurance defense for large insurance carriers. My research and writing for these firms focused in these areas almost without exception. During this time frame, I also second-chaired a number of personal injury trials while employed with Clark, Butler, Walsh & McGivern, representing the defendant insurance carrier in those matters.

07/92-07/93 Judicial Clerk. As a judicial clerk for Iowa Judicial District 2A, I researched and wrote in virtually every area that involved the District Court, including civil litigation, family law, criminal law, probate, mental health committal appeals, and other disputes.

07/93-04-95 Private Practice in a small rural firm. While at the Coleman Law Firm in Fort Dodge, I handled criminal matters, including trials, as well as civil litigation and family law matters. Criminal cases constituted 70% of my work, and civil and family law litigation constituted the remaining 30%. Typical clients were criminal defendants generally under the age of 35, and family law clients of all ages.

04/95-01/97 Private practice in a larger, more urban firm. While at Gallagher, Langlas & Gallagher in Waterloo, I continued to handle criminal matters (35% of my practice at that time), and also handled personal injury and medical malpractice claims (35% as well). In addition, I began to try family law cases including divorce and custody modifications (20%) and worked on probate matters (10%). Typical clients during this time frame included individual personal injury plaintiffs, criminal defendants under the age of 50, and insurance carriers.

01/97-05/04 Private practice in large metropolitan area. As I began my years at Seidl & Chicchelly, I continued to handle criminal matters (35%), prepared client tax returns (5%), handled personal injury claims (10%) and began to handle a larger percentage of family law cases (50%). This percentage also included a growing number of juvenile cases. Typical clients included young criminal defendants, individuals of all ages who required assistance with divorce proceedings or personal injury claims, and parents and children involved in juvenile court matters. My practice area percentages remained fairly steady until roughly 2004, at which point I took on a high profile criminal representation in conjunction with the Linn County Public Defender's Office. That year, I was privately hired by a defendant's family to represent him in the defense of a First Degree Murder charge. Most of my remaining practice was managed by my law partners as I immersed myself in this criminal defense. Approximately one-half of my practice was in criminal casework during that time frame.

05/04-03/13 Private practice in large metropolitan area. In the years following my involvement in the aforementioned murder case, my reputation as a litigator grew exponentially. Rather than focusing on criminal representation, however, I found that I enjoyed the challenge of family law and had reached a high level of experience and expertise in that area. Accordingly, my law practice became more focused on family law, collaborative family law and mediation. As of the end of 2012 and just before my appointment to the bench, family law constituted approximately 80% of my caseload. I also continued to write wills and trusts, handle guardianship and conservatorship matters and some personal injury cases. My typical clients were individuals seeking assistance with various family law matters, probate issues and personal injury claims. My final jury trial in April 2010 was a federal diversity case which I tried as co-counsel in the U.S. District Court for the Northern District of Illinois, resulting in a favorable verdict for our clients.

b. The approximate percentage of your practice that has been in areas other than appearance before courts or other tribunals and a description of the nature of that practice.

As an attorney, I spent 50-60% of my time meeting with and advising clients, working on pleadings and discovery, engaging in settlement negotiations, and preparing matters for hearings and trials. I also provided legal consultations for prospective clients, prepared wills, tax returns and other legal documents, and assisted parties with mediation.

c. The approximate percentage of your practice that involved litigation in court or other tribunals.

Approximately 45-50% of my practice involved litigation in state court, and less than 5% litigation in federal district court.

d. The approximate percentage of your litigation that was: Administrative, Civil, and Criminal.

Administrative	1%
Civil	
General civil	15%
Domestic	60%
Juvenile	10%
Probate	4%
Criminal	10%

For the first ten years of my practice, these percentages were approximately 60% civil and 40% criminal.

e. The approximate number of cases or contested matters you tried (rather than settled) in the last 10 years, indicating whether you were sole counsel, chief counsel, or associate counsel, and whether the matter was tried to a jury or directly to the court or other tribunal. If desired, you may also provide separate data for experience beyond the last 10 years.

During the past ten years, I tried approximately 60 cases as an attorney. In all but two, I was sole counsel for my clients. On the remaining two, I was co-counsel with duties shared between counsel in an equal manner. 95% of these trials were non-jury trials, and the remaining 5% were jury trials.

Additionally, within the past eight years I have presided over approximately 300 trials as a District Court Judge. This number does not include cases which were individually assigned to me for case management, but later were settled, dismissed, or pled, nor does it take into account the numerous motion hearings, temporary and miscellaneous hearings over which I have presided. Sixth Judicial District statistics indicate that the average number of case dispositions per year per District Court Judge is 1085. Thus in eight years on the bench, this suggests that I have rendered more than 8,000 case dispositions, though most of those did not require a trial. While on the bench, approximately 15-20% of my trials have been jury trials, with the remaining 80-85% being non-jury trials.

f. The approximate number of appeals in which you participated within the last 10 years, indicating whether you were sole counsel, chief counsel, or associate counsel. If desired, you may also provide separate data for experience beyond the last 10 years.

Because I have been a District Court Judge for eight of the past ten years, I have not participated in any appeals within that time frame. However, from 1999 through 2009, I appealed eleven cases to the Iowa Court of Appeals as sole counsel, and one case to the Iowa Supreme Court as associate counsel.

9. Describe your pro bono work over at least the past 10 years, including:

a. Approximate number of pro bono cases you've handled.

In the past ten years (essentially, in the two years preceding my appointment to the bench), I handled more than fifty pro bono cases.

b. Average number of hours of pro bono service per year.

I provided, on average, forty to fifty pro bono service hours per year as a practicing attorney.

c. Types of pro bono cases.

My pro bono service consisted of representation of litigants in family law matters including divorces, custody and child support matters.

10. If you have ever held judicial office or served in a quasi-judicial position:

a. Describe the details, including the title of the position, the courts or other tribunals involved, the method of selection, the periods of service, and a description of the jurisdiction of each of court or tribunal.

I have served as a District Court Judge for the Sixth Judicial District of Iowa from February 2013 to the present time. I was appointed to this position through the merit selection process by Governor Terry Branstad. In Iowa, the District Court is a Court of general jurisdiction, including felony and indictable misdemeanor criminal matters, civil matters exceeding $10,000 in value, equity matters such as divorce and custody, as well as probate, property foreclosures, worker's compensation appeals, small claims appeals and mental health committal appeals. As a District Court Judge, I routinely preside over criminal and civil jury trials, including murder cases, complex probate cases, medical malpractice cases and personal injury matters. I also preside over bench trials conducted either in law or in equity, such as lien foreclosures, divorces and custody matters. While I spend

approximately seven months each year on either presiding or trial dockets in Linn County, the second most populated county in our state, I also preside for one month apiece in four rural counties (Jones, Tama, Benton and Iowa) on a rotating basis, and serve on either a trial or presiding docket in Johnson County (Iowa City) for 1-2 months of each year.

b. List any cases in which your decision was reversed by a court or other reviewing entity. For each case, include a citation for your reversed opinion and the reviewing entity's or court's opinion and attach a copy of each opinion.

In my past eight years on the bench, I have had three decisions *partially* reversed, and one decision reversed but then subsequently affirmed.

1. In Langholz v. Brumbaugh, Linn County Case Number EQCV079534, I granted injunctive relief to a father requesting that a softball coach be kept away from his young daughter. In entering this injunction, which contained factual findings that in my judgment I felt would be embarrassing and potentially harmful to the young child at the center of the controversy, I further ordered that the ruling should remain sealed to protect her best interests. The child's father, appealed as he wanted the ruling to be made public. On appeal, in No. 15-0547, the Iowa Supreme Court affirmed my ruling on the injunction in its entirety. However, the Court reversed and remanded *in part* relative to my decision to seal the ruling, indicating that while sealing the ruling may be an appropriate remedy, a hearing should be held in accordance with Iowa Code Section 22.8 to make this determination. On remand, I conducted a hearing in accordance with Iowa Code 22.8. In accordance with that statute, the burden of proof was on Defendant Brumbaugh, the softball coach, to prove that the ruling should remain sealed. As a self-represented litigant, Mr. Brumbaugh struggled with this burden of proof, and I was unable to find that he had met the required burden at the conclusion of the hearing. Thus, though I did not like the result, I adhered to the rule of law and ordered that the ruling be unsealed. My decision in Case Number EQCV079534 accompanies this application. The Supreme Court's decision in No. 15-0547 can be found on the Iowa Judicial Branch website.

2. Bos v. Climate Engineers, Linn County Case Number CVCV085324, involved a Plaintiff's appeal to the District Court of an agency ruling granting the Plaintiff worker's compensation benefits. I ruled that the agency's conclusion with regard to the Plaintiff's entitlement to benefits for a shoulder injury was correct, but that the Plaintiff had failed to prove his alleged mental condition was causally related to his work injury. Further, I ruled that one expert's report had not been timely provided and should have been excluded from evidence. Thus, I remanded the matter to the agency for reconsideration

without the improperly admitted evidence. In No. 17-0159, the Iowa Court of Appeals affirmed my ruling that the Plaintiff had failed to prove his alleged mental condition was causally related to his work injury and was supported by substantial evidence. The Court, however, finding that admissibility of expert reports is within the discretion of the agency, reversed my decision to reverse the deputy commissioner's admission of an expert's vocation report which I had found to be untimely provided. My decision in Case Number CVCV085324 accompanies this application. The Court of Appeals decision in No. 17-0159 can be found on the Iowa Judicial Branch website.

3. Nesset, Inc. v. Charles Jones and Green Sokol, L.L.C., Linn County Case Number EQCV089116, was an action brought by a Plaintiff to foreclose a mechanic's lien filed against real estate owned by the Defendant L.L.C.. The Plaintiff was a subcontractor that had performed work on the Sokol Building owned by the Defendant corporation, and the Defendant failed to pay for all of the work despite the personal assurances of Defendant Charles Jones, sole owner of the Defendant corporation. In No. 19-0549, the Iowa Court of Appeals upheld my $17,708.00 award of damages to the Plaintiff, but found that only the Defendant L.L.C. and not Charles Jones individually could be held liable for said damages. My decision in Case Number EQCV089116 accompanies this application. The Court of Appeals decision in No. 19-0549 can be found on the Iowa Judicial Branch website.

4. Morales Diaz v. State, Tama County Case Number PCCV007389, was a post-conviction relief matter wherein Mr. Diaz, the Applicant, alleged that he had ineffective assistance of counsel in his underlying criminal matter in that he was not advised by counsel that he would be deported in the event he signed a written plea of guilty to an aggravated forgery charge. After trial, I ruled that Mr. Diaz had not had effective counsel during the plea process, and further ordered that his guilty plea should be rescinded and the matter set back upon the docket. My ruling was initially reversed by the Iowa Court of Appeals at S. Ct. 15-0862. **However, the Iowa Supreme Court granted further review and affirmed my ruling in its entirety, with special concurrences by Justices Mansfield, Zager and Waterman**. My decision in Case Number PCCV007389 accompanies this application. The Court of Appeals and Supreme Court decisions in No. 15-0862 can be found on the Iowa Judicial Branch website.

c. List any case in which you wrote a significant opinion on federal or state constitutional issues. For each case, include a citation for your opinion and any reviewing entity's or court's opinion and attach a copy of each opinion.

As a District Court Judge, I frequently issue rulings in criminal cases involving state constitutional issues. Such issues arise on a regular basis in the form of Motions to Suppress Evidence regarding 4th Amendment search and seizure issues and 6th Amendment right to counsel issues in the context of criminal confessions.

The following are rulings I have written concerning significant state constitutional issues. Copies of each ruling accompany this application.

State v. Diamonay Richardson, FECR105915, S. Ct. 14-1174, Sentencing
State v. Diamonay Richardson, FECR105915, S. Ct. 14-1174, Mot. to Suppress.
State v. Diamonay Richardson, FECR105915, S. Ct. 14-1174, Detention Motion.
Roberto Morales Diaz v. State, PCCV007389, S. Ct. 15-0862, Trial Ruling.
Iowa State Ed. Assn. et. al. v. Kim Reynolds, ex. rel. State of Iowa, et. al., CVCV081968, Ruling on Emergency Hearing for Injunctive Relief.

11. If you have been subject to the reporting requirements of Court Rule 22.10:

a. State the number of times you have failed to file timely rule 22.10 reports.

I have never failed to file a timely rule 22.10 report.

b. State the number of matters, along with an explanation of the delay, that you have taken under advisement for longer than:

i. 120 days. 0
ii. 180 days. 0
iii. 240 days. 0
iv. One year. 0

12. Describe at least three of the most significant legal matters in which you have participated as an attorney or presided over as a judge or other impartial decision maker. If they were litigated matters, give the citation if available. For each matter please state the following:

a. Title of the case and venue,
b. A brief summary of the substance of each matter,
c. A succinct statement of what you believe to be the significance of it,
d. The name of the party you represented, if applicable,
e. The nature of your participation in the case,
f. Dates of your involvement,
g. The outcome of the case,
h. Name(s) and address(es) [city, state] of co-counsel (if any),
i. Name(s) of counsel for opposing parties in the case, and
j. Name of the judge before whom you tried the case, if applicable.

Significant legal matter #1:

a. State v. Goddard
b. This matter was a First Degree Murder case in the Iowa District Court in and for Linn County in which our client was charged with murdering his wife's young child.

c. This case was significant to the extent that co-counsel and I were not only able to achieve an acquittal for our client, but were able to scientifically prove his innocence to the satisfaction of the jury through the presentation of complex medical evidence which showed that the child's death was resultant of an accidental fall down a flight of stairs.

d. Charles J. Goddard, Jr.

e. The case itself involved multiple criminal issues, but was also a complicated medical evidence case. I was instrumental in the research and development of our medical experts and organizing our case for trial, and the duties at trial were equally split between Mr. Johnston and me.

f. My involvement in this case spanned from August 2003 until April 2004.

g. Our client was acquitted on all charges.

h. I represented the defendant as privately-hired co-counsel with Tyler Johnston of the Linn County Public Defender's Office, 425 2nd Street SE, #1020, Cedar Rapids, Iowa 52401

i. Jerry Vandersanden, the current sitting Linn County Attorney, Linn County Courthouse, prosecuted the matter.

j. Judge William Thomas, now deceased, presided over the matter.

Significant legal matter #2:

a. Winkler et. al. v. Patrick B. Kelly and Wetterau Homestead, Inc.

b. This matter was a federal diversity case tried in the Northern District of Illinois, Eastern Division, in April 2010. In that case, the Defendant truck driver ran into a number of vehicles parked at a toll booth in Chicago, including the vehicle of our injured plaintiffs.

c. This was complex litigation under Federal diversity jurisdiction involving numerous issues, challenging financial evidence and medical evidence as well. We were able to secure a verdict for our clients in this matter.

d. Our clients were John and Maria Winkler.

e. My role in the case was coordination and direct examination of lay trial witnesses, client contact and exhibit preparation.

f. My involvement in this case spanned from October 2007 through April 2010.

g. We secured a six-figure verdict for our clients.

h. Co-counsel was my law partner, Mark J. Seidl, and also local counsel George Bellas of Bellas & Wachowski, 15 Northwest Hwy., Park Ridge, IL.

i. The defendants were represented by Brian P. O'Neill and Alton Haynes, 200 West Adams Suite 500, Chicago, and Lee Scheon, 200 West Adams Suite 1005, Chicago.

j. U. S. District Judge Virginia Kendall presided over the matter.

Significant legal matter #3:

The third matter of great significance to me in my legal career involved a juvenile matter in Linn County Juvenile Court, in which I was appointed by Judge Susan

Flaherty to represent siblings of a child who had been brutally murdered. Though confidentiality would preclude me from discussing the case further, I was honored that the Court would entrust me with such an important role, and also I felt I was able to provide my clients with strong legal representation while also exhibiting the appropriate empathy and demeanor toward my clients and their family.

Significant legal matter #4:

a. State of Iowa v. Dustin Jefferson. Tama County Docket Number FECR014283. S. Ct. 16-0935 (appeal).

b. This was a criminal matter over which I presided as a District Court Judge. In this matter, the Defendant was charged with Aiding and Abetting Murder in the First Degree. The allegation was that Mr. Jefferson had assisted his mother in stabbing his wife in their marital home in Tama, Iowa.

c. This matter, which took three jury trials to conclude, was significant largely due to its length and complexity. The initial trial resulted in a continuance due to a defense challenge to the make-up of the jury panel. Trial was reset to allow the defense to investigate the process by which jury panels are created in the State of Iowa. Of particular concern was the seemingly low number of Native Americans on the panel. Having conducted such investigation, the Court and parties were able to conclude that, while the jury panels created in Tama County were created in a wholly unbiased and random manner, many Native American jurors did not appear when summoned for their jury duty. Recognizing this as an issue particular to that county, as the Judge presiding over the matter it was my duty to ensure that all jurors summoned for the second trial would appear for service. I was able to accomplish this task by involving the clerk in contacting all non-appearing jurors to ensure their presence. The second trial was then conducted. It involved numerous complex evidentiary issues, including lengthy motions in limine relative to the defendant's police interviews and body camera videos. The case also involved extensive individual voir dire and challenging logistics with regard to jury empanelment, witnesses and trial length. Ultimately, the second trial resulted in a mistrial as the jury hung after four days of deliberations. Due to the matter having been tried or partially tried in Tama County on two occasions, I then granted the Defendant's motion to change venue, and the case was moved to Jasper County, Iowa, for a third jury trial. At the conclusion of this trial, a jury convicted Mr. Jefferson of Aiding and Abetting Murder in the First Degree.

d. I was the specially assigned trial judge for this case.

e. As this was an assigned matter, I conducted all pretrial, trial and post-trial proceedings in the case.

f. The dates of my involvement in this matter were May 2014 through June 2016.

g. Mr. Jefferson appealed the jury's verdict of guilty, and the Court of Appeals affirmed. I sentenced Mr. Jefferson to life in prison without the possibility for parole.

h. N/A

i. Counsel for the State in this matter were Brent Heeren, Tama County Attorney, 100 West High Street, P.O. Box 6, Toledo, Iowa, and Assistant Iowa Attorney General Laura Roan, 1305 E. Walnut Street, Des Moines, Iowa. Counsel for the Defendant was Thomas Gaul, Special Defense Unit of the State Public Defender's Office, Des Moines, Iowa.

j. N/A

Significant legal matter #5:

a. State of Iowa v. Diamonay Richardson. Linn County Docket Number FECR105915, S. Ct. 14-1174 (appeal).

b. This was a criminal matter over which I presided as a District Court Judge. In this matter, the Defendant was charged with Murder in the First Degree. The allegation was that Ms. Richardson, who was fifteen years old at the time, assisted her eighteen year old boyfriend in killing a neighbor in their apartment complex.

c. Though this matter did not proceed to trial, this case was significant because it involved Constitutional issues relative to Ms. Richardson's confession, as well as sentencing issues complicated by Ms. Richardson's young age at the time of the offense and the fact that she was prosecuted in District Court for the offense. In light of my unfavorable ruling relative to the motion to suppress her confession, Ms. Richardson entered a guilty plea to Murder in the Second Degree and proceeded to sentencing. The sentencing hearing in this matter, which I conducted in accordance with Miller v. Alabama, 567 U.S.460 (2012), proceeded over the course of three days as would a trial. My preparation for this sentencing hearing involved significant research into the sentencing of juveniles in District Court. This area of the law was developing rapidly at that time due to the passage of new statutes as well as decisions from the United States Supreme Court and Iowa's appellate courts. Importantly, though the law was in flux at the time, I was able to determine a fair sentence for Ms. Richardson which was within the bounds of the law, and my sentencing order, though appealed, was affirmed. My research and involvement in this particular case led to me being contacted by judges throughout the state for guidance on the issue of sentencing juveniles in Iowa's District Courts.

d. I was the specially assigned trial judge for this case.

e. As this matter was specially assigned to me as a trial judge, I presided over the matter, conducted all hearings and issued all rulings in the case.

f. The dates of my involvement in this matter were December 2013 – July 2014.

g. I sentenced Ms. Richardson to a twenty-five year indeterminate term in prison with eligibility for parole and no mandatory minimum sentence.

h. N/A

i. Linn County Attorney Jerry Vandersanden of Cedar Rapids served as Counsel for the State in this matter. Attorneys Dennis Cohen, Rachel Antonuccio and John Bruzek of the Johnson County Public Defender's Office in Iowa City, Iowa served as defense counsel.

j. N/A

13. Describe how your non-litigation legal experience, if any, would enhance your ability to serve as a judge.

I believe my lengthy experience in the non-litigation aspects of client representation in an incredibly broad variety of substantive areas of the law greatly enhances my ability to serve on Iowa's Court of Appeals. However, more importantly, the fact that I spent countless hours, days and weeks working with, advising and counselling real people in these substantive areas of the law has informed me as a judge to treat their matters respectfully, to be diligent and timely in my work, and to never lose focus on the people at the heart of each case. Moreover, in my representation of individuals throughout my legal career, I was able to rely on the law and our rules of court to provide a solid framework for advising clients and for engaging in informed settlement negotiations. This reliance upon the rule of law allowed my clients to properly consider their settlement options and enhanced my ability to effectively advise them. I feel that bringing this perspective to the Court of Appeals would enhance my ability to serve effectively in that capacity as well.

14. If you have ever held public office or have you ever been a candidate for public office, describe the public office held or sought, the location of the public office, and the dates of service.

I have never held public office, nor have I ever been a candidate for public office.

15. If you are currently an officer, director, partner, sole proprietor, or otherwise engaged in the management of any business enterprise or nonprofit organization other than a law practice, provide the following information about your position(s) and title(s):

a. Name of business / organization.

Iowa Judges Association

b. Your title.

Treasurer

c. Your duties.

I report to the Iowa Judges Association Board which is engaged in the support of Iowa's judges relative to state budget, compensation and resource issues. I manage the finances of the association, ensure that required tax filings are made, that dues are safely kept, and that all of the Association's bills are timely paid.

d. Dates of involvement.
I have served as the Treasurer of the Iowa Judges Association since June 2017.

16. List all bar associations and legal- or judicial-related committees or groups of which you are or have been a member and give the titles and dates of any offices that you held in those groups.

Bar associations and legal or judicial groups to which I have belonged	Committees / Titles	Dates (From -- To)
Iowa State Bar Association	Family Law (1997-2013) Board of Governors judicial liaison (2017-2018)	1992- present
American Bar Association	Judges Section (current)	1992- present
Iowa Judges Association	President(2016-2017) Treasurer (2017 – present) Co-Legislative Liaison (2017-present)	2013- present
Cerro Gordo County Bar Association		1992-1993
Webster County Bar Association		1993-1995
Black Hawk County Bar Association		1995-1997
Linn County Women Attorneys		1997-2003
Linn County Bar Association	Board of Governors (2007-2010) President Elect (2012-2013) Family Law ((1997-2013) Juvenile Law/GAL (1997-2013)	1997- present
Dean Mason Ladd Inn of Court	Emeritus member	2000- present
National Conference of State Trial Judges	NCSTJ delegate (2016-2017)	2016- present
International Academy of Collaborative		2010-2013

Law Professionals		
Collaborative Lawyers of Eastern Iowa	Vice President (2010-2013)	2010-2013
Sixth Judicial District Mediation Advisory Committee	Chairperson (2013 – present)	2013 - present
Linn County Advocates Advisory Board		2012- March 2013
Jones County Magistrate Selection Committee	Chairperson (2017 – present)	2017- present
Sixth Judicial District Probate Mediation Pilot Project	Coordinator	2018 - present
Judicial Education Faculty, Iowa Judicial Branch		2016 - present
National Judicial College	General Jurisdiction Course Facilitator Alumni Relations Committee	2019 – present 2021-present

17. List all other professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed above, to which you have participated, since graduation from law school. Provide dates of membership or participation and indicate any office you held. "Participation" means consistent or repeated involvement in a given organization, membership, or regular attendance at events or meetings.

1997 - present Marion Metro Kiwanis. Current member. Past-President, Board Member.

1998 - present Cedar Rapids Literary Club, President (2005-7 and 2011-13) and member

2001 - 2004 St. Pius X and St. Elizabeth Ann Seton Joint Board of Ed. member

2003 - 2013 St. Pius X and St. Elizabeth Ann Seton Adult Ed. Committee Chair

2004 - 2006 Girl Scouts of America, Brownie Troop co-leader

2006 - 2009 Regis Middle School Mock Trial Assistant Coach

2006 - present ISBA Mock Trial Judge (Regional and State Competitions)

2012 - 2013 Big K Foundation Board Member (Kiwanis International)

18. If you have held judicial office, list at least three opinions that best reflect your approach to writing and deciding cases. For each case, include a brief explanation as to why you selected the opinion and a citation for your opinion and any reviewing entity's or court's opinion. If either opinion is not publicly available (i.e., available on Westlaw or a public website other than the court's electronic filing system), please attach a copy of the opinion.

1. State of Iowa v. Diamonay Richardson, Linn County Number FECR105915, S. Ct. 14-1174, Sentencing Ruling. I included this sentencing ruling as a sample of my writing to emphasize the thoroughness of my attention to detail within the record. Further, I feel this ruling demonstrates my thorough analysis of a complex constitutional issue as well as my adherence to the law in the context of Iowa's discretionary sentencing constructs.

2. Roberto Morales Diaz v. State of Iowa, Tama County Number PCCV007389, S. Ct. 15-0862, Trial Ruling. I have included the trial ruling in this matter as a sample of my writing in order to emphasize my ability to focus on a specific issue, analyze it fully and issue a concise decision that can stand up appellate scrutiny.

3. State of Iowa v. Venckus, Johnson County Number FECR104263, Ruling on Daubert Issue. This ruling is included as a sample of my writing to emphasize the level of my ability to understand complex technological and/or medical information and effectively recommunicate it in my writing in a cohesive and understandable way.

4. Brandy Byrd v. State of Iowa, PCCV076895, Trial Ruling. I include this ruling as a sample of my writing in order to emphasize my ability to clearly and efficiently address multiple legal issues brought forth in the same matter. Further, this writing sample demonstrates my adherence to the rule of law in that I decline the Applicant's invitation to establish a new cause of action.

5. In re Marriage of Telecky, Linn County Case Number CDDM042740, Dissolution of Marriage Ruling. I include this writing sample for purposes of demonstrating my knowledge in the substantive area of family law, as well as to demonstrate structured writing in a case involving multiple intertwining legal issues.

19. If you have not held judicial office or served in a quasi-judicial position, provide at least three writing samples (brief, article, book, etc.) that reflect your work.

N/A

OTHER INFORMATION

20. If any member of the State Judicial Nominating Commission is your spouse, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, father, mother, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister, state the Commissioner's name and his or her familial relationship with you.

I have no such relationship with any member of the State Judicial Nominating Commission.

21. If any member of the State Judicial Nominating Commission is a current law partner or business partner, state the Commissioner's name and describe his or her professional relationship with you.

I have no such relationship with any member of the State Judicial Nominating Commission.

22. List the titles, publishers, and dates of books, articles, blog posts, letters to the editor, editorial pieces, or other published material you have written or edited.

I have not published any such material.

23. List all speeches, talks, or other public presentations that you have delivered for at least the last ten years, including the title of the presentation or a brief summary of the subject matter of the presentation, the group to whom the presentation was delivered, and the date of the presentation.

Mary E. Chicchelly Judicial Investiture, April 5, 2013, personal remarks at public investiture ceremony.

LCBA Family Law Committee, February 6, 2014, "Trial Practice Tips".

Cedar Valley CPCU Chapter, February 11, 2014, "Judicial Ethics".

Presentation at Iowa State Bar Assn. 2014 Annual Meeting. Co-presented with Judge Annette Scieszinski. "Impressive Lawyering: What Judges Want you to Know".

Iowa Association for Justice, March 31, 2016, Judges Panel, "Courtroom Tips".

Iowa Judges Association, June 13, 2016, Remarks as incoming President. Generally discussed the status of the Association and our initiatives relative to judicial salaries and budget.

State of Iowa Judges, October 17, 2016. "Best Practices for Cases Involving Self- Represented Litigants".

Iowa Judges Association, June 19, 2017, Remarks as outgoing President.

Iowa New Judges School, November 16, 2017, "Sentencing Juveniles in Iowa District Court".

IWILL NCS Pearson, June 7, 2018, "Iowa's Court System". Presented on the basics of Iowa's Court System structure and judicial ethics.

State of Iowa Judges, June 19, 2018, "Sentencing Juveniles in Iowa District Court". NBI Judicial Forum panel discussion on Family Law, November 15, 2018.

State of Iowa Judges, June 10, 2019, "Juvenile Waivers and Reverse Waivers". Presented on the topic of waiving juvenile criminal offenders into Iowa District Court for prosecution and also on reverse waivers from District Court to the juvenile court of juvenile offenders charged with felony offenses at the District Court level.

Dean Mason Ladd Inn of Court, November 14, 2019, "Preserving the Record". Presented as a part of a panel discussion on the topic of preserving a good trial record for appellate purposes.

Iowa Paralegal Association, April 23, 2021, "Tips and Best Practices for Paralegals in a Post-Covid World." Presented via Zoom on basic post-covid courtroom and courthouse protocols, current Supervisory Order requirements, and tips and best practices for paralegals to assist their attorneys in preparing for hearings and trials in the post-covid environment.

24. List all the social media applications (e.g., Facebook, Twitter, Snapchat, Instagram, LinkedIn) that you have used in the past five years and your account name or other identifying information (excluding passwords) for each account.

Facebook - Mary Chicchelly
LinkedIn - Mary Chicchelly

25. List any honors, prizes, awards or other forms of recognition which you have received (including any indication of academic distinction in college or law school) other than those mentioned in answers to the foregoing questions.

Name/Title of Honor, Prizes, Awards	Awarded by:	Month/Yr Received
Valedictorian	Regis High School	May 1986
University of Iowa Presidential Scholarship	University of Iowa	August 1986
Dean's List	University of Iowa	Jan., May 1988 and May 1989
Martindale-Hubbell AV Preeminent Attorney Rating	Martindale-Hubbell	2012
Award of Recognition for Pro Bono Service	Iowa Supreme Court	2012-2013
Recognition for Exemplary Service	Iowa Judges Assn.	June 2017

26. Provide the names and telephone numbers of at least five people who would be able to comment on your qualifications to serve in judicial office. Briefly state the nature of your relationship with each person.

Name	Address	Telephone number
Retired Iowa District Judge Stephen Carroll, my former employer and current mentor and friend	Franklin County Courthouse Central Avenue & First Street, N.W. Hampton, Iowa 50441	(641)456-5624
U.S. District Judge Rebecca Ebinger, former colleague and friend.	U.S. District Courthouse 123 E. Walnut Street Des Moines, Iowa 50309	(515)284-6248
Iowa District Judge Ian Thornhill, current colleague on the District Court bench.	Linn County Courthouse 51 Third Avenue Bridge Cedar Rapids, Iowa 52401	(319)398-3920 Ext. 1100
Iowa District Judge Kevin McKeever, current colleague on the District Court bench.	Linn County Courthouse 51 Third Avenue Bridge Cedar Rapids, Iowa 52401	(319)398-3920 Ext. 1100
Michele Busse Attorney at Law friend and law school classmate	Collins Aerospace 400 Collins Road, N.E. M/S 124-303 Cedar Rapids, Iowa 52498	(319)651-8707

27. Explain why you are seeking this judicial position.

I seek this position in large part because it is my continuing endeavor to dedicate myself to the service of Iowans as fully and completely in whatever task my role as a public servant requires. Moreover, I believe that my particular skill set suits me well for the Iowa Court of Appeals. As an Iowa District Court Judge, I have strived to provide independent, accessible and fair dispute resolution within our court rooms during my eight-year tenure. Thus, I can bring to the appellate bench a practical and thoughtful approach from the perspective of the trial court. I believe this skill to be critical for an appellate court judge. Also, in the twenty years that I practiced law prior to my appointment to the bench, my areas of expertise were robust and varied, including family law, civil trial law, probate, juvenile law and criminal law. My areas of particular focus included family law, juvenile law and criminal law, which collectively comprise the bulk of the Iowa Court of Appeals caseload. Additionally, I am a strong writer, a critical thinker and an organized administrator. Because it remains my firm belief that the strength of Iowa's judiciary is dependent upon well-qualified applicants stepping up for consideration for appointment to our State's Courts, including our Appellate Courts, I feel it is both my duty and honor to place myself into consideration for this Court. To that end, I believe that my experience and qualifications underscore my ability to serve in this position, and for those reasons I am seeking to be considered for the same.

28. Explain how your appointment would enhance the court.

My appointment to the Iowa Court of Appeals would enhance the court in a number of ways. I am a hard worker with a strong judicial background and an overarching dedication to public service. Accordingly, I continue to have great awareness that the work that I am doing is in service to real people with real problems that require timely and thoughtful solutions. I am accustomed to judicial writing and decision making within that awareness, and I have consistently strived in my role as a District Court Judge to perform my work well and timely, with my focus upon the litigants at the center of the controversies and provision of solutions that adhere to the rule of law.

In addition, my experience as a practicing attorney and my work as a District Court Judge have given me great breadth and depth of legal experience. I have extensive experience in and have developed a great deal of expertise in family and criminal law both as an attorney and judge. As an attorney, I tried criminal and civil jury cases, drafted wills, handled guardianship and juvenile matters, and represented both parents and children in juvenile court matters. The breadth of my experience, especially as a District Court Judge, gives me great perspective as to how appellate decisions impact the work of our courts, which in turn impacts court users at all levels. Moreover, my focus as a practicing attorney for twenty years was in the areas of criminal law, family law and juvenile law, which comprise much of the Court of Appeals caseload.

29. Provide any additional information that you believe the Commission or the Governor should know in considering your application.

I would like Governor Reynolds and the Commission to know that I have a great dedication to public service, service to the bench and to judicial education. I strive for personal excellence in all phases of my life. I am efficient, organized, a strong writer, a keen thinker, and willing leader. Not only do I complete my work well, but I complete it in a timely fashion with appropriate attention to detail and with an eye toward justice and ensuring that litigants know that their matter has received the attention and thoughtfulness that it deserves. Also, I remain committed to supporting and improving the Iowa Judicial Branch by remaining involved in the various committees and boards upon which I serve.

Further, I have great respect for, and am dedicated to upholding, our Constitution and the rule of law. I strongly believe that my duty as a judge is to apply the law, and interpret it as written. As such, I can be counted on to respect the integrity of the law and the separation of powers.

In addition, I would urge that my experience as a litigator in civil law, family law, criminal law and juvenile law, as well as the eight years that I have spent on the bench as a District Court Judge, have provided me with robust experience in broad and varied legal matters and underscore my solid substantive knowledge in those areas most reviewed by the Iowa Court of Appeals. Further, I have demonstrated my comprehensive legal ability, as well as my ability to render timely, fundamentally sound and correct decisions.

I would also point out that during the course of my judicial tenure I have rendered solid decisions, including thousands of dispositions, and have never had one case on the Rule 22.10 list. Further, with only three partial reversals, my rulings have withstood well the scrutiny of appellate review.

In addition, my experience is broad from the standpoint of having experience in rural areas of our state. I practiced law in courthouses across Iowa, from Lemars to Maquoketa. While on the bench, I have presided in the communities of Marengo, Tama, Anamosa and Vinton. This has allowed me to connect with Iowans from many walks of life, and to understand the nuances of the law within our rural communities.

In short, I continue to believe that my strengths would serve the Iowa Court of Appeals well, and I would be honored to be given the opportunity to serve in that capacity.

Attachments for Question 10(b)

IN THE IOWA DISTRICT COURT IN AND FOR LINN COUNTY

KENT D. LANGHOLZ,	)	
	)	
Plaintiff,	)	**NO. EQCV079534**
	)	
vs.	)	
	)	
HAROLD E. BRUMBAUGH,	)	**RULING**
	)	
Defendant.	)	

Trial on Plaintiff's Petition Seeking Permanent Injunctive Relief was held on January 27 and 28, 2015. Plaintiff, Kent Langholz (Kent), personally appeared with his attorney, Jacob Koller. Defendant, Harold Brumbaugh (Harold), personally appeared with his attorney, Jon Hammond.

Plaintiff's Petition seeks a permanent injunction enjoining Defendant Brumbaugh from having any contact with Petitioner's minor children, K.M.L. age 15, born in January 2000, and S.E.L. age 13, born in August 2001. Plaintiff's request is based upon a number of inappropriate text and email messages which were exchanged between K.M.L. and Defendant Brumbaugh herein. An ex parte temporary injunction was put into place in this matter on October 2, 2013, which precluded all contact between the children and Brumbaugh. Thereafter, the parties entered into a stipulated temporary injunction on January 8, 2014, which stated as follows:

> … a temporary injunction is entered against [Brumbaugh], and he shall be enjoined and restrained from communicating with and/or otherwise contacting K.M.L. and S.E.L. in any matter whatsoever, including but not limited to, contact or communications through a third party, passing gifts, or attending the sporting or other extracurricular events of either child; provided, however, that [Brumbaugh] may attend the extracurricular events of his step-grandchildren, which may also involve K.M.L. or S.E.L as a participant, and he may attend any game or event at any sports complex, provided that neither child is participating in the game or event which he is attending and he make every effort to avoid visual contact with K.M.L. and S.E.L. at all times.

The stipulated temporary injunction does not preclude Brumbaugh from being at the children's residence so long as the children are not present.

Findings of Fact

Kent is the father of K.M.L. and S.E.L. Kent is a Vice President with Alan Stevens Associates and resides at 6310 Ushers Ridge Drive, Cedar Rapids, Iowa. He is presently married to LeAnn Langholz who has two children from a previous relationship. Kent was married to Angela Hagedorn (Angela), the mother of the two children at issue in this matter, on July 22, 1989. After nearly twenty-four years of marriage, Kent and Angela divorced on June 3, 2013, in Linn County case number CDDM039840. In their divorce decree, Kent and Angela agreed to share physical care of their two daughters on a week by week basis. Although Kent asked Angela to agree to a provision within the decree to preclude contact between Harold and their children, Angela initially agreed then withdrew her assent to such a provision, as it is her belief that Harold has not had inappropriate contact with the children. Therefore, the parties' Decree of Dissolution does not address the issue of contact between the children and Harold Brumbaugh. Kent has not requested modification of the parties' decree to address the issue of contact with Brumbaugh, as in light of Angela's resistance to limitation of contact, he did not wish the children to endure the additional strain such litigation would put upon his already strained relationship with their mother, Angela. Moreover, the Court notes that while such provision would control Kent and Angela's actions, it would do nothing to control the actions of Harold Brumbaugh outside of their knowledge or control.

K.M.L., the child central to this case, is described as a very athletic girl who is extremely competitive, smart and shy. She is a very gifted fast pitch softball pitcher with Olympic aspirations. It was stated by most witnesses at trial that "softball is her life." K.M.L. is also described as being a typical teenager who will at times do whatever it is that she wants to do despite the directives of her parents. She has not, however, typically been a disciplinary challenge to her parents.

Defendant Harold Brumbaugh, presently age sixty-five, resides at 3110 Briar Street, S.W., Unit A, Cedar Rapids, Iowa. He is widowed. Though he has no formal degree, and his early career was in sales, Harold became, during his lifetime, a premiere girls and women's softball coach. Harold began coaching softball in the military in the late 1960's, and has since that time spent time coaching at the Division II college level (University of Missouri St. Louis), as well as at the National level (Holland, Austria, Australia, and New Zealand). Harold has continued to coach softball through the present time, though since 2009 this has been largely at the high school level in the Cedar Rapids area. His coaching credentials have clearly rendered him a highly sought-after pitching coach in particular.

The Langholz family came to know Harold Brumbaugh in 2010 at a pitching clinic. K.M.L. began taking private pitching lessons from Harold shortly thereafter. K.L.M. was ten years old at the time. At first, these private lessons occurred once per week. However, over time, with K.M.L.'s progression as a pitching talent, these lessons increased to almost daily. As time progressed, Harold also became a close family friend to the Langholz family. He would frequently eat dinner at their home, would watch sports games on television with them, and he would participate in other activities with the family such as pool, darts, and table games in their home. Kent, Angela and Harold also frequently drank an excessive amount of alcohol during these activities, and often K.M.L. would serve as their bartender. Harold would even stay overnight in the Langholz home when he was too intoxicated to drive home. As Harold testified, he and the Langholz family were together almost all the time. K.M.L. was always involved in the activities that Harold, Kent and Angela engaged in, but S.E.L. was more of a loner, spending most of the time away from the group.

In 2012, Harold assessed that K.M.L. was talented enough to play at an age level well above her chronological age. However, because the softball program she was playing for would not promote her, Ken and Angela Langholz, along with Harold, determined to form a softball team comprised of seven young pitchers who Harold had been coaching, along with some additional recruits, to play at the 14U level (K.M.L. was twelve at the time). The team they formed together, C.R. Sting, was managed by Angela and coached by Harold. As a team, the C.R. Sting travelled to many regional and even national tournaments, generally placing well and often winning. The team was ranked in the range of 30th out of 1100 teams nationally in one year. Unsurprisingly, this team became very important to K.M.L. who clearly loves the game of softball above all else. Also, unsurprisingly, in light of their shared interests and the copious amounts of time they spent together, K.M.L. and Harold became very close to each other. It is the nature of this relationship which is at the center of this case.

Central to this case is an alleged inappropriate texting and emailing relationship between Harold and K.M.L.. Though no physical sexual contact has been proven to have occurred between the two, Kent points out that the written communications between Harold and K.M.L. tend to support that a physical relationship may have occurred or was potentially developing between them.

It is difficult to establish from the record exactly when the texting and emailing between K.M.L. and Harold began to occur. That said, it is clear that text communications were occurring between the two at least as of April 2012. Kent had invited Harold to travel to Hawaii with the family during spring break of that year. During that trip, the Langholz family and Harold went on an excursion aboard a retired racing sailboat which travelled at high rates of speed and at forty-five degree angles through the water. K.M.L. was seated next to Harold

during the ride as waves crashed over the sides of the boat. Kent and Angela found texts on K.M.L.'s phone later that day between K.M.L. and Harold wherein K.M.L. states that the boat ride scared her and Harold responding that if she were scared, she could have crawled underneath him, or words to that effect. Primarily concerning to Angela and Kent was that Harold then directed K.M.L to "DAT", which stands for "delete all texts." Angela and Kent confronted Harold about this, and according to Kent, Harold "pooh-poohed" their concerns, so the matter was briefly dropped. K.M.L. was twelve years old at the time.

Shortly after the Hawaii trip, Angela, who had K.M.L.'s phone in her possession due to K.M.L. losing it for disciplinary purposes, then found text messages between K.M.L. and Harold wherein Harold again was telling K.M.L. to "DAT" or delete all texts. Angela confronted Harold via email, stating confidently in her initial email to him, "I open her texts and find one from you telling her that we/parents monitor her texting and to delete her messages. If you were in my shoes, what would you think? The first thing that pops in my head is what the heck is going on that you fear I will read or find out about? The second is that why would you tell my daughter to be dishonest or hide things from us? Is there something going on?" Harold responded to Angela that he "wasn't telling her to be dishonest, just that parents are allowed to monitor, this is also meant for them to watch how they talk to others not just me but other kids…not to have a conversation that cannot be viewed by all others and to always be proper on the phones and internet." He went on to imply that she is being "overprotective" and finished with "if you don't trust your kid to talk to me and or concerned whom I talk to then we need to talk." Though his answer did nothing to respond to her inquiry other than to suggest that somehow telling a child to delete all their texts is to tell them not to have a conversation that cannot be viewed by others and to always be proper on the phones and internet, Harold's response clearly put Angela on the defensive. Angela then responded to Harold by completely backing down from her confident stance to a defensive mode and stating "I assumed as much, and I totally trust my kids and I trust you." She even went so far as to state that she will "sometimes jump to conclusions," and that she "truly did not think anything was wrong."

Less than a month later, on June 6, 2012, Angela discovered additional email exchanges between K.M.L. and Harold. Those are summarized as follows:

1. On June 5, 2012, K.M.L. asks Harold if he received her texts on an app. He replies that he received them but had to use his computer. K.M.L. responds "O emails fine then," to which Harold responds "As long as dat and emails cause that's a written record…and can be viewed." K.M.L. assures him that she does delete them, to which Harold replies "Ok but remember what I said recently, I can get so much grief…and you too."
2. Also on June 5, 2012, K.M.L. writes "Love you pops do u like that nickname or would u like 2 change it??" Harold responds "Love you too, nite Kate and sweet dreams,

snuggle in…" as well as ""Well pops is good if it's good for you." K.M.L. responds, "Fine for me just want u happy," and Harold replies, "I'm happy, very happy hope you are too." She states, "I'm happy good thing ur happy cuz I hate grumpy old men." Harold replies that he "hates crabby girls," to which K.M.L. states "Well thats definately not me." Harold then replies, "Oh is that so….then I'd better receive better attention….or I'll think your crabby" to which K.M.L. replies "K but how?" Harold responds "Nice touch or smile between you and me, unnoticeably." K.M.L. then replies "Ok sounds good and if we r lucky maybe a Hug or kiss." The exchanges continue, with the final email from Harold, "Dat all and email as it leaves a trail."

3. On June 6, 2012, Harold emails K.M.L. "don't forget dat and email and remember what I said nothing is private if written….esp email…..but just in case let's not write or text anything that will get you in trouble or me for that matter…..so go back and check to see about all email being gone or off, it does leave a trail and you have to remove it before replies. Or it just keeps going….now dat and e when you write delete, and when you receive delete….she was mad the last time and said she would take you off team if she could not trust you or me….. and I don't want that to happen……"

Angela was concerned enough about the June 5 and 6, 2012 emails to advise Kent. In response, they decided together to obtain tracking software so that they could monitor K.M.L.'s emails and texts, and Angela contacted an IT specialist through her employer to accomplish this. After tracking software was in place, Kent testified that things were "status quo" for a while. Kent explained that he and Angela worried less because they had the tracking software in place.

Kent testified that between June 2012 and March 2013 he did not discover any inappropriate texts or communications between K.M.L. and Harold. It is clear from the record, however, that K.M.L. and Harold were continuing to have inappropriate communications with each other during this time frame, and Angela was aware of some of these communications but chose not to tell Kent about them. For instance, on November 3, 2012, K.M.L.'s web browser revealed that in a five minute period that morning, she Googled the terms "Harold Brumbaugh", "cum", "semen", "penis", "soft penis", "flaccid penis" , "condoms" and "condoms with lubricant". Angela testified she was immediately aware of these searches and believed K.M.L.'s explanation that she was learning about these things in sexual education class at school. Also, though Harold's name was included in the list of searches, Angela summarily dismissed this fact and thought nothing of it. Thus, Angela chose not tell Kent about having found these searches.

Angela additionally testified that in late December 2012, Harold made her aware that on November 9, 2012, K.M.L. had texted to him, "If u come over I'll give u the best blow job ever and u don't have to do anything for me if u don't want to it can b all about u…" Harold's response to her was, "…One…do not write those comments..Two, I said maybe later….Three,

you have long day at BB tomorrow" and "I hope dat happened." This final message, again, refers to him requesting her to delete the communications. Though the Court finds this email exchange to be extremely disturbing and indicative of an inappropriate relationship between Harold and K.M.L. (especially when coupled with the above-noted Google searches within the same timeframe which Angela testified she was aware of), again, fearing that Kent would remove K.M.L. from the softball team if he found out about the communications, Angela decided not to tell Kent about them, but rather set up a meeting with Harold to discuss them.

According to Angela, her meeting with Harold to discuss the explicit texts was held at Panera Bread in January, 2013. At that meeting, Angela testified that Harold told her that he "didn't like" where these emails were going. The two then agreed to meet with K.M.L. at Westdale Mall to discuss that it was inappropriate for her to write such emails to Harold. In their meeting with K.M.L., Angela states that Harold "took the blame" and agreed that he should have approached K.M.L.'s parents sooner. In any event, it is clear that Angela became convinced by Harold that K.M.L. was somehow the aggressor with regard to the explicit "blowjob" email, to the point that Harold was more in need of protection from K.M.L. than the other way around. According to Angela, K.M.L. was told, "You can't initiate conversations like this," and K.M.L. "acknowledged she had done wrong." It was also apparently stressed to K.M.L. by Harold and Angela that K.M.L. was a softball player and not Harold's "friend."

Per Angela, no further inappropriate emails between Harold and K.M.L. were discovered by her after this January 2013, meeting. However, it is clear to the Court by this point that Harold was very aware that his correspondence with K.M.L. was monitored. It is also apparent that Harold and K.M.L. could have been communicating through the Wicker application which was later found to be on K.M.L.'s phone, and would render communications untraceable.

After January 2013, it is clear from the record that Kent and Angela's marriage was crumbling and Angela's father was in the process of dying. Angela had a lot on her plate. During this time frame, Angela was also having daily contact with Harold, as was K.M.L.. Kent accused Angela of having an emotional affair with Harold, and Angela, though she knew Kent had misgivings about Harold by that point, insisted that Harold continue to be a frequent guest in their home. Tensions grew, and on March 16, 2013, Angela filed for a divorce.

On March 17, 2013, one day after the divorce was filed, Kent discovered an additional series of texts between Harold and K.M.L. which occurred on March 16, 2013, and referenced a note that K.M.L. had left in Harold's shoe. Alarming to Kent was that it was apparent K.M.L. and Harold had moved to less traceable non-electronic communications, and that Harold was continuing to ask K.M.L. to delete all texts in their electronic messages. In fact, Harold asked K.M.L. to delete all texts three times within a one hour span in this series of communications. Kent also points out that, though it is clear that K.M.L. and Harold were continuing to have

frequent communications with each other, at no point did Harold bring this to Angela and Kent's attention after January, 2013. Rather, Angela again allegedly told Harold not to initiate communications with K.M.L.. Also, as evidenced by emails between Kent and Angela on March 21, 2013, both parents seemed to be on board at that point with not having Harold alone with K.M.L., and not letting K.M.L. ride in his vehicle.

In mid-May, 2013, Kent found the following email exchange between K.M.L. and Harold which had previously taken place on December 27, 2012. From the record, it is clear this communication between Harold and K.M.L. occurred directly before Harold approached Angela about the "blowjob" email. Nearly two months had passed between the "blowjob" email and Harold approaching Angela to advise her of it. The following exchange clarifies that it was K.M.L. who prompted its revelation.

> Harold: It's probably best to DAT and emails..but not sure I can trust you to do this. In fact I don't know who I can trust.
> K.M.L.: Coach I just want to make things right. We both should go to mom and apologize and really mean it.
> Harold: I will not talk to her about this and you should just stop. This isn't something a parent wants to hear especially from daughter or me…do not even go that route, please for me….just let it drop and forget. Please don't, it's bad now but would get much worse… Can I trust you to delete all these emails???????
> K.M.L.: You can trust me. As long as I can trust u to be my coach
> Harold: Talking to anyone even your mom will hurt my family, your family, ur friends, my life…and yours…people will never talk about you or me in a nice way. Drop it and delete.
> K.M.L.: Ever thought what they would think if u quit
> Harold: Health reasons for me, more if you have said something.
> K.M.L.: Please don't

Upon discovering the above exchange, Kent believed that K.M.L. had been molested by Harold. Thus, in part in response to their divorce, and in part due to the continuing communications between K.M.L. and Howard, Kent and Angela set up counselling for their two daughters.

K.M.L. had an initial therapy session with therapist Jessica Blake on May 20, 2013. During that session, Kent and Angela brought all of the texting between K.M.L. and Harold that they were aware of to Ms. Blake's attention. Notably, however, it is clear that though Angela was previously aware of the "blowjob" email, she did not choose to disclose that to the therapist at this time. Even so, the numerous emails and texts that demanded K.M.L. "delete all texts" and promoted secrecy from her parents, as well as the messages that spoke of "Unnoticeable"

touches and smiles, as well as the more serious December 2012 emails proved to be a red flag for Ms. Blake. Ms. Blake immediately reported the communications to the Department of Human Services. The Child Protection Center (CPC) interviewed K.M.L., but K.M.L. was evasive and untruthful in her responses. Ultimately, though social worker and CPC interviewer Julie Easton felt that Harold was "grooming" K.M.L. (taking preparatory steps toward eventually carrying out an act of abuse with a child), the Department did not enter a finding of abuse as Harold had not been in a caretaker role with the child. The CPC did, however, recommend that K.M.L. have no contact with Harold due to their concerns of grooming. Angela vehemently disagreed with this recommendation and stormed out of the meeting. Additionally, lacking solid physical evidence, the Cedar Rapids Police Department had nothing to prosecute. Though it was suggested that Harold's number could be blocked from K.M.L.'s phone in this time frame, the police suggested this not be done as it would hinder their investigation.

Between K.M.L.'s first and second therapy sessions, on June 3, 2013, Kent and Angela's divorce became final. Despite Kent's request, Angela did not want a provision within their decree which precluded contact between K.M.L. and Harold. In the end, Angela's position won out in the divorce, as Kent was closing on a house, and Kent felt that Angela would follow the directives of K.M.L.'s counsellor and the CPC. In any event, by the time of K.M.L.'s second meeting with Ms. Blake on June 11, 2013, Kent had fully taken the position that K.M.L. and Harold should cut ties completely. Angela continued to disagree, believing that she could keep K.M.L. safe without prohibiting contact all together. Ms. Blake discussed with the two parents that if they felt they could keep K.M.L. safe and supervised with Harold, that she could safely finish that softball season with him, but that she should cut ties thereafter. Ms. Blake clearly was of the belief that Harold was grooming K.M.L., and that the potential for sexual abuse was present, and perhaps had already taken place.

Around June 15th or June 20th, 2013, Kent discovered K.M.L.'s web browser search history from November 2012 which included the search terms of "Harold Brumbaugh" and numerous references to penises and semen. He also discovered a lengthy text exchange that occurred between Harold and K.M.L. on December 20, 2012. Many portions of this text exchange are of particular interest to the Court.

> Harold: How about notes (the Court, by the way, particularly observes that Harold is referring to "notes" in the plural here)
> K.M.L.: Huh?
> Harold: Pillow
> K.M.L.: O ya saw it didn't have time to write u one
> Harold: Where are they (again in the plural)
> K.M.L.: Ripped up
> Harold: Hope flushed

The texting continues on later as follows:

Harold: Dat and do flush now before you forget please
Harold: Dat all bi
K.M.L.: Did
Harold: Have a great day

The texting continues further on as follows:

Harold: Hey Call
K.M.L.: Huh?
Harold: Call
K.M.L. (to Angela's phone): Jeez just said call what should I say
K.M.L. then calls her mom.
K.M.L.: Ok I will in a few just a min
Harold: U home
K.M.L.: Duh.

A voice call ensues between K.M.L. and Harold that lasts over five minutes. At the conclusion of this call, Harold advises K.M.L. to Dat again. Harold then suggests that he should stop coaching and take a vacation. A text conversation ensues as follows:

K.M.L.: No no no ur a good coach and I Still want to b friends
K.M.L.: And I want u to b my coach
Harold: We are good friends kiddo. Ur not saying all and I need know. To protect you and me. Now DAT.
K.M.L.: But I am believe me even dad says how moms being weird bout grandpa
K.M.L.: I said that on the phone fir both of us don't want eather of is to b in trouble and don't want to keep lieng
Harold: No problem. DAT
Harold: DAT my name and even my number
K.M.L.: Y
Harold: So u don't get in trouble

Later the same day, Harold texts K.M.L. as follows:

> Harold: Yea…lol Hey, no matter how or what is said…never say anything….regardless of how the questions are asked, nothing ever happened and by the way your mom is sad about her family, bro's and her dad…but u don't know this……Understand?? DAT PLEASE DAT

Kent provided the foregoing to Jessica Blake when he discovered them.

On approximately June 29th or 30th of 2013, Kent finally discovered the "blowjob" email. Again, Kent immediately provided it to Jessica Blake, who informed him that something should be done to immediately inform the other parents on the softball team. Therefore, in early July 2013, Kent wrote a letter to the C.R. Sting Board of Directors detailing the inappropriate text communications, and including the "blowjob" email. The Board responded by removing Harold as the coach.

K.M.L. attended further counselling sessions in July, 2013 with Jessica Blake, but K.M.L. continued not to admit that anything had gone on between her and Harold. Jessica Blake tried hard not to be confrontational with K.M.L. about the texting and emails. According to Ms. Blake, K.M.L. was clearly uncomfortable discussing the subject. Even so, Ms. Blake continued to be convinced that "grooming" had been taking place between Harold and K.M.L., and she therefore continued to recommend that contact cease entirely between the two. Ms. Blake testified at trial that she has concerns that something has already happened between K.M.L. and Harold. She bases this opinion upon the nature of the explicit email from November 2012, reasoning that if nothing had ever occurred, K.M.L.'s email to Harold would not have likely been so explicit. Ms. Blake further opined that even if there was no inappropriate sexual contact between the two, the communications were so inappropriate that there should not be communication. This is largely because of the level of secrecy Harold has requested even though K.M.L.'s parents confronted him about it. She also opined that Harold's reaction to K.M.L.'s explicit "blowjob" email was suspicious, in that the appropriate response to it would have been to turn it down completely, stay away from the child, block her number, cease all contact and report it immediately to her parents (even if his motivation was merely to protect himself). Harold did none of these things, rather waiting nearly two months to discuss it with Angela only, and even then only to discuss it at K.M.L.'s prompting.

Ultimately, Jessica Blake opined that potential dangers to K.M.L. should an injunction not be entered to preclude contact with Harold include that K.M.L. could be sexually abused by him, and if she were to be abused, K.M.L. would be less likely to talk about it in the future. Further, Ms. Blake felt that the message would be confusing to K.M.L. to tell her that it is not okay to send texts to Harold but it would be okay for her to have contact with him. Ms. Blake did not feel that the passage of time would reduce any potential dangers to K.M.L., as she does

not perceive that anything has significantly changed in the dynamic between these individuals within the past year.

After Harold was removed from the softball team, he began bringing gifts by the house, including a bike for K.M.L., stereo equipment and so forth. Though K.M.L. had started playing with a new softball team, Harold started coming around that team. In October 2013, feeling he had no other option, Kent filed an application for injunctive relief in this case to keep Harold away from K.M.L.. Harold seemed to abide by the Court's initial Order.

In December, 2013, Kent was sitting on the couch next to K.M.L. when she got an error message on her phone. K.M.L. accused Kent of hacking her account, which he had not done. He procured K.M.L.'s password from her, and found the following additional email exchanges in K.M.L.'s deleted mailbox:

1. On April 30, 2012, K.L.M. emails "U know I can't breath when people r tickling me." Harold responds "Didn't know that," to which K.L.M responds "That's alright still worth it". Harold's response is ";)))))) happy man, I am". K.L.M. responds "Good…love u pops ur the best." Harold again follows this text with "Delete all."

2. On Friday May 4, 2012, K.M.L. emails Harold stating "I mean if u really wanted a hug u could say gotta grab something and say u couldn't find it," to which Harold responds "Lol kiddo mom and dad are watching." K.M.L. responds with "From downstairs???" to which Harold replies, "Ok meet me outside."

3. On May 4, 2012, and into the early hours of May 5, 2012, K.M.L. emails Harold stating "U guys r being loud tryin to fall asleep!!!" Harold apologizes and K.M.L. responds "That's ok still love u." Harold tells her to "stay in bed kiddo, get healthy, love you soooooo much". K.M.L. then asks if he is leaving, to which he responds "Yep, why can't you be older." K.M.L. responds "Idk u know I still love u low pops," and he responds "Me2 u".

4. Additional emails between K.M.L. and Harold occur from May 4, 2012 into May 5, 2012, as well. Most notably, Harold emails "If only" and "you were older". K.M.L. then responds "Y" and that she "still [doesn't] get it," to which Harold responds "I know, that's the problem."

5. On the evening of May 5, 2012, at 9:23 p.m. K.M.L. emails Harold "Nite pops and don't u still o me". He responds at 9:37 with "yes," and also "I wanted more but you were shy." K.M.L. immediately replies "Don't forget k?!" and at 9:39 with "Not shy in pain and btw all u had to do was ask and I would've given you more hugs". Harold then writes at 9:40 p.m. "I won't, but you have to be ready, love ya sweetie…" He also states "You are shy," and she asks "How???" Harold responds "You wait for me" to which K.M.L. responds "O I wont next time promise….and u can trust me."

The first of these exchanges, which may be interpreted as Harold being a happy man because being tickled is worth the discomfort of not being able to breath for K.M.L., may have a much more innocent and equally plausible explanation as Harold would like the Court to believe. However, because Harold again follows this text with "Delete all," the Court finds it suspicious. The remaining of these April and May 2012 texts denote just how close K.M.L. and Harold had already become by that early timeframe, referencing physical affections and Harold's longing for K.M.L. to be "older."

In January 2014, the parties entered into a stipulation Temporary Injunction. No further texts or emails between Harold and K.M.L. have been discovered by Kent since that time, but Kent notes that the two may possibly have the ability to communicate through cellphone applications such as Wicker. Kent, however, could provide no proof of this. In all, Kent estimates that he reviewed as many as 6000 pages of texts and emails that took place between Harold and K.M.L. over the course of 2012 and 2013.

The Court makes the following findings with regard to credibility of the parties and witnesses herein. Kent's testimony was extremely credible. He was calm, his recollection of events was thorough and consistent. His testimony tracked with chronologies that were also provided in the written email and text documents, and it was consistent with what Jessica Blake acknowledged she was aware of in terms of emails and texts when they were brought to her. It did not appear from his testimony that he was aware of communications between K.M.L. and Harold that he did not disclose to investigators at the time these matters were under investigation by either police or the Department of Human Services. This weighs greatly in favor of his credibility as a witness. Further, Kent clearly has an agenda of protecting his child which is unwavering. The Court could discern no improper bias on his part. Kent's motivation does not appear in any way to the Court to be compromised by concerns about feelings for Harold or concerns about his daughter's softball ambitions. Additionally, Kent's motivations appear to take Angela into account in a positive manner, in that he sought relief in this case rather than filing litigation against Angela.

Angela, on the other hand, was found by the Court to be surprisingly biased in favor of Harold Brumbaugh. Perhaps this bias is derived from his position as a highly sought after and successful coach in the sport that her daughter loves, or perhaps it is the knowledge that K.M.L. would prefer to continue to have contact with Harold Brumbaugh that clouds Angela's judgment. Perhaps it is Angela's own ambition of having her child play at a collegiate, national or Olympic level under his tutelage, or perhaps it is because Angela now describes Harold as her "best friend". In any event, it is clear to the Court that Angela's perception of events is skewed, and she demonstrates great willingness to overlook obviously inappropriate communications between this sixty-five year old man and her own teenage daughter. This great willingness to minimize Harold's culpability is underscored by Angela's knowledge of the "blowjob" email and her failure to disclose it to Child Protection Services as well as to the Cedar Rapids Police during their investigation. The Court finds Angela's credibility is also greatly diminished by the fact that she deliberately refused to include Kent in the knowledge of and discussion about the "blowjob" email and K.M.L.'s November 2012 web searches because she feared that Kent would remove K.M.L. from the softball team.

In her testimony, Angela was very protective of Harold, stating that she could not determine that K.M.L. and Harold's communications with each other were inappropriate because the emails and texts were out of context (although social worker Jessica Blake could think of no context within which they would be appropriate). Angela insists that more context is needed in order to determine whether the communications were appropriate or not. That said, she had no explanation for why Harold had not provided the additional context necessary, stating simply "I don't know what he has access to."

In her testimony, Angela insisted she does not think Harold is a danger to K.M.L., and that Kent has made a bigger deal out of this matter than it has deserved. While she admits that some of the communications between Harold and K.M.L. were inappropriate, she clearly considers K.M.L. to have been the aggressor, and is also strangely critical of Kent for not identifying his concerns about the emails and texts sooner, even though she deliberately denied or limited his access to the information she received about the communications – especially concerning the extremely explicit communications of November 2012.

Also, while Kent, Ms. Blake, Ms. Easton, the Department of Human Services, the Police and the CR Sting Board all recommend that Harold should not have any contact with K.M.L., Angela has no explanation or understanding for why she derives a different conclusion from very same text and email history between K.M.L. and Harold from which those individuals and entities derive their conclusions. At the current time, Angela supports a supervised friendship between K.M.L. and Harold, and does not agree that a prohibition of contact is necessary.

The Court found Harold's testimony to be at times rambling, and at times unresponsive, but overall completely lacking in credibility. Statements made by Harold on the record were often not supported by any other evidence, and conflicted with the evidence available. For instance, Harold argues that Kent was physically aggressive toward K.M.L., but there is absolutely no evidence anywhere in the record that supports this contention. K.M.L. in fact identifies Kent to the CPC interviewer as a person that she trusts, and K.M.L. describes discipline from her parents consistent with their own descriptions, to wit, loss of phone privileges, or possibly getting yelled at. Another example of Harold's testimony not being supported by other evidence appears in his contention that he only gave one physical note to K.M.L.. Harold describes said alleged single note as an appropriate note that he left under her pillow out of concern for her when he was once house-sitting for the family. However, in his text messages to K.M.L., Harold refers to "notes" in the plural, and uses the word "they" when referring to them. He also demands assurance from K.M.L. that "they" were flushed. The Court believes, therefore, that more than one note existed, and to the extent Harold demanded it be flushed, the Court finds Harold's testimony that the note was "appropriate" in nature to be quite incredible, begging the question as to why an appropriate note as Harold described in his testimony would need to be torn up and flushed down the toilet.

Harold's lack of credibility is only compounded by the number of times in the record that he tells K.M.L. to DAT, or delete all texts and emails in his communications with her. This is despite repeated requests from her parents that he not direct K.M.L. to be deceitful. Harold's explanation for telling K.M.L. to delete her texts is rambling at best. He states he "knew she was young", and that he wanted to make sure she "didn't get herself into trouble" because of "nonsense kid stuff". When confronted by Angela about telling K.M.L. to delete her communications with him, Harold testified he "didn't mean anything by it," and that "kids will be kids, and I know girls." He describes his frequent direction to K.M.L. that she "DAT" or "delete all texts and emails" as a mistake, but cannot adequately explain why he did it, and even worse, why he continued to do it when he was aware her parents repeatedly disapproved.

In addition, Harold's explanations for many of the text messages lack believability and/or do not make sense. For instance, he testifies that his request that K.M.L. pay "special attention" to him in one email was to suggest she bring him another drink, although his text immediately thereafter refers to an unnoticeable "touch or smile, " and not a drink. Harold further testified that the same email about the "touch or smile unnoticeably" referred to K.M.L. giving him a wet willy. The Court finds it hard to believe that demanding K.M.L. pay him special attention was meant for her to understand that she should give him a wet willy.

Harold contradicts himself and/or his own emails and texts throughout his testimony. With regard to the "blowjob" email, for instance, Harold testified that he didn't initially bring it up to Kent because he "didn't think Kent could handle it." Also, he testified that he knew

Angela's dad was dying, so he "held off" for as long as he could. This testimony, however, obviously conflicts with Harold's own text messaging to K.M.L. wherein it is clear that she is urging him to discuss things with Angela and Harold is adamantly refusing. Another example of Harold's contradictory testimony appears in that he testifies numerous times that he is never alone with the girls he coaches, and has never been alone with K.M.L., however, he admitted in his cross-examination that he spoke to K.M.L. face to face after the "blowjob" email – a discussion that the Court knows never could have nor would have occurred in the presence of any other human being. When asked why he directs K.M.L. to "never say anything" and "nothing ever happened," Harold could only testify that he couldn't recall what that was about, and that he "didn't know why that's in there."

Also, when Harold tries to explain why stated he wished K.M.L. was older in some of his texts/emails, it was his testimony that her youth made it hard for her to understand why she should be more appropriate in her communications with him. However, the Court notes that in the May 4-5, 2012, emails wherein Harold first makes such statements, K.M.L.'s communication to him had simply been "K love u pops cu tomorrow hopefully fealing better." There was nothing aggressive or improper about K.M.L.'s communication. It was Harold's own response that fell short of appropriateness. In short, the Court found Harold Brumbaugh to be entirely lacking in credibility in this matter.

Notwithstanding his lack of credibility, Harold did testify that at one point he did try to reach out to S.E.L., K.M.L.'s younger sister, to communicate by means of text or email with her about an item. Harold testified that S.E.L. never responded to him. In any event, Harold's unsolicited initiation of text or email contact with S.E.L. is of concern to the Court in the context of this case, and this concern is compounded by the nature of Harold's ongoing relationship with Angela, S.E.L.'s mother. To that extent, and in light of the totality of the record within this case, the Court believes that, without its intervention, S.E.L. may also be at risk of future injury should Harold be allowed contact with her.

As a final note, though the Court is quick to point out that K.M.L. is the victim in this case and the Court does not fault her in any manner for Harold's behavior, the Court also finds K.M.L.'s CPC interview to be entirely lacking in credibility as it is clear that she is going out of her way to protect Harold. Though the totality of the record, including the overwhelming documentary evidence and in this matter, shows that K.M.L. was in constant email and text contact with Harold, and that she saw him daily at softball and also socially within her home, K.M.L. could only bring herself to admit to the CPC interviewer as having had contact with Harold for purposes of softball three times a week. She also greatly minimized the amount of texting and emailing she did with Harold, and denied seeing him anywhere else besides softball. Further, she only admitted that "maybe once" Harold told her not to tell anyone about the texting, though the Court is aware from the record of multiple occasions upon which this

occurred. Further, K.M.L. denied Harold ever talked to her about keeping things appropriate between them, which is even at odds with Harold's own testimony. K.M.L. also denied having a nickname for him, although the record is replete with the fact that she calls Harold "Pops".

CONCLUSIONS OF LAW

Iowa Rule of Civil Procedure 1.1501 entitled Independent or Auxiliary Remedy states, in part: "An injunction may be obtained as an independent remedy by an action in equity, or as an auxiliary remedy in any action…"

The Iowa Supreme Court has "often noted that '[a]n injunction is an extraordinary remedy which should be granted with caution and only when clearly required to avoid irreparable damage.'" *Sear v. Clayton County Zoning Board of Adjustment*, 590 NW2d 512, 515 (Iowa 1999). "The party seeking the injunction must establish: (1) an invasion or threatened invasion of a right; (2) that substantial injury or damages will result unless the request for an injunction is granted; and (3) that there is no adequate legal remedy available." *Id.*

"When considering the appropriateness of an injunction 'the court should carefully weigh the relative hardship which would be suffered by the enjoined party upon awarding injunctive relief." *Id.* A party is not entitled to injunctive relief when it has an adequate remedy at law. *Lewis Investments, Inc., v. City of Iowa City*, 703 NW2d 180, 185 (Iowa 2005).

The Plaintiff, the moving party, has the burden to establish a factual basis for the issuance of an injunction. *Atlas Mini Storage, Inc., v. First Interstate Bank of Des Moines, N.A.,* 426 NW2d 686, 689 (Iowa Ct. App. 1988).

In reaching my decision in this matter, I place great weight on the following facts:

1. The credible testimony of Kent Langholz, and the plethora of email and text communications that the Court found to be inappropriate and sometimes sexual in nature between Harold Brumbaugh and K.M.L..
2. The testimony of Jessica Blake and Julie Easton, each of whom are trained social workers and mandatory child abuse reporters, and each of whom strongly opined that Harold Brumbaugh was grooming K.M.L. for a sexually inappropriate and/or abusive relationship.
3. The entirety of Harold Brumbaugh's testimony and its lack of credibility. Harold was unable to explain to the satisfaction of the Court his actions with regard to K.M.L., and therefore ultimately his lack of credibility was in turn supportive of Kent Langholz's position herein.

4. Harold will not suffer any hardship if the requested injunction is entered. Harold's own witness, Denita Peterson, demonstrated to the Court that the perceptions of Harold within at least some portion of the softball community have remained unchanged regardless of the entry of the temporary injunction that was entered within this matter. Harold will also be able to continue his friendship with Angela should he so choose. He will simply not be allowed to have any contact with her children.

5. Kent has no other adequate remedy at law that would entirely prohibit Harold from contacting his children. Though Kent could seek modification of his divorce in order to seek a provision that states that both he and Angela would do what they could to keep Harold away, the injunctive relief that Kent has sought in this matter would entirely preclude Harold from contacting K.M.L. and S.E.L. whether Angela and Kent were aware of it or not.

The Court agrees with the expert opinions of Jessica Blake and Julie Easton in this case that Harold's text and email conversations with K.M.L., when taken as a whole, evidence his attempts to groom K.M.L. for purposes of taking preparatory steps toward eventually carrying out an act of abuse with her. The Court therefore finds that, absent injunctive relief precluding contact from him, K.M.L. will likely suffer irreparable damage in the form of emotional and potentially physical and sexual abuse from Harold, as Harold would almost certainly continue to pursue an inappropriate relationship with her, with or without the knowledge of her parents.

IT IS THEREFORE ORDERED that Plaintiff's request for injunctive relief is granted. Defendant Harold Brumbaugh shall be enjoined and restrained from communicating with and/or otherwise contacting K.M.L. and S.E.L. in any matter whatsoever, including but not limited to, all written and in person contact or communications, all contact or communications through a third party, passing notes or gifts, or attending the sporting or other extracurricular events of either child; provided, however, that Defendant Harold Brumbaugh may attend the extracurricular events of his step-grandchildren, which may also involve K.M.L. or S.E.L as a participant, and he may attend any game or event at any sports complex, provided that neither child is participating in the game or event which he is attending and he make every effort to avoid visual contact with K.M.L. and S.E.L. at all times, and shall be no closer in proximity to them than 100 feet. This injunction shall remain in place until K.M.L. and S.E.L. each reach the age of majority.

IT IS FURTHER ORDERED that this ruling shall be sealed and shall be accessible only by the parties and their counsel.

Clerk to notify.

Dated: February 3, 2015.

IN THE IOWA DISTRICT COURT IN AND FOR LINN COUNTY

NESSET, INC., d/b/a WEBER PAINT & GLASS,	)	
	)	No. EQCV089116
Plaintiff,	)	
	)	**FINDINGS OF FACT,**
vs.	)	**CONCLUSIONS OF LAW**
	)	**AND RULING**
CHARLES JONES AND GREEN DEVELOPMENT SOKOL, L.L.C.,	)	
	)	
Defendants.	)	

On the 9th day of January, 2019, this matter came before the Court for purposes of contested trial on Plaintiff's action to foreclose a mechanic's lien. The Plaintiff, Nesset Inc. d/b/a Weber Paint & Glass (Weber Paint), an Iowa corporation with its principal place of business in Marion, Iowa, appeared through its President, Larry Nesset ("Nesset"), and Attorney Kevin Caster. The Defendant, Green Development Sokol, L.L.C. ("Green Development Sokol"), an Iowa limited liability company with its principal place of business currently in Cedar Rapids, Iowa, and Defendant, Charles Jones ("Jones"), who formed Green Development Sokol, appeared through and with Attorney Peter Riley.

Weber Paint filed a petition in equity on November 17, 2017, to foreclose a mechanic's lien filed against real estate owned by Green Development Sokol on January 31, 2017. Defendants Green Development Sokol and Charles Jones were served and did file an Answer on January 30, 2018.

In 2016, Weber Paint entered into an agreement to furnish labor, materials and equipment related to construction of property located at 415 3rd Street SE, Cedar Rapids, Iowa 52403, locally known as the Sokol Building. The Sokol Building is a roughly 4,800 square foot building consisting of a basement, a main level, a mezzanine level, a second and third level and rooftop. In 1908 it was constructed for use as a gymnasium, and was utilized in that capacity until 2008. After the historic Cedar Rapids flood of that year, the building stood vacant until purchased by Green Development Sokol in 2014 to be converted into a restaurant and residential apartments (the "Sokol Building project").

In 2014, Green Development Sokol hired MW Construction, managed by Mr. Miles Wilson ("Wilson"), as the general contractor for the Sokol Building project. Wilson then hired a number of subcontractors to work on the project in various capacities.

The Plaintiff, Weber Paint, was initially approached by Wilson in July 2016 to provide subcontracting work of installing the storefront entry and doors of the building, as well as a metal and glass railing surrounding the open mezzanine area in the main entryway of the building. Specifically Weber Paint was to furnish front windows (street level), two commercial doors for North and South side entry, new frames to match old existing frames, glass around the transom, as well as lights, new double doors for the new East entryway, a glass and metal railing on the perimeter of the mezzanine and a glass staircase railing from the entry area to the mezzanine level.

Weber Paint provided a proposal including three design options to Wilson on July 6, 2016 relative to the guard railing design. It was not disputed at trial that Wilson would pass proposals provided by the various subcontractors on to Jones and that Jones, on behalf of Green Development Sokol, would either approve or reject them. It is also not disputed that the second option outlined in that proposal, contemplating that the railing would be comprised of 3/8" clear tempered glass at a cost of $16,532, was accepted by Jones.

On July 8, 2016, Weber Paint provided a proposal to Wilson for labor and materials for North and South side entry doors at a cost of $11,630.40. This proposal, through Wilson, was accepted by Jones. Wilson made a $2,035 down payment on that work on July 8, 2016, and on August 29, 2016, Wilson paid the remaining $9,595.40 for that work.

Emails between Nesset and Wilson during July 2016 show that, though double entryway doors were contemplated in the building design, no decision had yet been made by the Defendants on the installation of double doors at the main entryway of the building. Contemporaneously, however, Nesset advised Wilson that glass surrounding the eventual doors, as well as two side-lights and three transom pieces made of ¼" tempered glass could be ordered at a total cost of $1,215.77. It is not disputed that Jones, through Wilson, accepted this proposal as well. Wilson wrote Weber Paint a check for this full amount on August 1, 2016.

On September 20, 2016, Weber Paint provided a proposal to Wilson for a 3/8" tempered glass and metal staircase and railing at a cost of $10,455. On September 30, 2016, an email from Nesset to Wilson evidences a change order on this scope of that work to provide extra glass and metal for a 90 degree turn in the railing at an additional cost of $940.20. It is not disputed that Jones, through Wilson, accepted this proposal with the noted change order at a total combined cost of $11,395.20.

In Nesset's email to Wilson on September 30, 2016, Nesset also provided further information to Wilson about the contemplated double entryway doors. It is clear from the content of this email that no final design or product had then yet been selected by Jones for the double entryway doors, but that doors from two companies, Sierra Pacific and Marvin, were being considered for the project. In the September 30, 2016, email, Nesset specifically "reminds" Wilson that the Sierra Pacific doors would cost $14,688.11, which would include "stain/finish, exit hardware, automatic ADA opener/closer and all installation" but would not include "electrical to the door". Nesset also specifically advised Wilson in the September 30 email that the doors would be custom size and would therefore "have extended lead times."

On October 10, 2016, an email from Nesset to Wilson indicates that Weber Paint had arranged for the Sierra Pacific representative to come to Cedar Rapids on October 11 to reconfirm the dimensions for the front doors so that they could be ordered. This clearly suggests that the decision had been made by

that point for Sierra Pacific to be the company that would provide the double doors, but also suggests that the Defendants had agreed to the proposal for the double doors as set forth in Nesset's September 30, 2016 email. Nesset advised Wilson in the October 10, 2016, email that the doors were custom, and therefore would require five to six weeks for delivery. In the same email, Nesset further states relative to the doors, "I will contact you for the deposit on them next week when you are back in town." The email also noted that no further action would be taken by Weber on the glass railing and staircase until a deposit payment was made for that part of the work. On October 18, 2016, a check in the amount of $13,500 was remitted to Weber by Green Development Sokol bearing Jones' signature for deposit on the railing system.

On December 6, 2016, Weber Paint submitted an invoice to Wilson in the amount of $1,219.93 for the frame surrounds and custom side lights for the double entryway doors. On January 4, 2017, Nesset followed up on this invoice by emailing Wilson and asking that payment be arranged for that part of the work. Also attached to Nesset's January 4, 2017 email was a second invoice for the guard railings ($16,532 as noted above), stair railings ($11,395.20 as noted above) and front entrance custom double doors ($14,688.11). The total balance due to Weber Paint relative to that invoice was $42,615.31. Nesset noted in his January 4, 2017, email that Green Development Sokol had made the $13,500 deposit, and that the total remaining due on this invoice was $29,115.31. Nesset went on to request that a progress payment of $15,000 be paid by the end of that week.

It was around the beginning of January 2017 that Wilson no longer served as intermediary between Nesset/Weber Paint and Jones/Green Development Sokol. Jones testified that was because his agreement with Wilson to provide general contracting extended only through the process of establishing the "vanilla shell" of the building for purposes of obtaining an occupancy permit on or before December 31, 2016, such that Jones and Green Development Sokol could avoid having to pay a $50,000 penalty for failure to procure the same. Once past that hard deadline, Jones testified that he undertook dealing with the remaining subcontractors, including Weber Paint, on his own. From Nesset's perspective, however, it appeared that Wilson and MW Construction had not finished their work on the project, and that though Nesset did not have any specific conversation with Jones about Jones taking over the interactions with Weber Paint and Nesset, it rather just happened. Thus, commencing in January 2017, Jones began to speak, text and email directly with Nesset and his crew on site, and Jones continued to make partial payments directly to Weber Paint for the work.

With Wilson then out of the picture, on January 4, 2017, Jones texted Nesset about some adjustments he wanted made to the stair design. A week later, on January 11, 2017, Jones texted Nesset about "a leveling issue with the glass installed" that would need to be discussed. On January 19, 2017, Jones again texted Nesset stating that "the shimming improved that brewery glass alignment substantially." Other texts between Jones and Nesset during the month of January 2017 reflect their ongoing discussions about materials that were en route for finalizing the project, and also to essentially put finishing touches on Weber's work in the building. The texts are short, and generally respectful and productive.

In addition to their text messaging, it is clear from the record that the parties also continued to communicate, in part, via email during January, 2017. On January 13, 2017, for instance, Nesset emailed Charles Jones directly about providing three pieces of 1/4" clear annealed glass for apartment 201 in the

building for a cost of $250.16. It is not disputed that Weber Paint provided the glass for this part of the project, but that a slightly different size of glass was needed, and therefore the total amount invoiced relative to this glass was $280.97. On January 18, 2017, Nesset emailed Jones indicating that, likely due to an ice storm, the metal for the railing had not yet arrived. The email further referenced a minor chip that Jones had shown him in the top of the glass railing, and indicates that though Nesset denied the chip was present when installed, he would have the chip remedied by one of his workers. Lastly, that email referenced the fact that a closer mechanism for the front door would be installed on January 25, 2017, thus evidencing that the front double doors had been installed at some point prior to that time.

On January 26, 2017, the parties' communications with each other began to break down. It was on that date that Nesset texted Jones a reminder that Green Development Sokol's account was past due. In response, Jones texted Nesset as follows: "You only finished the railing around the brewery last week, and were supposed to be finished with all of it no later than December 16th, and the front door still needs to be fixed. I've been professional, and very patient with you. The bank requires that I sign off that an entire scope of work is complete before issuing final payment. 90% done doesn't pass a building inspection. If it's done, and done right it's not a problem." In response to this text, Nesset texted Jones "This is a Progress payment. No check, no work, and a lien will follow." Jones then responded to Nesset's text via another text stating "You should answer for your work like a man, all you can do is hang up because you know you're wrong. That door is a travesty This door isn't invoiceable." Notably, the January 26, 2017 texts provide the first suggestion within the record that Jones was in any way unhappy with Weber Paint's work on the double doors even though they had been invoiced three weeks prior.

On January 27, 2017, Jones texted Nesset that "until our dispute is resolved you are hereby notified per Iowa code 716.7 to not trespass on the Sokol property at 415 3rd Street SE Cedar Rapids IA 52401 If you or any employees or associates try to enter the building I will call the police."

As of January 31, 2017, Weber Paint had been promised payments by Jones, but payments had not been received for much of the work that Weber Paint had done. As a result, Nesset filed a mechanic's lien against the building claiming a then-current principal sum of $30,616.21.

On February 1, 2017, the day after the mechanic's lien was filed, Miles Wilson issued a check to Weber for $7,000, referencing the "Sokol Glass Railing." On February 1, 2017, Nesset sent Jones a text indicating that Weber Paint would be cutting metal and coming to the building for installation on February 2nd. This text suggests that Jones and Nesset had telephone contact subsequent to Jones' January 27 "no trespass text", but prior to February 1, 2017, and that they had come to terms on Nesset and Weber Paint being able to enter the building to continue to finish their work.

On March 1, 2017, Jones sent a text to Nesset stating that the restaurant within the Sokol Building had opened, and that he was continuing to work on funding such that disbursements could be made. The same text inquires of Nesset as to whether a ten percent interest figure would be fair for any balances that were more than 30 days past due. A further check in the amount of $500 was remitted to Weber by Green Development Sokol on March 9, 2017 referencing "progress payment/finance charge."

On March 31, 2017, Jones sent a letter to Nesset thanking him for helping with the restoration of the building and stating that historic tax credits had been applied for which would provide "enough funds to pay the entire balance owed to you." The letter further stated that "the very good news is there is

certainty that, that balance will be paid if not sooner, than later via the historic tax credit payments" and that "there is no realistic risk of not getting the rest." Jones included with the letter a check in the amount of $5,407.88 written on the account of Green Development Sokol.

Nesset again emailed Jones on May 10, 2017, and further texted him on May 15, 2017, reminding him that the past due balance on the work done by Weber at the Sokol Building totaled $18,415.45. Within four minutes of Nesset's text, Jones replied to Nesset stating, "Awning was completed last Friday, so this week I'll be submitting the historic tax credit application, and then I'll check with the state and Feds on their estimated processing time and as soon as I hear something I'll let you know." The Court finds it very telling that nothing in Jones' response signified any indication that he was not planning to pay the remaining bill to Weber Paint.

A similar email was sent by Nesset to Jones on June 1, 2017, again requesting payment and adding ten percent interest for a then-current total of $18,553.57. By this point in time, the weather had warmed up. Jones, however, still had not paid his bill in full, so Nesset refused to do any additional work on the double doors despite the warmer temperatures.

On July 13, 2017, Nesset received another letter from Jones stating that "eventual payment is still secure" and that "a 10% finance charge will be added to any past due balances." It is clear from that letter that Jones was continuing to count on the historic tax credit monies to cover any outstanding balances that were still owed. It was also clear from Jones' letter that he assented to a 10% finance charge being added to any past due balances. On July 17, 2017, Weber Paint, pursuant to Jones' statement in the July 13 letter, then invoiced Miles Wilson and MW Construction for a ten percent finance charge on the outstanding balance of $17,427.36 on invoice #64292 dated January 4, 2017, and also on the outstanding balance of $280.97 on invoice #64321 dated January 30, 2017. This evidences Nesset's assent to the ten percent finance charge. The total finance charge billed on those two invoices came to $891.46, which when added to the amounts of the two unpaid invoices ($17,708.33) came to a grand total of $18,599.79.

In his testimony, Nesset explained that the double doors in particular became an area of contention between Jones and Weber Paint because the doors were not completed prior to Jones demanding their installation. Nesset further explained that the doors had arrived at Weber from the manufacturer in December 2016, and had only received one coat of varnish prior to their installation by the beginning of January 2017, at which time Jones was adamant that the doors be installed so that the building could be inspected and Jones could avoid a $50,000 penalty. This resulted in the doors being installed with streaks, drips and bubbles in the varnish. There were also problems with the fit of the doors as their installation was completed in a hurry. Kile Harper, an employee of Weber Paint, corroborated this testimony, stating that the doors had left Weber's shop before they were finished.

It was clear from Nesset's testimony that though he was generally aware that there was an inspection scheduled in January 2017, he was never made aware of the "vanilla shell" deadline referred to by Jones in his testimony until the deadline had become imminent. It was also quite clear from Nesset's testimony that Nesset was very aware of the fact that the doors were not finished when they were installed, and that further work would be required (sanding, additional varnishing and lacquering) for them to be completed correctly. However, it was January, and the weather had become inclement, so Nesset testified that the doors would not be able to be removed and finished until the weather became

warmer. Nesset testified that he planned to return to finish the doors properly once the weather warmed up.

Jones, in his testimony, also admitted that he knew the doors were not complete prior to their installation, and that he had insisted upon their installation nonetheless. However, Jones insisted that there had been numerous issues with Weber Paint's work throughout the process, including lateness of the work on the railings and doors, the railings not being level when initially installed, and that panels of glass for the railings had "impact damage" on certain corners. Nonetheless, the evidence at trial shows that Weber Paint took actions to correct any deficiencies or imperfections in its work that were noted by Jones as the project progressed, including remedying the function of the doors. Jones admitted at trial that his primary objection ultimately was that Weber Paint never came back to properly finish the cosmetics of the double doors.

Moreover, Jones also testified that the March 1, 2017, text, March 31 letter and July 13 letter, all of which promised either further payment or payment of "the entire balance owed", as well as promising payment of a ten percent finance charge on any remaining balances, were not meant to promise Weber Paint payment in full. Rather, they were simply mass communications which were sent to *all* of the Defendants' subcontractors who had not yet been paid in full, and that Jones really had no intention of paying *Weber Paint* in full because he felt that the double doors were not "invoiceable". The Court finds that even if the aforementioned communications were made to all of Jones' unpaid subcontractors, Jones' testimony that he never intended to make such promises to Weber Paint specifically lacks credibility. The Court makes this credibility finding in light of Jones' text to Nesset on May 15, 2017, sent in response to Nesset's text reminding him that the past due balance at that time totaled $18,415.45, an amount that Jones testified to be similar to the amount charged for the double doors. However, Jones' May 15, 2017 text not only fails to dispute the amount owed in any way, but essentially communicates a reassurance of payment, and was communicated within four minutes of Nesset's text to Jones demanding payment.

Ultimately, Jones had the doors replaced by Garling Construction in September 2018, 21 months after their installation and nearly a year after suit herein was filed.

Weber Paint demands judgment against the Defendants in the total amount of $17, 708.33, which represents the total in unpaid invoices, plus $3,564.23 in pre-judgment interest, for a total of $21,272.56. Weber Paint also demands foreclosure upon its registered mechanic's lien herein.

A mechanic's lien is purely statutory in nature. Baumhoefener Nursery, Inc. v. A & D Partnership, II, 618 N.W.2d 363, 366 (Iowa 2000) (citing Gollehon, Schemmer & Assocs., Inc. v. Fairway-Bettendorf Assocs., 268 N.W.2d 200, 201 (Iowa 1978)). An action to enforce a mechanic's lien must be by equitable proceedings and no other cause of action shall be joined therewith. Iowa Code § 572.26. The mechanic's lien statute is liberally construed to promote restitution, prevent unjust enrichment, and assist parties in obtaining justice. 10 Ia. Prac., Civil Practice Forms § 58:1 (2012 ed.). The mechanic's lien claimant has the burden of proof. Id. Iowa Code § 572.2 governs who is entitled to a mechanic's lien and requires the existence of a contract between the mechanic's lien claimant and the property owner or his agent. Id. For purposes of § 572.2, the term "owner" includes every person for whose use or benefit any building, erection, or other improvement is made, having the capacity to contract, including guardians. Iowa Code § 572.1(3). "Every person who furnishes any material or labor for… any building… for improvement…thereof, …by virtue of any contract with the owner.. [or] general

contractor…shall have a lien upon such building…, and land belonging to the owner on which the same is situated …to secure payment for the material or labor furnished…." Iowa Code §572.2.

To be entitled to a mechanic's lien, there must be an express contract or such a state of facts as will give rise to an implied contract. 10 Ia. Prac., Civil Practice Forms § 58:1 (2012 ed.). In attempting to enforce a mechanic's lien, a meeting of the minds is essential to the existence of either an express or implied contract. Id. (citing Harper v. Ford, 179 N.W.2d 772 (Iowa 1970)). Fundamental to establishment of a mechanic's lien on property is proof of such an express or implied contractual arrangement binding the person then possessing an ownership interest. Clemens Graf Droste Zu Vischering v. Kading, 368 N.W.2d 702, 708-09 (Iowa 1985). Any permissible claim or counterclaim meeting subject matter and jurisdictional requirements may be joined with an action for a mechanics lien pursuant to Iowa's statutes, and the Court may enter judgment on a permissibly joined claim or counterclaim. Iowa Code 572.24.

It is clear in this matter that Defendant Charles Jones, and Green Development Sokol, L.L.C., are the owner of the real estate described in the Plaintiff's Petition. Further, it is clear that Green Development Sokol, through Jones and its general contractor, hired Weber Paint to provide installation of storefront entry and doors and a metal and glass railing surrounding the open mezzanine area in the main entryway of the Sokol building. The scope of work agreed upon included installation of front windows (street level), two commercial doors for North and South side entry, new frames to match old existing frames, glass around the transom, lights, new double doors for the new East entryway, a glass and metal railing on the perimeter of the mezzanine and a glass staircase railing from the entry area to the mezzanine level. Evidence is clear that the parties entered into a contract relative to this work. Also clear from the evidence is that Jones (either individually or in his capacity as a member or manager of Green Development Sokol) communicated on numerous occasions directly with Nesset an intention to pay for the work. Weber Paint provided substantial compliance with this agreement. All of the material and labor that Weber Paint had contracted to provide, save for properly finishing the front double doors, was provided in a satisfactory fashion. Further, the Court finds that any deficiency with the front double doors was attributable to the lack of priority placed upon the doors by either the Defendants or their general contractor in the initial discussions with Weber Paint. Though the Defendants originally contacted Weber Paint in July 2016, the Defendants did not decide upon which custom doors to order until approximately three months later. Further, there is no dispute that the doors were incomplete when they were installed, and even Nesset admitted that they needed additional work, which he intended to complete as exterior temperatures warmed.

The Court finds Jones' statements that he never intended to pay for the doors to lack credibility. Dissatisfaction with the doors was not mentioned in any of Jones' written communications to Nesset with regard to past due invoices, nor did Jones ever state to Nesset that he did not intend to pay for the doors specifically. Further, Jones' single text to Nesset that the doors were not invoiceable could be understood as merely communicating that he felt the doors were unfinished and in need of additional work, which Nesset already knew. Parenthetically, the Court finds any evidence of the lack of quality of the finish on the doors, by way of an expert or otherwise, to be immaterial as to whether the doors should ultimately be paid for in this particular case, as Jones's own delay in ordering the doors ultimately forced the rush of their installation when not completely finished. Moreover, this single text does not relieve Jones from being held responsible for payment of the work that was completed, including the doors. This is

especially in light of the fact that the doors were fully functional, and that Jones kept the doors on the building and continued to use them for nearly 21 months after their installation.

The Court finds that Weber Paint is entitled to be compensated for the cost of their full unpaid contact sum. To deny Weber Paint payment would result in unjust enrichment of the Defendants herein. The total unpaid balance due to Weber Paint is $17,708.33. Though an interest rate was not stated nor disclosed to Defendant in Weber Paint's initial bid, Jones proposed a ten percent finance charge on past due balances, and Nesset, on Weber Paint's behalf, accepted it. Thus, the unpaid balance due to Weber Paint of $17,708.33 is subject interest at 10 percent, per annum, on the amount of $17,427.36 beginning on January 4, 2017, and on the amount of $280.97 beginning on January 30, 2017.

The Court now turns to Weber Paint's request for attorney's fees. Iowa Code Section 572.32 provides that "a prevailing Plaintiff may be awarded reasonable attorney's fees." This no longer makes the award of attorney's fees mandatory as previously held under the predecessor statute in Baumhoefener Nursery v. A and D Partnership, 618 N.W.2d 363, 368 (Iowa 2000). This is a conclusion reached by the Iowa Court of Appeals in the unpublished case of Tri-State Agri Corp. v. Clasing, 2001 Iowa App. LEXIS 787 (decided December 28, 2001). In exercising discretion, a Court should look at factors such as the difficulty of the case and the results obtained. Baumhoefener, *supra* at pages 368-69. The Court finds that Weber Paint is eligible for attorney's fees under this statute. The question, however, is whether to grant the fees and, if so, how much. As noted in the ruling above, Weber Paint filed the mechanic's lien within one month of furnishing Jones with a final invoice. From the start of the project to the end, the cost of the project remained substantially the same. Thus, the court finds Green Development Sokol and Jones' refusal to pay the bill was not reasonable nor was it anticipated. Moreover, Jones repeatedly sent written communications to Nesset on behalf of Weber Paint indicating that Weber Paint's bill would be paid in full. Thus, under the circumstances of this case, the Court finds that an award of attorney's fees is appropriate in the amount of $1,391.18 for fees through December 2018. This award may be supplemented upon application by the Plaintiff.

Next, the Court notes that Defendant Jones has raised an affirmative defense, arguing that any contractual relationship with Weber Paint would have been with Green Development Sokol and not with Jones individually. Jones argues that a member of an LLC is not liable for the LLC's contract debts. However, as the Plaintiff rightly points out, it is Jones' burden to prove his affirmative defense that any promises he made to pay Weber Paint herein were solely made in his representative capacity. Jones has provided no such evidence. His repeated promises to pay were not made on letterhead designating the LLC, nor were they made with his signature accompanied by his title with the LLC. Rather, many of his repeated promises to pay past due invoices were simply uttered by means of text or via letter bearing only his own name at the close. Accordingly, the Court concludes that Jones' affirmative defense on this point has not been proven.

Lastly, the Court notes that the Defendants have raised an affirmative defense relating to deficiencies in Plaintiff's work. Again, the burden of proof relative to this defense is upon the Defendants. On this defense, the Defendants also fail to meet their burden. Jones accepted the doors knowing they were unfinished, and did not provide notice of revocation. Rather, he kept the doors in place and used them for nearly two years subsequent to their installation. In addition, the Court could find no evidence in the record proving Defendants' cost to repair the doors. Though there was evidence in the record suggesting the doors could be remedied by shimming, adjusting, sanding and varnishing, this was not undertaken by the Defendant and therefore there is no way to determine what the cost for such repairs would be. Moreover, the cost of replacing the doors in September 2018 was unclear, and even if clear, would not have been the appropriate remedy.

In light of all of the Court's foregoing findings, IT IS, THEREFORE, ORDERED that judgment shall enter in favor of the Plaintiff, Weber Paint & Glass., and against the Defendants Charles Jones and Green Development Sokol, L.L.C., jointly and severally, in the amount of $17,708.33, subject interest at 10 percent, per annum, on the amount of $17,427.36 beginning on January 4, 2017, and on the amount of $280.97 beginning on January 30, 2017, plus attorney's fees in the amount of $1,391.18 plus interest at the legal rate. Further, IT IS ORDERED that the mechanic's lien which is the subject of this matter is hereby foreclosed. Costs are taxed to the Defendant.

IN THE IOWA DISTRICT COURT IN AND FOR LINN COUNTY

Micheal E. Bos,	)	
	)	
Petitioner,	)	
	)	**No. CVCV085324**
vs.	)	
	)	**RULING**
Climate Engineers, Inc. and The	)	
Hartford Fire Insurance,	)	
	)	
Respondents.	)	

On this date, the Petition for Judicial Review filed by Petitioner Micheal E. Bos came before the undersigned for review. The Court finds a hearing on the Petition is unnecessary. Having considered the file, relevant case law, and written arguments of counsel, the Court hereby enters the following ruling:

FACTUAL AND PROCEDURAL BACKGROUND

On November 12, 2014, Deputy Workers' Compensation Commissioner Stan McElderry entered an Arbitration Decision, following Petitioner's filing of a petition in arbitration in which Petitioner sought workers' compensation benefits from Climate Engineers, Inc., employer, and The Hartford Fire Insurance, insurance carrier. The following issues were presented to Deputy McElderry for determination: temporary benefits; the extent of permanency benefits; medical expenses; and penalties. Deputy McElderry entered the following factual findings (references to "claimant" are to Petitioner, and references to exhibits are omitted):

> The claimant was 33 years old at the time of hearing. He is a high school graduate, and has taken some general studies courses at Kirkwood Community College. He began working for the employer herein in about 2005. The claimant had pre-existing anxiety issues for which he had received treatment. Although the claimant is currently on prescriptions for depression/anxiety, he has no restrictions from work activities due to the depression/anxiety.

On October 31, 2012, the claimant was working with a piece of plywood when his left shoulder popped. The claimant had previously dislocated this same shoulder. He went to St. Luke's Hospital and was referred to James Pape, M.D., who had seen the claimant for the previous left shoulder problem. The claimant was returned to light duty work until surgery was performed in January of 2013.

On January 4, 2013, Dr. Pape performed a left shoulder arthroscopy with capsular/labral repair on the claimant. Dr. Pape referred the claimant for physical therapy and work hardening. The claimant did not complete the work hardening and was discharged for non-compliance. Dr. Pape then referred the claimant to a pain clinic where the claimant saw Douglas Sedlacek, M.D. Dr. Sedlacek prescribed a pain patch (Lidoderm), Celebrex, and more therapy. Dr. Pape then released the claimant in July of 2014. Dr. Pape opined a six percent of the whole person impairment.

David S. Tearse, M.D. performed an independent medical examination (IME) of the claimant on March 10, 2014. Dr. Tearse opined a 6 percent of the whole body impairment and permanent work restrictions of no more than 20 pounds lifting above shoulder height on an occasional basis, 40 pounds floor to waist, and 25 pounds floor to shoulder. Dr. Tearse also opined a maximum medical improvement (MMI) date of January 4, 2014, the day claimant was discharged from physical therapy.

On June 4, 2014, the claimant underwent an independent medical evaluation (IME) with Mark Taylor, M.D. Dr. Taylor opined a 7 percent of the whole person impairment, limit lifting to 40 pounds floor to waist, 30 pounds waist to shoulder, and 20 pounds above the shoulder on an occasional basis.

On July 9, 2014, the claimant saw Kent Jayne for a vocational assessment. Mr. Jayne opined that the claimant's limitations would preclude him from most of the competitive labor market. On August 22, 2014, the claimant saw James Carroll for a vocational assessment. Mr. Carroll opined a 29 percent loss of employability and a 20 percent loss of access to the labor market. If a restriction of driving vehicles or operating machinery were included, Mr. Carroll opined up to a 72 percent loss of access to the labor market and a 35 percent loss of employability. The opinions of Mr. Jayne go beyond the other evidence in the record. The claimant believes he can work and the claimant has no work restrictions from his mental issues. The opinions of Mr. Carroll for vocational issues are entitled to more weight.

Claimant's own testimony indicated his belief that he is employable without further training in maintenance, customer service, and customer service (sic). He is a certified

forklift driver and has a commercial driver's license (CDL). He does the snow removal, mowing, and yard work at his home. He cares for his son. The claimant is not totally disabled, and he is not an odd-lot employee. Given the claimant's pain, claimant's medical impairment, training, permanent restrictions, as well as all other factors of industrial disability, the claimant has suffered a 40 percent loss of earning capacity.

The parties stipulated that the claimant's gross weekly earnings were $778.00 per week, and that he was single, and entitled to 1 exemption. As such, his weekly benefits rate is $486.94. Commencement date for permanent disability is when the claimant reached maximum medical improvement. In this case that date is July 28, 2013, when the claimant was released to full duty from the work injury. He had a non-work related hernia for which he was restricted, but that was a personal condition. The claimant also seeks healing period benefits from March 12, 2014 through July 7, 2014. There is no evidence that this was a healing period from the work injury herein.

The claimant also seeks payment of medical expenses. Those medical expenses are detailed in Exhibit 12 and are for treatment of anxiety/depression and a physical therapy session. Payments were mailed late, generally a day or two, on 58 occasions. Late payments totaled $12,590.88.

See Arbitration Decision, pp. 1-3.

Deputy McElderry first considered the issue of permanent disability. Deputy McElderry concluded that "[b]ased on the finding that the claimant has suffered a 40 percent loss of earning capacity, he has sustained a 40 percent permanent partial industrial disability entitling him to 200 weeks of permanent partial disability pursuant to Iowa Code section 85.34(2)(u)." See Arbitration Decision, p. 4.

Deputy McElderry next considered temporary benefits, finding "[t]he claimant seeks healing period for March 12, 2014 through July 7, 2014, but it was not found above to be a healing period. No additional healing period can be awarded on this record." See Arbitration Decision, p. 4.

Next, Deputy McElderry considered medical benefits. Deputy McElderry concluded: "The claimant seeks payment of medical bills detailed in Exhibit 12. Those medical expenses were reasonable and necessary for the treatment of the claimant's work injury. Defendants shall pay/reimburse those bills as appropriate." See Arbitration Decision, p. 5.

Finally, Deputy McElderry considered the issue of whether Petitioner was entitled to penalty benefits. Deputy McElderry found: "Payments were mailed late, generally a day or two,

on 58 occasions for all total $12,590.88 in late payments. The payments were not very late, but were late. A penalty of $1,250.00 is appropriate on these facts." See Arbitration Decision, p. 7.

Petitioner filed a Motion for Rehearing, and each party appealed from Deputy McElderry's Arbitration Decision. On March 22, 2016, Workers' Compensation Commissioner Joseph S. Cortese II filed an Appeal Decision. Commissioner Cortese noted that the appeal issues before him were as follows (references to "defendants" are to Climate Engineers and to the Hartford Fire Insurance):

> On appeal, defendants assert the deputy commissioner erred in awarding 40 percent industrial disability and medical expenses related to treatment of anxiety and depression. On cross-appeal, claimant asserts the deputy commissioner erred in admitting a late-served vocational expert report, in failing to find defendants admitted claimant should be awarded permanent total disability, in failing to find claimant sustained permanent total disability, and in determining the commencement date for permanency benefits is July 28, 2013.

See Appeal Decision, p. 1. Commissioner Cortese adopted Deputy McElderry's Arbitration Decision, along with the following added analysis (references to transcript pages and to exhibits have been omitted):

> Claimant was born on September 13, 1980, and he is right hand dominant. Claimant graduated from high school in 1999. Following graduation from high school claimant attended Kirkwood Community College, but he did not graduate or obtain any certificates. At the time of the hearing, Claimant was 33 years old.
>
> Claimant has worked in construction and maintenance for the majority of his working career. From June 1999 through February 2000, claimant worked for Bill Lane Construction, where he was involved with framing and roofing homes. Claimant left Bill Lane Construction and accepted a maintenance position with Cedar Graphics. While with Cedar Graphics, claimant operated a paper baler/shredder, he performed building maintenance and grounds keeping duties, and he obtained a forklift operator certification. Claimant worked for Cedar Graphics from 2000 through 2007. While working for Cedar Graphics, claimant also worked part-time as a cashier for Hawkeye Convenience Store in Cedar Rapids, from October 2005 through November 2007.
>
> In 2007, claimant accepted a pre-apprentice sheet metal position with defendant-employer. Defendant-employer fabricates and installs ductwork for commercial HVAC systems. As a pre-apprentice, claimant was a member of the Local 263 Sheet Metal Workers Union. Claimant performed material handling, including unloading trucks,

moving material into the barn, and "loading up the burn table." Claimant would help set up the installation. He handled large and small pieces of ductwork used in industrial settings, which required lifting and carrying. He reported the weight of the pieces varied between 20 and 100 pounds. Claimant estimated he spent equal time working between floor and waist level, waist to shoulder level, and above shoulder level.

While working for defendant-employer, claimant also engaged in nonmaterial handling duties. He estimated during an average shift, he spent between one percent and 25 percent of the time sitting and holding his hands in one position, 25 to 50 percent using vibratory tools, and 50 to 75 percent climbing ladders. Claimant reported he spent 75 percent or more of his shift standing, walking, stooping, bending, crawling, kneeling, climbing, and gripping or grasping.

While working as a pre-apprentice, claimant obtained a chauffer's license. After a period of time defendant-employer offered claimant a utility worker position in the office. Claimant accepted that position and he was no longer affiliated with the union. As a utility worker, claimant was responsible for coordinating and scheduling deliveries between jobs, training employees in obtaining chauffer's licenses, and training employees how to tie down loads and manage tools and materials for the field and shop personnel.

Claimant worked as a utility worker for approximately five years. He was involved in several accidents with company vehicles and, after being disciplined, defendant-employer returned him to the pre-apprentice position in late September or early October 2012.

On October 31, 2012, claimant was out in the field working at the new Kirkwood Community College Training Center. He stated he was getting ready to slide a piece of plywood onto a flat roof and, as he began sliding the plywood, his left shoulder "dislocated or re-dislocated, popped out." Claimant finished pushing the plywood with his right arm, he climbed down, and he reported the injury to his employer. Claimant was taken to the emergency room at St. Luke's Hospital and his shoulder dislocation was reduced.

Claimant previously dislocated his left shoulder at work in November 2011. As of October 31, 2012, claimant had not had surgery or received any permanent restrictions or limitations with respect to his left shoulder.

On November 2, 2012, Dr. Ann McKinstry, M.D., saw claimant at St. Luke's Work Well Clinic and referred him to James Pape, M.D., orthopedic surgeon. Claimant saw Dr. Pape for his prior left shoulder injury in 2011.

Dr. Pape ordered an MRI of claimant's left shoulder. Dr. Pape reviewed the MRI, which revealed a subacute Hill-Sachs impaction fracture of the posterior superior aspect of the humeral head with overlying cartilage irregularity. The MRI report noted an intrasubstance peripheral partial rim rent tear of the supraspinatus portion of the rotator cuff, but no complete tears or tendon retraction. Dr. Pape recommended an arthroscopic labral repair and prescribed Lortab for pain.

On January 4, 2013, Dr. Pape performed a left shoulder arthroscopy with labral repair and left shoulder anterior capsular plication. Dr. Pape ordered physical therapy and placed claimant's left arm in an UltraSling. Claimant was placed on light duty from the date of injury until his surgery. After the surgery claimant was off work.

Upon recheck six weeks following surgery, Dr. Pape noted claimant's progress was slow. Dr. Pape discontinued the UltraSling and claimant continued to receive physical therapy.

In March and April 2013, claimant complained to Dr. Pape and to his primary care physician, Bradley Beer, M.D., that he was experiencing occasional numbness in his left upper extremity. Claimant informed Dr. Beer his left arm was "numb and tingly." In April and May 2013, Dr. Pape noted claimant was progressing with physical therapy and his strength was improving. During claimant's May 15, 2013, appointment, Dr. Pape noted he believed claimant could increase some of his work activities, and he was "very close to being released to full duty."

Claimant was discharged from physical therapy on June 10, 2013. The physical therapist found claimant had met his goals, had near equal range of motion in both shoulders, and had reached maximum benefit. On June 13, 2013, Dr. Pape noted claimant had advanced to a home exercise program, and should proceed with a progressive return to work over the next six weeks.

Defendant-employer intended claimant would return to work on a four-hour basis. Claimant did not return to work. Defendant-employer discharged claimant on June 14, 2013. Claimant had developed a left inguinal hernia and had surgery on June 27, 2013.

On July 25, 2013, Dr. Pape re-evaluated claimant and noted claimant did not return to work due to restrictions related to his hernia repair. Claimant complained of discomfort in his left shoulder and noted he had ongoing stiffness because he had not been able to proceed with home exercises due to his hernia repair. Dr. Pape found claimant was doing well overall and noted, "I think that it would be reasonable for the patient to be released in terms of progressing to regular duty as previously written for his left shoulder." Dr. Pape found claimant had not reached maximum medical improvement, but released

Claimant to return to work without restrictions with respect to his left shoulder effective July 25, 2013.

On November 12, 2013, claimant returned to Dr. Pape and continued to complain of discomfort, numbness and tingling in his left arm, with a sense of temperature difference between the right and left upper extremities. Dr. Pape expressed concern that claimant "may have some regional pain difficulty given his temperature difference in his upper extremity." Dr. Pape recommended work hardening and a possible evaluation at a pain clinic. In December 2013, claimant initiated work hardening and Dr. Pape referred claimant for a pain clinic evaluation.

On December 30, 2013, claimant saw his primary care provider, Dr. Beer, and reported he was feeling depressed because of his left shoulder injury due to financial issues and because he had been unable to return to work. Dr. Beer noted claimant had a history of depression, but had been doing fairly well before his injury. Dr. Beer prescribed Cymbalta. Dr. Beer characterized claimant's depression as moderate and affecting his activities of daily living.

On January 2, 2014, claimant was discharged from work hardening, due to noncompliance and performance. The therapist noted claimant periodically arrived late for appointments, left early, and took longer breaks than indicated. Claimant reported his attendance problems with work hardening were due to issues with his bank and transportation. Claimant stated he believes he made progress during work hardening.

On January 29, 2014, claimant returned to Dr. Pape. Claimant reported he still had numbness, tingling, and a temperature difference in his left upper extremity. Dr. Pape noted claimant continued to have symptoms with his left shoulder and would benefit from evaluation and treatment at a pain clinic. Dr. Pape informed claimant he did not have much more to offer with respect to his shoulder. Dr. Pape referred claimant to Douglas Sedlacek, M.D., pain specialist.

Dr. Sedlacek evaluated claimant on February 28, 2014. Dr. Sedlacek noted claimant had taken tramadol and diazepam long-term for foot and knee problems, and that the medication had been prescribed by Dr. Beer. Claimant reported temperature changes in his left hand and described his left hand as cold, and having a "vague kind of glove distribution, numbness and discomfort." Claimant reported most of his pain was over the deltoid and supraspinatus and infraspinatus on the left side. Dr. Sedlacek prescribed Lidoderm patches for seven days, followed by Flector patches for seven days, and physical therapy. Claimant reported relief from the patches.

Claimant discontinued physical therapy in April or May 2014 and continued with home exercises and stretches. Claimant testified the physical therapy was beneficial.

In March 2014, defendants referred claimant for an independent medical examination with David Tearse, M.D. Dr. Tearse concluded that further surgery was not indicated and recommended claimant continue with a home exercise program. Dr. Tearse placed claimant at maximum medical improvement with respect to the left shoulder as of his discharge from physical therapy on January 2, 2014. Dr. Tearse concluded claimant sustained permanent physical impairment resulting from the work injury based on the AMA Guides to the Evaluation of Permanent Impairment—Fifth Edition, as follows:

> I would assign him a 6% upper extremity impairment, using Table 16-26 for mild (occult) instability. I would additionally assign him a 4% impairment rating for limited motion, using fiture 16-40, 16-43, and 16-46. These are combined using the Combined Values Chart to total a 10% impairment of the upper extremity, which is converted using table 16-3, to a 6% whole person impairment.

Dr. Tearse assigned permanent restrictions: "limit above shoulder reaching to no more than 20 lbs. on an occasional basis only, lifting from floor to waist limited to 40 lbs. with the left arm and 25 lbs. from floor to shoulder."

Claimant exercised his right to an independent medical examination (IME) with Mark Taylor, M.D. Dr. Taylor prepared a report on June 4, 2014, finding claimant sustained permanent physical impairment based on the AMA Guides to the Evaluation of Permanent Impairment—Fifth Edition, as follows:

> Turning to Tables 16-40, 16-43 and 16046 on pages 476-479, I would assign a 5% left upper extremity impairment rating related to decrements in range of motion compared to his normal right upper extremity. Additionally, turning to Table 16-26 on page 505, I would place Mr. Bos in the occult category and would assign a 6% left upper extremity impairment rating related to the mild instability with a positive Apprehension test. These values are then combined according to the combined values chart on page 604 and results in an 11% left upper extremity impairment rating.
>
> According to Table 16-3 on page 439, an 11% left upper extremity impairment rating converts to a 7% whole person impairment rating.

Dr. Taylor assigned permanent restrictions, including "a 40 pound lifting limit between floor and waist level with both arms together, and a 30 pound lifting limit between waist

and shoulder level," and 20 pounds or less above the shoulder level on an occasional basis.

For non-material handling, Dr. Taylor concluded claimant can sit, stand, walk, squat, bend, and kneel without restrictions. Dr. Taylor found claimant can climb stairs occasionally, but he should avoid working above ground level because his medications can cause drowsiness. Dr. Taylor further noted, "[h]e may tolerate going up a few steps on a stepladder, but I would generally recommend that he avoid climbing extension or vertical ladders due to the residual left shoulder symptoms."

On July 8, 2014, Dr. Pape found claimant had reached maximum medical improvement and released him from his care. Using the AMA Guides to the Evaluation of Permanent Impairment—Fifth Edition, Dr. Pape opined claimant sustained "an impairment of 10% to his left upper extremity based upon table 16-26 on page 505 and table 16-35 on page 510 and figure 16-46 on page 479 of the guide. This would translate into a 6% whole person impairment."

While working for defendant-employer, claimant earned $14.00 to $15.00 per hour. Claimant was not employed from the date of his discharge on June 14, 2013, through the date of the hearing, which was September 9, 2014.

At the hearing, claimant submitted a job search log showing he contacted eleven employers between July 22, 2014 and August 29, 2014, regarding employment. He also contacted Iowa Vocational Rehabilitation Services for help finding a job. Claimant reported he looked at a variety of jobs including "landscaping, customer service reps, service writer, counter part sales, tank washer, semi tank washing, a tree service, Americlean, either trying to clean duct work out or cleaning carpets." Claimant stated he has had four or five interviews with Americlean.

Claimant testified he interviewed with Kirkwood Community College for a temporary, seasonal groundskeeper helper position. The position involved maintaining the grounds, including mowing. Claimant stated he thought he could perform the position. During his interview, claimant disclosed his left shoulder injury and he reported he had restrictions of 40 pounds from floor to waist, 30 pounds from waist to shoulder, and 20 pounds overhead. Claimant testified the staff member who interviewed him at Kirkwood told him he would need to be able to lift 60-pound bags of fertilizer. Claimant stated he responded that he could put the fertilizer on a dolly and scoop it out as needed.

Claimant alleges he has experienced depression as a result of his work injury. Claimant testified he experienced crying spells, a short temper, he was forgetful, he had trouble

focusing, and he lost his appetite and motivation. Claimant's family physician, Dr. Beer, began treating Claimant for depression at the end of 2013 or the beginning of 2014. Dr. Beer prescribed Cymbalta for depression and diazepam for anxiety. Claimant sees Dr. Beer every three to four months. Claimant reports his mood has improved since he first saw Dr. Beer.

Claimant received treatment for depression with Dr. Beer before his work injury, following a death. Claimant stated his prior depression was situational. Dr. Beer also treated claimant in the past for anxiety and prescribed lorazepam, Xanax, and clorazepam. Claimant has not seen a psychiatrist, psychologist, or counselor for psychotherapy, counseling, or other treatment since his October 2012 shoulder injury. He has treated only with Dr. Beer.

During the hearing, claimant testified he experiences pain in his left shoulder area and numbness, and temperature changes in his left hand. Claimant described the pain in his shoulder as "kind of all around and down may arm. It's kind of burning, sharp, numbness, achiness." Claimant stated he always has pain. Claimant reported that on a good day his pain is a two or three out of ten, and on a bad day, six to eight out of ten. Claimant described the pain as "throbbing, sharp, numbness, tingling. Feels like the back of my neck is burning or something." Claimant uses ice, stretching, his pain patch, and elevates his shoulder on a pillow. He stated he has a bad day approximately two to three days per week. Claimant notes he has bad days when he lifts or reaches out, or engages in more activity with his left arm. Claimant testified a bad day might last a day or two. He stated he continues to perform home exercises, including lifting weights, and he performs shoulder blade pinches, stretches, and bicep curls.

Claimant does not believe he could perform his prior positions with Climate Engineers, Bill Lane Construction, and Cedar Graphics. Claimant reported his job with Climate Engineers was physical, with frequent reaching out, lifting, and lifting overhead, which are duties he can no longer perform. Claimant testified his position with Bill Lane Construction required him to carry wood and set up walls, which are also duties he can no longer perform. Claimant stated he does not believe he could perform the maintenance position at Cedar Graphics. Claimant believes he can engage in mowing. Claimant testified he cares for his infant son at home, mows the grass with a riding lawnmower, and moves snow with the blade attached to his tractor.

Two vocational experts, Kent Jayne, M.A., and James Carroll, M.Ed., rendered expert opinions on behalf of claimant, and defendants respectively. Jayne performed a records review, performed assessments, and met with claimant. Carroll performed a records review only.

Mr. Jayne concluded claimant is precluded from the competitive labor market, as follows:

> However, even absent his psychological and emotional difficulties, Mr. Bos' reduced ability to use his upper extremities, and his limited ability to perform manual dexterity, fine motor coordination, and minimal clerical skills are particularly devastating from a vocational standpoint. His limitations in use of the left upper extremity in lifting, carrying, and endurance, in addition to his dexterity problems, would preclude him from nearly all jobs within his previous capacities in the labor market. Significant limitations in handling or dexterities will eliminate a large number of occupations a person might otherwise do. Mr. Bos' noncompetitive performance in both fine motor coordination and manual dexterity, as well as the limitations set forth by Drs. Taylor and Tearse would preclude him from the competitive labor market. He was certainly unable to perform at a level which would permit him to return to any of his previous relevant occupations. When the limitations revealed by standardized testing in other areas in clerical perception, reasoning, and basic academic abilities are taken into account, it is eminently clear that Mr. Bos has been precluded from the competitive labor market. He has no marketable transferable skills at his current level of abilities as understood.

When preparing his report, Mr. Jayne noted claimant's work history. Mr. Jayne did not discuss claimant's previous experience as a convenience store clerk, a position he held for two years. Mr. Jayne opined claimant is precluded from performing "entry level clerical work, such as that of a cashier, clerk, or in retail" based on assessments he performed. Mr. Jayne did not consider Claimant's complete work history in rendering his opinions, and specifically found claimant lacks the capacity to work as a cashier, work he performed for a period of two years. Based on this oversight, I do not find Jayne's opinion persuasive.

Mr. Carroll disagreed with Jayne, and opined Claimant is not completely vocationally disabled. Mr. Carroll found the restrictions imposed by Drs. Tearse and Taylor place claimant within the medium physical demand level. Mr. Carroll noted claimant's work history includes work in the following occupations:

Carpenter	DOT#860.381-02	SVP 7 Medium
Groundskeeper Industrial-Commercial	DOT#406.684-014	SVP 3 Medium
Maintenance Mechanic Helper	DOT#899.684-022	SVP 5 Heavy
Baler Operator	DOT#920.685-010	SVP 2 Heavy

Industrial Truck Operator	DOT#921.683-050	SVP 3 Medium
Cashier Checker	DOT#211.462-014	SVP 3 Light
Sheet Metal Shop Helper	DOT#619.686-022	SVP 2 Heavy
Truck Driver, Heavy	DOT#905.663-014	SVP 4 Heavy

> Mr. Carroll determined that pre-injury, claimant had access to 97 different occupations, with 2,085 positions in the Cedar Rapids labor market based on transferable skills from his vocational history. Mr. Carroll found the post-injury assessment revealed 69 occupations with 1,669 positions, representing a loss of employability of 29 percent, and loss of access of 20 percent of the labor market. Mr. Carroll also considered the variables of not being able to drive a work vehicle and not being able to operate machinery, which would result in a post-injury loss of employability of 35 percent as opposed to 29 percent. Based upon a review of claimant's pre-injury earnings and post-injury earning capacity, Mr. Carroll determined claimant has a loss of earning capacity of 22 percent.

See Appeal Decision, pp. 2-9.

In his conclusions, Commissioner Cortese first considered Petitioner's claim that Deputy McElderry erred in failing to find that Respondents had admitted that Petitioner was permanently and totally disabled. This claim was based on Petitioner's argument that Respondents stipulated that Petitioner was permanently and totally disabled through their Response to Request for Admission No. 4. Request No. 4 stated "[t]hat Michael Bos' claim for workers' compensation benefits from his 10/31/2012 work injury should be compensated pursuant to Iowa Code § 85.34(3)," which was admitted by Respondents. Respondents claimed they understood that they were agreeing that Petitioner sustained an injury to his body as a whole, as opposed to a scheduled injury, and that the language of the admission does not specifically mention "permanent total disability," but only the manner by which the claim should be compensated. See Appeal Decision, p. 10. Respondents also claimed that neither party believed Respondents had stipulated that Petitioner was permanently and totally disabled because Respondents denied Petitioner had sustained an industrial disability; both parties retained vocational experts; and the hearing report noted the parties disputed that Petitioner had sustained a 100% loss of earning capacity and was an odd-lot employee. Id. Commissioner Cortese concluded:

> When the parties submitted the hearing report to the deputy commissioner, the parties reported there was a dispute as to whether claimant was totally disabled. If claimant believed there was no dispute regarding the issue because the matter had been deemed admitted, he should have raised the issue before the deputy commissioner. Instead of doing so, he waited until the filing of his post-hearing brief to raise the issue at the time the record was closed. If claimant had raised the issue at the start of the hearing, it could have been addressed by the deputy commissioner at the time of the hearing. And at that

> time, defendants could have moved to amend or withdraw the admission under Iowa R. Civ. P. 1.511.
>
> Claimant's attorney signed the hearing report, agreeing there was a dispute as to whether claimant was totally disabled. He did not raise the admission during the hearing, and not until he filed his post-hearing brief. This agency relies on hearing reports to determine the issues to be decided by the presiding deputy commissioners. Claimant waived his argument by signing the hearing report and by failing to raise the purported admission with the deputy commissioner at the start of the hearing.

See Appeal Decision, p. 12.

Commissioner Cortese next considered the admission of Mr. Carroll's vocational assessment, which was hearing Exhibit G. "Claimant objected to the admission of Exhibit G, claiming it is highly prejudicial and should be excluded because defendants failed to identify Mr. Carroll in their answers to interrogatories and in their witness and exhibit list." See Appeal Decision, p. 13. "Counsel for claimant argued, "I think it's highly prejudicial. I don't want to have additional time and expenses to go out and do something more. We're here today and want to put on this case." Id. Deputy McElderry disagreed and ruled the report would be admitted. Commissioner Cortese concluded that Petitioner had not established prejudice due to the admission of the report, and stated that "[t]he deputy commissioner noted he found the report was of very little use to him and he provided claimant with an opportunity to submit a response to the report. Counsel for claimant declined the offer." See Appeal Decision, p. 15. Commissioner Cortese affirmed Deputy McElderry on this issue.

Next, Commissioner Cortese considered the extent of Petitioner's disability. On appeal, Defendants contended that Deputy McElderry erred in determining that Petitioner sustained a 40% loss of earning capacity. On cross-appeal, Petitioner contended that Deputy McElderry erred in failing to find he is permanently and totally disabled, or an odd-lot employee. With respect to industrial disability, Commissioner Cortese concluded:

> Drs. Tearse and Pape determined claimant sustained a six percent whole person impairment and Dr. Taylor found claimant sustained a seven percent whole person impairment. Dr. Tearse assigned permanent restrictions limiting "above shoulder reaching to no more than 20 lbs. on an occasional basis only, lifting from floor to waist limited to 40 lbs. with the left arm and 25 lbs. from floor to shoulder." Dr. Taylor assigned permanent restrictions, including "a 40 pound lifting limit between floor and waist level with both arms together, and a 30 pound lifting limit between waist and shoulder level, and 20 pounds or less above the shoulder level on an occasional basis.

The deputy commissioner found claimant sustained a 40 percent industrial disability based on his left shoulder injury. The deputy commissioner noted claimant "had pre-existing anxiety issues for which he had received treatment [and found while] the claimant is currently on prescriptions for depression/anxiety, he has no restrictions from work activities due to the depression/anxiety." Claimant contends the evidence presented at hearing supports a finding that he is permanently and totally disabled based on "work-related depression" and chronic pain. Defendants deny claimant's assertion.
…

Claimant received pharmacological treatment for anxiety and depression prior to his work injury from his primary care physician, Dr. Beer. Claimant also received pharmacological treatment from Dr. Beer after his work injury. Claimant has not received an evaluation or treatment from a psychologist, psychiatrist, or counselor since his October 2012 left shoulder injury. He has not received any counseling or psychotherapy. Drs. Pape, Taylor, and Tearse did not provide any opinions regarding a connection between claimant's employment and his anxiety or depression, nor did they provide any work restrictions related to anxiety or depression. No physician or mental health provider has opined claimant has any permanent impairment or restrictions related to his mental health conditions. The deputy commissioner correctly rejected claimant's assertion.

Claimant obtained a vocational rehabilitation opinion from Kent Jayne asserting claimant is totally disabled. Defendants obtained a vocational rehabilitation opinion from James Carroll asserting claimant sustained a loss of earning capacity of 22 percent. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion.

Mr. Jayne opined that claimant is precluded from engaging in clerical work, such as that of a cashier, clerk or in retail, based on the assessments he performed. Mr. Jayne's finding is inconsistent with claimant's prior work experience as a cashier, a position claimant held for two years, when he worked for Hawkeye Convenience Store from October 2005 through November 2007. Mr. Jayne's report does not mention this past relevant work. Based on this omission, I afford Mr. Jayne's opinion very little weight.

Mr. Carroll, on the other hand, identified all of claimant's relevant work history and limitations when considering his residual functional capacities. Mr. Carroll determined that pre-injury, claimant had access to 97 different occupations, with 2,085 positions in

the Cedar Rapids labor market based on transferable skills from his vocational history. Mr. Carroll found the post-injury assessment revealed 69 occupations with 1,669 positions, representing a loss of employability of 29 percent, and loss of access of 20 percent to the labor market. Mr. Carroll also considered the variables of not being able to drive a work vehicle or operate machinery, which would result in a post-injury loss of employability of 35 percent as opposed to 29 percent. Based upon a review of claimant's pre-injury earnings and post-injury earning capacity, Mr. Carroll determined claimant has a loss of earning capacity of 22 percent.

Claimant had not worked since his June 14, 2013, discharge by defendant-employer through the hearing on September 8, 2014. He was noncompliant with work hardening. And at the time of the hearing claimant had only contacted 11 employers in the Cedar Rapids area regarding employment, from July 22, 2014, through August 29, 2014.

A majority of claimant's work history involves unskilled and semi-skilled work, in the medium-to-heavy level. Claimant has permanent restrictions which preclude him from returning to many, but not all of his prior positions. And he can perform medium level work, including work where he occasionally lifts 20 pounds above his shoulders. Claimant has experienced a loss of earning capacity, but he is not totally disabled. The evidence does not support the contention that claimant is incapable of returning to work as a cashier. Claimant has received a forklift certification, a chauffer's license, and he has trained other employees in obtaining chauffer's licenses.

Claimant is a young man. At the time of the arbitration hearing he was 33 years old. Claimant is a high school graduate, and he has attended classes through Kirkwood Community College. Claimant noted on his application to Iowa Vocational Rehabilitation Services that he was interested in training and school and he was considering enrolling in Kirkwood Community College or Coe College. Claimant works on snow removal, mowing, and yard work at home, and he cares for his son, who was an infant at the time of the hearing. Claimant believes he can engage in mowing. Claimant is not incapable of retraining. Considering claimant's age, education, qualifications, experience, his ability to engage in similar employment, and all other factors of industrial disability discussed above, I affirm the deputy commissioner's finding that claimant has sustained 40 percent industrial disability.

See Appeal Decision, pp. 16-18.

Commissioner Cortese next considered the applicability of the odd-lot doctrine. Claimant asserted that Deputy McElderry erred in failing to find that Petitioner is an odd-lot worker. Commissioner Cortese concluded:

Claimant has not established a prima facie case under the odd-lot doctrine. Claimant lives in an urban area, Cedar Rapids. At the time of the hearing, claimant had only applied for 11 jobs. Claimant believes he can engage in mowing. His past relevant work as a cashier is also consistent with his limitations. Claimant's own testimony reveals he believes he is employable. Mr. Carroll's report supports there are positions in the Cedar Rapids market which claimant is capable of performing, consistent with his limitations and residual functional capacities.

Claimant has sustained an industrial disability….Claimant is entitled to permanent partial disability benefits for 200 weeks from July 28, 2013.

See Appeal Decision, p. 19.

Finally, Commissioner Cortese considered the issue of penalty benefits, affirming Deputy McElderry on this issue.

In response to the Appeal Decision, Petitioner filed a Motion for Rehearing. Petitioner raised the following grounds in the Motion:

1. Exhibit G, Mr. Carroll's vocational report, should be excluded.
2. The vocational report of Mr. Jayne should be given considerable deference regarding industrial disability.
3. A finding should be made that Petitioner's mental health condition is related to the work injury.
4. Petitioner should be found to be an odd-lot employee.
5. The correct commencement date for permanent partial disability benefits should be July 8, 2014.
6. Respondents should be liable for a penalty of $14,016.91.

On the issue of Mr. Carroll's report, Commissioner Cortese concluded:

The deputy in this case stated, on the record, that the untimely-served vocational report had little use. The deputy also gave claimant's counsel the opportunity to rebut the untimely-served report to offset any prejudice.

Claimant cannot establish prejudice in this case. Claimant's counsel was given the opportunity to file rebuttal to the untimely report. Counsel for claimant declined that opportunity. Claimant cannot now claim prejudice, for the late served vocational report,

when claimant's counsel was given the opportunity to offset any prejudice and declined that opportunity. Claimant's application for rehearing is denied as to this ground.

See Rehearing Decision, p. 2.

As to Mr. Jayne's vocational report, Commissioner Cortese found:

As detailed in the appeal decision, Mr. Jayne opined claimant is precluded from the competitive labor market. Claimant testified in hearing there are jobs he can perform. He is certified as a forklift driver and has a CDL. He has, essentially, a medium physical demand level to his left shoulder only. Claimant is right handed. He is 33 years old. Claimant has a varied work history. Mr. Jayne's opinions were detailed and discussed in the appeal decision. A re-review of Mr. Jayne's opinions, found at Exhibit 6, does not change the findings made in the appeal decision.

In addition, it is noted a review of past agency decisions indicates in 2014 alone, Mr. Jayne routinely opined in over a dozen cases that claimants were also completely disabled….In 2015 Mr. Jayne opined in another 15 cases that claimants were either completely disabled or precluded from the competitive labor market….It appears Mr. Jayne routinely opines claimants are precluded from the competitive labor market. Given this record, and the findings of fact and conclusion of law made in the appeal decision, the arbitration and appeal decision were correct in finding Mr. Jayne's opinions are less than convincing.

See Rehearing Decision, pp. 2-3.

Commissioner Cortese next considered the question of whether Petitioner's mental health condition is related to his work injury. Commissioner Cortese concluded:

Claimant had a preexisting depression/anxiety condition and had been treated for that condition in the past. The record indicates claimant did not tell any doctor about his alleged depression, until July of 2013, or approximately 9 months after his date of injury. At the time of hearing, the only treatment claimant had received for his depression was medication prescribed by Dr. Beer. Claimant was not receiving any other treatment or counseling. No other treating physician, other than Dr. Beer, has opined claimant's mental health issues are related to his injury. Claimant testified he believed his depression was due to his having a child on the way and not having a job.

In his July 30, 2014, letter, Dr. Beer opined that claimant's preexisting depression was exacerbated by the October 2012 injury. Dr. Beer goes on to state: "Commonly, patients

who suffer injuries that lead to disability, even if there is no underlying depression/anxiety, will developed [sic] depression/anxiety."

Dr. Beer specializes in family medicine. His pronouncement that, individuals who have injuries that lead to disability ultimately have mental health problems is unsupported in the record. Such a position would result in most cases before this agency resulting in mental claims. Dr. Beer has no explanation why claimant's depression disorder went unreported for nearly a year after the date of injury. Given this record, it is found the opinions of Dr. Beer are not convincing.

As noted, claimant had a preexisting mental health condition and had treated with Dr. Beer for that condition. Claimant did not tell any physician about his alleged depression until nearly a year after the date of injury. At the time of hearing the only treatment claimant was receiving for his depression was medication prescribed by Dr. Beer. Dr. Beer's opinion regarding causation is found not convincing. Given this record, it is again found claimant has failed to carry his burden of proof that his mental condition is causally connected to his October 2012 work injury. Claimant's application is denied as to this ground.

See Rehearing Decision, pp. 3-4.

On the question of whether Petitioner is an odd-lot employee, Commissioner Cortese found:

As noted in both decisions, claimant is 33 years old. He has worked in construction and maintenance. He has also worked in a convenience store. Claimant has worked as a groundskeeper. He is certified to operate a forklift and has a CDL. Claimant has between six to seven percent permanent impairment of his body as a whole due to his left shoulder injury. He has a lifting restriction limiting him to lifting 40 pounds from waist to floor on the left and 25 pounds from floor to shoulder. Claimant is right-hand dominant. The record indicates defendants intended for claimant to return initially to work part time. Claimant did not return to work. The record suggests claimant did not return to work due to a hernia repair. At the time of hearing, claimant had made minimal effort to find other employment. James Carroll, defendants' vocational expert, opined claimant had a 22 percent loss of earning capacity. As noted above, Dr. Jayne's opinions regarding vocational opportunities are found not convincing.

Claimant has a 40 percent industrial disability. He is not an odd-lot employee. For the same rationale detailed above, and in the appeal decision, claimant is also found not to be permanently and totally disabled. Claimant's application is denied as to this ground.

See Rehearing Decision, p. 4.

As to the issue of the correct date of commencement of permanent partial disability benefits, Commissioner Cortese found:

> On July 25, 2013, James Pape, M.D., the surgeon who performed claimant's surgery, indicated claimant was doing well with his shoulder and that it was "…reasonable for the patient to be released in terms of progressing to regular duty as previously written for his left shoulder." Claimant returned to work without restrictions in regard to his left shoulder on July 25, 2013.
>
> However, on August 6, 2013, Dr. Pape also indicated claimant was not at maximum medical improvement (MMI) for the left shoulder and the anticipated date of MMI would be sometime in October of 2013. Claimant was released to return to work without restrictions on the left arm on December 18, 2013.
>
> Based upon Exhibit A, page 11, the correct date for the commencement of permanent partial disability benefits would be December 18, 2013.

See Rehearing Decision, p. 5.

Finally, Commissioner Cortese found it would be an abuse of discretion to award Petitioner a penalty of over $14,000.00 for the alleged late payments.

Commissioner Cortese upheld the Appeal Decision, with the exception that Respondents were ordered to pay Petitioner two hundred weeks of permanent partial disability benefits at the rate of $486.94 per week commencing on December 18, 2013.

This judicial review action followed Commissioner Cortese's issuance of the Rehearing Decision. In the Petition for Judicial Review, Petitioner first argues that there is not substantial evidence to support the agency's rejection of Dr. Beer's uncontroverted opinions regarding Petitioner's depression and anxiety. Petitioner contends it was irrational and illogical for the agency to order Climate Engineers to pay for Petitioner's pre-hearing mental health treatment, while simultaneously rejecting Dr. Beer's uncontroverted opinion and holding that the mental health injury was not causally related to Petitioner's work injury. Petitioner believes Commissioner Cortese substituted his own observations and values to reach a decision on causation, while rejecting the opinion of Dr. Beer, who had treated Petitioner. Petitioner asserts that the fact that Dr. Beer had the perspective of treating Petitioner for mental health conditions both before and after his work injury should only serve to strengthen the value of Dr. Beer's

opinions, and the agency has rendered Dr. Beer's long-standing and extensive involvement in Petitioner's mental health treatment unreliable. Petitioner further asserts that Commissioner Cortese does not explain how or why Dr. Beer's opinion is unreliable, and it is illogical to conclude that this is a valid basis for the rejection of Dr. Beer's opinions.

Petitioner argues his testimony from the agency hearing was that there were four reasons for seeking treatment for depression—he was getting ready to have a child, his work injury, having no job, and the way he was being treated. Petitioner further argues the agency did not consider that Petitioner expressly testified that the work injury was a source of his depression, and the agency did not discuss Petitioner's statement about the way he was being treated, which was a reference to the way Respondents were handling the work injury. Petitioner contends the agency either failed to appreciate or chose not to discuss the fact that Petitioner's lack of a job and his inability to obtain a new job were due to his work injury. Petitioner also contends nothing in Petitioner's own testimony is supportive of the agency's finding.

Petitioner asserts that Commissioner Cortese implies that Petitioner should have complained of his depression symptoms sooner, but Petitioner contends that a complaint related to a work injury made in the days or even weeks following an injury would almost certainly lack any credibility. Petitioner further asserts that the fact that his depression developed and progressed after several months of unsuccessful treatment and ongoing pain can only be interpreted as being supportive of Petitioner's claim. Petitioner claims that the fact he did not see a psychiatrist, psychologist or counselor is not a reasonable basis upon which to reject Dr. Beer's opinion or Petitioner's claim, in that Petitioner repeatedly requested that Climate Engineers provide him with treatment, and Climate Engineers never exercised its right to have Petitioner evaluated by a psychiatrist or to have Petitioner evaluated or treated by a psychologist or counselor. Petitioner also claims Dr. Beer was fully capable of providing appropriate care, and it was illogical for Commissioner Cortese to reject Dr. Beer's expert opinion on the basis that Dr. Beer practices in family medicine.

Petitioner argues it is illogical for Commissioner Cortese to criticize Dr. Beer for being unable to render an opinion on the depression, while also criticizing Petitioner's claim because Drs. Pape, Taylor, and Tearse did not provide any opinions on causation of Petitioner's depression and anxiety. Petitioner points out that Dr. Pape is an orthopedic surgeon, Dr. Taylor is an occupational medicine physician, and Dr. Tearse is an orthopedic surgeon. Petitioner asserts there is no reason why any of these doctors would have needed to render an opinion on the cause of Petitioner's mental health conditions.

Petitioner claims the agency has misconstrued what Dr. Beer said, and Dr. Beer was expressing that what has happened in Petitioner's case is not unusual. Petitioner also claims Dr. Beer did not opine that every disabling injury produces mental health problems, and even if this

was Dr. Beer's opinion, it does not provide a logical basis to reject all of Dr. Beer's opinions. Petitioner asserts that, as to causation analysis, while Commissioner Cortese including a finding that no physician has assigned permanent impairment or restrictions related to Petitioner's mental condition, the factors relied on by Commissioner Cortese have nothing to do with a causation analysis. Petitioner further asserts that a causation analysis simply involves the consideration of whether a work injury is a substantial contributing factor in causing or aggravating an injury, and neither restrictions nor a rating have anything to do with this issue.

Petitioner's second primary argument is that the previously undisclosed and late-served vocational evidence was erroneously admitted into the record. Petitioner argues that the admission of Dr. Carroll's report was arbitrary, capricious, and erroneous. Petitioner asserts that while the report was admitted based on Deputy McElderry's finding that he does not generally find vocational reports very helpful and they usually are not a deciding factor, Commissioner Cortese relied heavily on the report in denying Petitioner's claim of additional disability and that he is an odd-lot employee. Petitioner further asserts that such utilization of the report was arbitrary and an abuse of discretion, and the report constituted Climate Engineers' only evidence capable of rebutting Petitioner's odd-lot claim. Petitioner contends the admission of the report was highly prejudicial, and even filing a response to the report after the hearing would have done nothing to remedy the fact that without the report, Climate Engineers had no evidence at all on the odd-lot claim. Petitioner argues that the rules must be applied consistently, and the one finding in Mr. Carroll's report that was beneficial to Petitioner was not even accepted by the agency.

Petitioner requests a remand to the agency with directions to reconsider the uncontradicted expert opinion of Dr. Beer, and to evaluate Petitioner's claim with the exclusion of the Mr. Carroll's opinion.

In their brief, Respondents first argue that the agency's finding that Petitioner failed to prove his alleged mental condition is causally related to his work injury is supported by substantial evidence. Respondents contend that a substantial number of facts were discussed by Commissioner Cortese regarding the causal relationship, or lack thereof, between Petitioner's shoulder injury and his alleged depression/anxiety. Respondents point out that Petitioner had a pre-existing depression/anxiety condition and had been treated for that condition in the past by Dr. Beer; that Petitioner did not tell any doctor about his alleged depression until July, 2013, approximately nine months after the October 31, 2012 injury; at the time of the hearing, Petitioner's only treatment for depression was medication prescribed by Dr. Beer, and Petitioner was not receiving any other treatment or counseling; no other treating physician opined that Petitioner's mental health concern was related to his injury; no mental health provider or physician opined he had any permanent impairment or restrictions related to his mental health condition; and Petitioner himself testified that he believed his depression was due, in part, to

having a child on the way and not having a job. Respondents contend that Petitioner cannot argue for causation based on a temporal relationship between the work injury and the condition, and then argue that a nine month delay after the work injury cannot be considered in determining whether the condition was caused by the injury.

Respondents assert there is nothing arbitrary in Commissioner Cortese's finding that Petitioner failed to meet his burden of proof, and it was proper for Commissioner Cortese to point out that Dr. Beer specializes in family medicine and that Dr. Beer indicated that "commonly" patients who suffer injuries that lead to disability will develop depression/anxiety. Respondents further assert that Commissioner Cortese never attributed to Dr. Beer a position that all disabling injuries cause mental health problems; rather, Commissioner Cortese was skeptical about even a general statement that commonly patients who suffer injuries that lead to disability will develop depression/anxiety. Respondents contend that the factors of Petitioner getting ready to have a baby and not having a job are factors that bear on the causation issue and are properly considered by the agency, as the fact-finder.

Respondents argue that the agency's consideration of the fact that Dr. Beer is a family medicine specialist was appropriate because the qualifications of any expert witness are proper items for consideration in a causation analysis. Respondents further argue that Dr. Beer's opinion was not uncontroverted, but rather was a weak opinion in light of Petitioner's history, his own testimony, Dr. Beer's qualifications, and the delay between the injury and the development of the condition.

As to the issue of Mr. Carroll's vocational report, Respondents argue that the agency did not err in admitting Mr. Carroll's report. By way of background information, Respondents state that Mr. Carroll's report was prepared August 22, 2014, and the hearing took place on September 9, 2014. Respondents note that Petitioner does not specify when the report was served, but argues that the report was not provided more than twenty days prior to hearing. Respondents further state that their counsel explained to Deputy McElderry that the vocational company had been designated in June, 2014, but could not do the assessment, so Respondents had to hire a different vocational expert. Respondents assert they continued to get job search records from Petitioner's counsel as late as September 4, 2014, which was five days prior to the hearing date.

Respondents argue that Petitioner has failed to show unfair prejudice related to the admission of the report, and has failed to show any abuse of discretion on the part of Commissioner Cortese. Respondents further argue that Petitioner was given thirty days to respond to the report, yet failed to do so. Respondents claim it was Petitioner's decision if he did not want to go to the expense of filing a response. Respondents also claim that Commissioner Cortese's determination that there was no unfair prejudice is supported by substantial evidence. Respondents do not believe that Mr. Carroll's report played a major role in the decision of either

Deputy McElderry or Commissioner Cortese, and the real issue is whether Commissioner Cortese gave the report any significant weight. Respondents contend that Petitioner did not establish a prima facie case under the odd-lot doctrine, and Commissioner Cortese noted Petitioner's own testimony that Petitioner believes he is employable. Respondents also contend that the finding of Mr. Carroll that was allegedly beneficial to Petitioner does not support a finding that Petitioner would have a 72% loss of earning capacity, and the Commissioner's decision indicates that the determination of 40% loss of earning capacity or industrial disability was not based merely on Mr. Carroll's report, but rather on multiple factors. Respondent assert the evidence does not support a finding that Petitioner has permanent medication-related limitations, and Commissioner Cortese properly found that Petitioner has no permanent work restrictions related to any mental issue. Respondents further assert that Petitioner did not prove he was unfairly prejudiced by the admission of the report, despite the fact he was given the opportunity to submit a response, and it was not an abuse of discretion for the Commissioner to admit the report under this standard.

Petitioner replies that Commissioner Cortese misinterpreted and mischaracterized the evidence, and illogically rejected the unrebutted opinion of Dr. Beer. Petitioner claims his point is made by the following passage from Respondents' brief:

> Interestingly, Claimant argues it was improper for the Commissioner to point out that Drs. Pape, Taylor, and Tearse did not provide any opinions on causation as to depression/anxiety. Claimant argues there was no reason for any of these physicians to render such an opinion because they are not mental health specialists. Nonetheless, at the same time, he argues that Dr. Beer's opinion on causation regarding a mental health condition must be accepted even though Dr. Beer is also not a mental health specialist.

Petitioner argues that Respondents correctly point out that it is illogical to say Petitioner's claim should fail because the orthopedic surgeons did not offer opinions on causation, and then to say the claim also fails because Dr. Beer is unqualified as a mental health expert. Petitioner further argues that Commissioner Cortese explicitly stated that Dr. Beer opined that all disabling injuries cause mental health problems, whereas it was Dr. Beer's actual opinion that mental health problems commonly occur in individuals who have injuries that lead to a disability. Petitioner claims none of Commissioner Cortese's attempts to explain why the anxiety and depression were unrelated to the work injury make sense, and it is illogical to conclude that Petitioner's anxiety and depression have not, at a minimum, been more than slightly aggravated by his work injury. Petitioner contends this was not a case of picking one expert over the other; rather, argues Petitioner, it is a case where the agency rejected an uncontradicted expert medical opinion.

As to Mr. Carroll's report, Petitioner argues that if the report had been timely procured and disclosed, Respondents would have had at least some evidence to refute the odd-lot claim, when in actuality, a rebuttal report would not have cured Petitioner's prejudice because Petitioner timely designated an unrefuted expert vocational opinion. Petitioner further argues Deputy McElderry made it clear that the report would not be a deciding factor, while ultimately utilizing the report. Petitioner contends the agency utilized an arbitrary and capricious application of the rules, and just because Commissioner Cortese considered other evidence does not prove that the report was not late or prejudicial.

CONCLUSIONS OF LAW

Petitioner is entitled to judicial review of this action pursuant to Iowa Code § 17A.19 (2015). "A person or party who has exhausted all adequate administrative remedies and who is aggrieved or adversely affected by any final agency action is entitled to judicial review thereof under this chapter." Iowa Code § 17A.19(1) (2015). "Iowa Code section 17A.19(8)(g) authorizes relief from agency action that is 'unreasonable, arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.'" Dico, Inc. v. Emp. Appeal Bd., 576 N.W.2d 352, 355 (Iowa 1998). "These terms have established meanings: 'An agency's action is "arbitrary" or "capricious" when it is taken without regard to the law or facts of the case…Agency action is "unreasonable" when it is "clearly against reason and evidence."'" Id. (citing Soo Line R.R. v. Iowa Dep't of Transp., 521 N.W.2d 685, 688-89 (Iowa 1994)). "An abuse of discretion occurs when the agency action 'rests on grounds or reasons clearly untenable or unreasonable.'" Id. (citing Schoenfeld v. FDL Foods, Inc., 560 N.W.2d 595, 598 (Iowa 1997)). The Iowa Supreme Court has stated that an "abuse of discretion is synonymous with unreasonableness, and involves a lack of rationality, focusing on whether the agency has made a decision clearly against reason and evidence." Id. (citing Schoenfeld, 560 N.W.2d at 598).

"Section 17A.19[10] provides that a party may successfully challenge an agency decision when the party's substantial rights have been prejudiced because the agency action 'is unsupported by substantial evidence' or 'is affected by other error of law.'" Titan Tire Corp. v. Emp. Appeal Bd., 641 N.W.2d 752, 754 (Iowa 2003). Factual findings are reversed "only if they are unsupported by substantial evidence in the record made before the agency when the record is viewed as a whole." Loeb v. Emp. Appeal Bd., 530 N.W.2d 450, 451 (Iowa 1995). "Evidence is substantial if a reasonable mind would find it adequate to reach the same conclusion. Id. (citing Dunlavey v. Economy Fire & Casualty Co., 526 N.W.2d 845, 849 (Iowa 1995)). "The agency's decision does not lack substantial evidence because inconsistent conclusions may be drawn from the same evidence." Id. (citing Dunlavey, 526 N.W.2d at 849).

"Substantial evidence is 'the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of

great importance.'" University of Iowa Hospitals and Clinics v. Waters, 674 N.W.2d 92, 95 (Iowa 2004). "'While "courts must not simply rubber stamp the agency fact finding without engaging in a fairly intensive review of the record to ensure that the fact finding is itself reasonable ⋯ evidence is not insubstantial merely because it would have supported contrary inferences.'" Id. "'The substantial evidence rule requires to review the record *as a whole* to determine whether there is sufficient evidence to support the decision the commission made.'" Stark Const. v. Lauterwasser, No. 13-0609, 2014 WL 1495479, *8 (Iowa Ct. App. 2014) (citing Woodbury Cnty. v. Iowa Civil Rights Comm'n, 335 N.W.2d 161, 164 (Iowa 1983)).

"[T]he agency is not required to mention each item of evidence in its decision and explain why it found the evidence persuasive or not persuasive." Keystone Nursing Care Center v. Craddock, 705 N.W.2d 299, 305 (Iowa 2005). "While it is true that the commissioner's decision must be 'sufficiently detailed to show the path he has taken through conflicting evidence,'…the law does not require the commissioner to discuss each and every fact in the record and explain why or why not he has rejected it." Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 274 (Iowa 1995). "Such a requirement would be unnecessary and burdensome." Id.

A claimant has the burden of establishing causal connection between her condition and her injury or treatment for the condition. Yount v. United Fire & Cas. Co., 129 N.W.2d 75, 77 (Iowa 1964).

> Generally, expert testimony is essential to establish causal connection. Bodish v. Fischer, Inc., 257 Iowa 516, 521, 133 N.W.2d 867, 870 (1965). The commissioner must consider the expert testimony together with all other evidence introduced bearing on the causal connection between the injury and the disability. Id. The commissioner, as the fact finder, determines the weight to be given to any expert testimony. Id. Such weight depends on the accuracy of the facts relied upon by the expert and other surrounding circumstances. Id.; see Sondag v. Ferris Hardware, 220 N.W.2d 903, 908 (Iowa 1974) (holding deputy commissioner disregarding uncontroverted expert testimony must state why). The commissioner may accept or reject the expert opinion in whole or in part. Sondag, 220 N.W.2d at 907.

Sherman v. Pella Corp., 576 N.W.2d 312, 321 (Iowa 1998).

In reviewing the admission or exclusion of evidence at trial, the reviewing court applies an abuse of discretion standard. State v. Jones, 490 N.W.2d 787, 797 (Iowa 1992). Rulings on admissibility of reports in workers' compensation proceedings are discretionary. Trade Professionals, Inc. v. Shriver, 661 N.W.2d 119, 123 (Iowa 2003).

Iowa Admin. Code r. 876-4.19 provides:

4.19(1) Prehearing procedure in contested cases shall be administered in accordance with these rules and the orders issued by the workers' compensation commissioner or a deputy workers' compensation commissioner.

4.19(2) Counsel of record and pro se litigants have a duty to exercise reasonable diligence to bring the contested case to hearing at the earliest reasonable opportunity.

4.19(3) For contested cases that were filed on or after July 1, 2004, the following time limits govern prehearing procedure, completion of discovery and case management in contested cases, except proceedings under rules 876-4.46(17A,85,86) and 876-4.48(17A,85,86) and except when otherwise ordered by the workers' compensation commissioner or a deputy workers' compensation commissioner.

a. Within 120 days, but not less than 60 days, following filing of a petition, the counsel of record for all parties and all pro se litigants shall jointly contact the hearing administrator by telephone at (515)281-6621 between the hours of 8:30 a.m. and 11 a.m. central time, Monday through Friday, excluding holidays, or by E-mail at dwc.hearing@iwd.state.ia.us to schedule a hearing date, place and time. Claimant has primary responsibility for initiating the contact. The parties shall identify the case by file number and the names of the parties and request that the hearing be set at a specific date, place and time that is shown to be available on the hearing scheduler published on the division's Web site. Primary and backup times must be requested for hearings in venues other than Des Moines. When the contact is made by E-mail, a copy of the request shall be sent to each opposing party, and the hearing administrator will reply indicating whether or not the case is assigned at the time requested. If a request is denied, the parties shall continue to contact the hearing administrator by telephone or E-mail until the case is scheduled or a prehearing conference is ordered. A joint scheduling contact may be initiated by any party at any other time agreeable to the parties. If more than 120 days have elapsed since the petition was filed, any party may move to schedule the hearing at a particular date, time and place that is available and the hearing administrator may assign the case for hearing at that date, time and place. The hearing date shall be within 12 months following the date the petition was filed or as soon thereafter as reasonably practicable as determined by the hearing administrator. If the parties fail to schedule the hearing with the hearing administrator, the case will be scheduled at the discretion of the hearing administrator without prior notice to the parties.

b. A party who intends to introduce evidence from an expert witness, including a rebuttal expert witness, shall certify to all other parties the expert's name, subject matter of expertise, qualifications, and a summary of the expert's opinions within the following time period: (1) claimant—120 days before hearing; (2) employer/second injury fund of

Iowa—90 days before hearing; (3) rebuttal—60 days before hearing. Certification is not required to introduce evidence from an examining physician pursuant to Iowa Code section 85.39, a treating physician, or a vocational consultant if the expert witness is known by all parties to have personally provided services to the claimant and the witness's reports are served on opposing parties prior to the date when certification is required. The parties may alter these times by written agreement.

c. Discovery responses must be supplemented as required in Iowa Rules of Civil Procedure 1.503(4) and 1.508(3). Discovery responses shall be supplemented within 20 days after a party requests supplementation. All discovery responses, depositions, and reports from independent medical examinations shall be completed and served on opposing counsel and pro se litigants at least 30 days before hearing. The parties may alter these times by written agreement.

d. At least 30 days before hearing, counsel of record and pro se litigants shall serve a witness and exhibit list on all opposing counsel and pro se litigants and exchange all intended exhibits that were not previously required to be served. The witness list shall name all persons, except the claimant, who will be called to testify at the hearing or who will be deposed prior to the hearing in lieu of testifying at the hearing. The exhibit list must specifically identify each exhibit in a way that permits the opposing party to recognize the exhibit. The description for a document should include the document's date, number of pages and author or source. Exhibits that were specifically identified when served pursuant to rule 876-4.17(17A,85,86) or in a discovery response may be collectively identified by describing the service such as “exhibits described in the notices served pursuant to rule 876-4.17(17A,85,86) on May 7, June 11 and July 9, 2004.“ Blanket references such as “all medical records,“ “personnel file“ or “records produced during discovery“ do not specifically identify an exhibit. A party may serve a copy of the actual intended exhibits in lieu of an exhibit list. Evidentiary depositions pursuant to Iowa Code section 86.18(2) may be taken at any time before the hearing in lieu of the witness testifying at the hearing.

e. If evidence is offered at hearing that was not disclosed in the time and manner required by these rules, as altered by order of the workers' compensation commissioner or a deputy workers' compensation commissioner or by a written agreement by the parties, the evidence will be excluded if the objecting party shows that receipt of the evidence would be unfairly prejudicial. Sanctions may be imposed pursuant to 876-4.36(86) in addition to or in lieu of exclusion if exclusion is not an effective remedy for the prejudice.

f. Counsel and pro se litigants shall prepare a hearing report that defines the claims, defenses, and issues that are to be submitted to the deputy commissioner who presides at

the hearing. The hearing report shall be signed by all counsel of record and pro se litigants and submitted to the deputy when the hearing commences.

Iowa Admin. Code r. 876-4.19.

The Court first considers Petitioner's argument that there is not substantial evidence to support the agency's rejection of Dr. Beer's uncontroverted opinions regarding Petitioner's depression and anxiety. The Court concludes that the agency's conclusion that Petitioner failed to prove his alleged mental condition is causally related to his work injury is supported by substantial evidence. Petitioner had the burden of establishing causal connection between his condition and his injury. While Dr. Beer's expert testimony was uncontroverted, in that Respondents did not offer expert testimony on the issue of Petitioner's depression and anxiety, Commissioner Cortese provided adequate reasons for his rejection of Dr. Beer's expert testimony. Commissioner Cortese discussed a substantial number of factors that he considered in reaching his conclusion that there was no causal connection between Petitioner's shoulder injury and his alleged depression/anxiety. These factors include that it was several months from the time of injury that Petitioner reported his depression and anxiety to a doctor; that Petitioner was not receiving treatment or counseling for depression/anxiety, aside from receiving medication prescribed by Dr. Beer; and that there was no testimony other than that offered by Dr. Beer to support a finding that the depression/anxiety was related to the work injury.

The Court also finds nothing unreasonable, arbitrary or capricious about Commissioner Cortese's decision that Petitioner did not prove his alleged mental condition is causally related to his work injury. Commissioner Cortese thoroughly considered Dr. Beer's medical opinions, and was not persuaded by Dr. Beer's opinions due at least in part to Dr. Beer's specialty being in family medicine, and Dr. Beer's conclusion that it is common for patients who suffer from disabling injuries to suffer from mental health problems. These are valid reasons for Commissioner Cortese to reject Dr. Beer's expert opinion.

The question is not whether the Court would have reached a different decision from Commissioner Cortese. Rather, the question is whether the decision reached by Commissioner Cortese is supported by substantial evidence, and whether there is anything unreasonable, arbitrary or capricious about Commissioner Cortese's decision. Because there is substantial evidence to support Commissioner Cortese's decision, and because there is nothing unreasonable, arbitrary or capricious about the decision, the Court affirms the agency's ruling as to Petitioner's first argument on judicial review.

Next, the Court considers Petitioner's assertion that Mr. Carroll's report was erroneously admitted into the record. The Court concludes that the agency's receipt of Mr. Carroll's report was unfairly prejudicial to Petitioner. It is undisputed that Mr. Carroll's report was untimely,

and Deputy McElderry acknowledged that the report probably should be excluded under the agency's technical rules. The report ultimately was used as at least a partial basis for the agency's final decision, and the opinions set forth in the report related at least somewhat to Petitioner's odd-lot claim. Petitioner was presented with the report late in the proceedings, and was faced with the decision of either delaying his hearing or expending the funds to obtain rebuttal evidence. Petitioner essentially was presented with a no-win situation once the agency accepted Mr. Carroll's untimely report. Petitioner's request for relief on this issue should be granted.

RULING

IT IS THEREFORE ORDERED that Petitioner's request for relief on judicial review is **DENIED** as to Petitioner's request for the case to be remanded for the agency to reconsider the uncontradicted expert opinion of Dr. Beer. Petitioner's request for relief on judicial review is **GRANTED** as to Petitioner's request for the case to be remanded to the agency with instructions to evaluate Petitioner's claim with the exclusion of Mr. Carroll's report. This matter is remanded to the Iowa Workers' Compensation Commissioner, with instructions to evaluate Petitioner's claim with the exclusion of Mr. Carroll's report.

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.

Attachments for Question 10(c)

IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY

Iowa State Education Association and Iowa City Community School District,	)	
Petitioners,	)	**No. CVCV081968**
vs.	)	
	)	**RULING**
Kim Reynolds, ex rel. State of Iowa; Iowa Department of Education; and Ann Lebo, in her official capacity as Director of the Iowa Department of Education,	)	
Respondents.	)	

Hearing took place on September 3, 2020 on Petitioners' request for emergency temporary injunctive relief. Appearances were made by Attorneys Charles Holland, Christy Hickman, Crystal Raiber, and Katherine Schoolen for Petitioners, and by the Iowa Solicitor General, Attorney Jeff Thompson, for Respondents. Having considered the file, relevant case law, and written arguments of counsel, the Court hereby enters the following ruling.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioners filed a Petition for Declaratory Judgment and Injunctive Relief on August 19, 2020. Petitioner Iowa State Education Association (ISEA) describes itself as a statewide nonprofit membership organization headquartered in Des Moines, Polk County, Iowa, representing more than 30,000 members, the majority of whom are employees of public schools throughout Iowa. The ISEA's mission is to "promote quality public education by placing students at the center of everything [ISEA does] while advocating for education professionals." ISEA states it is suing Respondents on behalf of ISEA members, who ISEA claims will be adversely affected by Respondents' actions. Petitioner Iowa City Community School District (ICCSD) describes itself as a school corporation organized and existing under the laws of the State of Iowa. ICCSD states it serves approximately 14,000 students, and employs approximately 2,250 staff members. ICCSD points out that Johnson County, Iowa has a population of approximately 151,000, and is home to the University of Iowa, which has a student

enrollment of approximately 32,500. ICCSD also claims it will be adversely affected by Respondents' actions.

Petitioners challenge Senate File 2310, which was passed by the Iowa Legislature and signed into law on June 29, 2020 by Iowa Governor Kim Reynolds. Additionally, in response to the ongoing COVID-19 public health emergency, Governor Reynolds has issued a series of "Proclamations of Disaster Emergency," and Iowa Department of Education Director Ann Lebo has issued guidance regarding the reopening of schools, applying and interpreting Senate File 2310 and other state laws. In her Proclamations of Disaster Emergency, Governor Reynolds recommended on March 15, 2020 that all Iowa schools should close for a period of four weeks to help mitigate the spread of COVID-19, and schools ultimately were closed for the remainder of the regularly scheduled school year. Other facilities and venues also were closed by the Governor during this time period, and the Governor also directed Iowans to practice social distancing. The Iowa Department of Education issued Return-to-Learn guidance on May 8, 2020, which included goals for Iowa school districts to ensure that remote learning options are available for students, and to enable schools to move between on-site and remote learning, as needed.

The Return-to-Learn guidance provides three permissible options to school districts for instruction of students during the 2020-21 school year: (a) fully remote, which was described as "Required Continuous Learning"; (b) on-site delivery of instruction in brick and mortar buildings; and (c) a hybrid learning plan, combining remote and on-site instruction. Each school district in Iowa was instructed to have a plan for fully remote instruction, and was given the option of using the on-site or hybrid models. Additionally, school districts were advised that the Department of Education could award credit to students for coursework completed under any of the three options in the Return-to-Learn plan. "Required Continuous Learning" was described by the Department of Education as ensuring "that academic work is equivalent in effort and rigor to typical classroom work. All students are required to participate, attendance is taken, work is graded, and credit is granted. Typically, instruction is provided through some type of online learning." "Required Continuous Learning" was permitted to "include online education, home delivery or pick-up of educational resources, online or telephonic check-ins or other innovative methods."

Petitioners claim that, in compliance with this guidance, school boards, superintendents and principals, teachers, and support personnel worked countless hours during May, June, and July, 2020, to develop the required Return-to-Learn plans best suited to the needs of their individual school districts and which would allow the students and staff or their districts to commence the 2020-2021 school year in the safest manner possible. Petitioners also claim that the plans of Iowa school boards were submitted to the Department of Education in compliance with the Return-to-Learn guidance.

Senate File 2310 was passed on June 13, 2020, and provides, in pertinent part, as follows:

3. *a.* For the school year beginning July 1, 2020, and ending June 30, 2021, any instruction provided in accordance with a return-to-learn plan submitted by a school district or accredited nonpublic school to the department of education in response to a proclamation of a public health disaster emergency, issued by the governor pursuant to section 29C.6 and related to COVID-19, shall be deemed to meet the requirements of subsection 1, regardless of the nature, location, or medium of instruction if the return-to-learn plan contains the minimum number of days or hours as required by subsection 1. Any return-to-learn plan submitted by a school district or accredited nonpublic school must contain provisions for in-person instruction and provide that in-person instruction is the presumed method of instruction.

b. This subsection is repealed on July 1, 2021.

…

Sec. 15. INSTRUCTIONAL TIME PROVISIONS FOR SCHOOL DISTRICTS AND ACCREDITED NONPUBLIC SCHOOLS FOR THE 2020-2021 SCHOOL YEAR.

1. Notwithstanding any other provision of law to the contrary, the instructional time requirements of section 279.10, subsection 1, and the minimum school day requirements of section 256.7, subsection 19, shall not be waived any time during the school year beginning July 1, 2020, and ending June 30, 2021, for school closure due to the COVID-19 pandemic unless the school district or the authorities in charge of the accredited nonpublic school, as appropriate, provide compulsory remote learning, including online learning, electronic learning, distance learning, or virtual learning. Unless explicitly authorized in a proclamation of a public health disaster emergency issued by the governor pursuant to section 29C.6 and related to COVID-19, a brick-and-mortar school district or accredited nonpublic school shall not take action to provide instruction primarily through remote-learning opportunities.

2. If the board of directors of a school district or the authorities in charge of an accredit nonpublic school determines any time during the school year beginning July 1, 2020, and ending June 30, 2021, that a remote-learning period is necessary, the school board or the authorities in charge of an accredited nonpublic school, as appropriate, shall ensure that teachers and other necessary school staff are available during the remote-learning period to support students, to participate in professional development opportunities, and to perform other job-related functions during the regular, required

contract hours, even if the accessibility to or by the teachers and other necessary school staff is offered remotely.

On July 14, 2020, ICCSD announced plans to open the 2020-21 school year remotely. On July 17, 2020, Governor Reynolds issued a new Proclamation of Disaster, stating that brick and mortar school districts or accredited nonpublic schools were authorized to provide instruction primarily through remote learning opportunities only in circumstances where there is parental consent; approved temporary school building or district closure; temporary remote learning for individual students or classrooms; or temporary remote learning because of inclement weather. Governor Reynolds announced that remote instruction exceeding fifty percent would violate Senate File 2310. Petitioners believe this is based on the use of "primarily" in Senate File 2310. On July 30, 2020, the Department of Education published criteria for granting permission to close a school building, which includes the school district meeting a threshold of 10% student absence rate, and the county in which the district is located must have a 15-20% positivity rate in testing. Petitioners believe that even if these thresholds are met, only closure of school events and communal spaces is authorized, and school building or district closure is authorized only when the positivity rate for testing in the county where the district is located is at or above 20%. ICCSD has requested permission from the Department of Education to waive these requirements, and the request has been denied.

Petitioners claim that the July 17, 2020 Proclamation is unconstitutional and in violation of Article I, Sections 1 and 2 of the Iowa Constitution. Petitioners assert that the July 17, 2020 Proclamation undermines and unnecessarily interferes with the basic right of all Iowans secured by the first two sections of the Iowa Constitution to enjoy their guarantee, through their government, of protection and security from the COVID-19 pandemic. Petitioners further assert that the actions and inactions of Respondents place in severe and needless jeopardy the basic right of the citizens of Iowa to defend their health and their lives, and to continue their pursuit and attainment of happiness.

Petitioners' next argument is that Iowa law and Senate File 2310 grant to school districts the exclusive right to determine when remote learning is necessary and do not require school districts to provide at least half of their instruction to be in-person during any two-week period. Petitioners assert that the July 17, 2020 Proclamation deprives the right of school districts to "determine" when "a remote-learning period is necessary"; deprives the right of school districts to draft and implement Return-to-Learn plans which are flexible and responsive to the safety of students, staff, families, and the communities in which the individual school districts reside; and the July 17, 2020 Proclamation and reopening guidance from the Department of Education prevent school districts from developing and implementing Return-to-Learn plans wherein the "presumed method of instruction" is "in-person instruction" and without "tak[ing] action to provide instruction primarily through remote-learning opportunities."

Next, Petitioners argue that Governor Reynolds' July 17, 2020 Proclamation, requiring school districts to provide at least half of student instruction to be in-person during any two-week period, exceeded her constitutional and statutory authority. Petitioners contend the action unlawfully usurps the authority of school districts under Iowa Code §§ 274.1 and 274.3, and unjustifiably prevents school districts from assuring safe conditions upon reopening.

Petitioners seek a declaratory judgment that the July 17, 2020 Proclamation, as interpreted to require public school districts to deliver in-person instruction, violates the Iowa Constitution and other Iowa laws. Petitioners also seek an expedited injunction prohibiting Respondents from any enforcement activities or taking punitive measures against any school district for formulating and effectuating their individual Return-to-Learn plans in their districts that are inconsistent with the relevant portions of the July 17, 2020 Proclamation or the relevant portions of Senate File 2310.

In support of the Petition, Petitioners have submitted the May 8, 2020 and July 30, 2020 Return-to-Learn Guidance from the Iowa Department of Education (Exhibits 1 and 2); "Public health criteria to adjust public health and social measures in the context of COVID-19," as issued by the World Health Organization (Exhibit 3); and ISEA's "Checklist for Safely and Equitably Reopening Schools and Campus Buildings." Petitioners also have submitted affidavits from Dr. Austin Baeth, MD; Dr. Megan Srinivas, M.D., M.P.H.; and Michael Beranek.

Respondents have resisted the request for an expedited injunction. In support of their Resistance, Respondents have submitted Governor Reynolds' June 29, 2020 approval of SF2310 (Exhibit A); Governor Reynolds' July 17, 2020 Proclamation of Disaster Emergency (Exhibit B); SF 2310 Guidance for Schools (Exhibit C); August 5, 2020 letter from Director Lebo to Matt Degner, Interim Superintendent of ICCSD (Exhibit D); August 26, 2020 letter from Director Lebo to Superintendent Degner (Exhibit E); Affidavit of Caitlin Pedati, State of Iowa, Iowa Department of Health, State Epidemiologist and Public Health Medical Director (Exhibit F); Affidavit of Amy J. Williamson, State of Iowa, Iowa Department of Education, Bureau Chief for School Improvement (Exhibit G); and Affidavit of Melissa Walker, Registered Nurse and Advanced Registered Nurse Practitioner (Exhibit H).

By way of background facts, Respondents state that Iowa Code chapters 29C and 135 provide the Iowa Governor with extensive powers to respond to a public health disaster emergency that threatens the lives and livelihoods of Iowans. Respondents further state that in March, 2020, Governor Reynolds issued the first of many Proclamations of Disaster Emergency related to the COVID-19 pandemic, and Respondents claim Governor Reynolds used the broad powers entrusted to her to temporarily close many businesses to prevent the spread of COVID-19; she prohibited, for a time, gatherings of more than ten people; and in April, 2020, she closed

Iowa public and nonpublic schools for the remainder of the 2019-2020 school year. Respondents note that the Iowa Legislature suspended its session in March, 2020, to avoid the spread of COVID-19, and the Legislature returned in June, 2020 to finish its shortened session, at which time SF 2310 was passed, to, as Respondents put it, allow school districts flexibility as they planned the return to school while the pandemic continued. Respondents state that on July 17, 2020, Governor Reynolds explicitly authorized school districts to provide instruction primarily through remote learning in four situations: when a child's parent or guardian chooses remote instruction for that child; when the Iowa Department of Education, in consultation with the Department of Public Health, approves a district to do so temporarily because of public health conditions in the district; when the district determines that a student or classroom must move online temporarily because of public health conditions; and during inclement weather. Respondents claim that if Governor Reynolds had not issued a Proclamation granting permission to districts to provide instruction primarily through remote learning in some circumstances, then under the terms of SF 2310, districts would not have been permitted to provide primarily remote learning at any time.

Respondents state that on the same day the Governor issued the Proclamation, the Department of Education provided guidance to Iowa school districts on SF 2310 and the Governor's Proclamation. Respondents assert the guidance explained that SF 2310's prohibition on taking action to provide instruction primarily through remote learning meant that a school cannot provide more than half its instruction to students through remote learning opportunities except in the situations authorized by the Governor, and subsequent Department of Education guidance informed districts when requests to temporarily provide instruction primarily through remote-learning opportunities would be approved. Respondents described this as happening when COVID-19 transmission in a county or counties is substantial, as reflected in a 15% or greater positivity rate in testing over the preceding 14 days and 10% absenteeism among students expected for in-person learning; at these rates, the Department of Education may approve a district to temporarily provide instruction primarily through remote learning. Respondents assert that, where COVID-19 transmission is minimal to moderate, districts must continue to provide on-site learning.

Respondents acknowledge that, on August 3, 2020, ICCSD requested permission to provide instruction primarily online to start the school year. Respondents assert that, at that time, the levels of community transmission in Johnson County did not reach the substantial level that, according to the Iowa Department of Public Health and the Iowa Department of Education guidelines, would make primarily remote instruction necessary. On August 5, 2020, the Iowa Department of Education denied ICCSD's request to begin the 2020-2021 school year with primarily remote instruction. On August 26, 2020, ICCSD again requested permission to provide instruction primarily through remote learning, and reported to the Iowa Department of

Education that the 14-day positivity rate in Johnson County was 13.95% and climbing. The Department of Education granted ICCSD's request, for a two week period.

For their legal argument, Respondents contend that Petitioners cannot show that they are likely to succeed on the merits. Respondents argue that Petitioners' broad assertion that local school boards can make decisions regarding the best interests of their school districts, their employees, and the children in their care disregards the express role the legislature has established for the executive branch during a public health disaster, and the legislature's specific directives regarding the provision of educational instruction during the COVID-19 pandemic. Respondents further argue that Petitioners' position disregards Iowa case law that is clear that it is the responsibility of the General Assembly to decide how to allocate responsibilities between the state and local districts. Respondents assert the Iowa Governor has broad powers to manage a public health emergency, and Governor Reynolds and the Iowa Department of Education have reasonably interpreted SF 2310. Respondents further assert there is no constitutional or statutory right to "local control" for school districts.

Respondents argue that Petitioners cannot show that they will be irreparably harmed in the absence of a temporary injunction, and the fact that ICCSD has been granted permission to start classes remotely renders the request for temporary injunction moot. Respondents further argue that any harm from future enforcement proceedings is speculative, and Petitioners have an adequate remedy at law if the state or its administrative agencies commences an enforcement action at a future date related to a district's implementation of its Return-to-Learn plan. Respondents contend Petitioners cannot demonstrate that they are likely to suffer an injury in the absence of an injunction.

Respondents assert that injunctive relief is not warranted considering the circumstances as a whole, and the balance of harms does not favor the Petitioners. Respondents claim an injunction would harm the State's interest in effectuating statutes enacted by the representatives of its people, and students and families will be harmed if students are not provided an option to attend school in person.

CONCLUSIONS OF LAW

Iowa Rule of Civil Procedure 1.1502 allows temporary injunctions "under any of the following circumstances:

> 1.1502(1) When the petition, supported by affidavit, shows the plaintiff is entitled to relief which includes restraining the commission or continuance of some act which would greatly or irreparably injure the plaintiff.
> 1.1502(2) Where, during the litigation, it appears that a party is doing, procuring or suffering to be done, or threatens or is about to do, an act violating the other

party's rights respecting the subject of the action and tending to make the judgment ineffectual.

1.1502(3) In any case especially authorized by statute."

I.R.Civ.P. 1.1502. "A petition seeking a temporary injunction shall state, or the attorney shall certify thereon, whether a petition for the same relief, or part thereof, has been previously presented to and refused by any court or justice, and if so, by whom and when." I.R.Civ.P. 1.1504.

"'A temporary injunction is a preventive remedy to maintain the status quo of the parties prior to the final judgment and to protect the subject of the litigation.'" Lewis Investments, Inc. v. City of Iowa City, 703 N.W.2d 180, 184 (Iowa 2005) (citing Kleman v. Charles City Police Dep't, 373 N.W.2d 90, 95 (Iowa 1985)). "'The issuance or refusal of temporary injunction rests largely in the sound discretion of the trial court, dependent upon the circumstances of the particular case.'" Id. (citing Kent Prods. v. Hoegh, 245 Iowa 205, 211, 61 N.W.2d 711, 714 (1953)). "One requirement for the issuance of a temporary injunction is a showing of the likelihood or probability of success on the merits of the underlying claim." Id.

The Iowa Supreme Court has "often noted that '[a]n injunction is an extraordinary remedy which should be granted with caution and only when clearly required to avoid irreparable damage.'" Sear v. Clayton County Zoning Board of Adjustment, 590 N.W.2d 512, 515 (Iowa 1999). "The party seeking the injunction must establish: (1) an invasion or threatened invasion of a right; (2) that substantial injury or damages will result unless the request for an injunction is granted; and (3) that there is no adequate legal remedy available." Id. "When considering the appropriateness of an injunction 'the court should carefully weigh the relative hardship which would be suffered by the enjoined party upon awarding injunctive relief." Id. Another factor to be considered is the public interest in granting injunctive relief. Mid-America Real Estate Co. v. Iowa Realty Co., Inc., 406 F.3d 969, 972 (8th Cir. 2005). A party is not entitled to injunctive relief when it has an adequate remedy at law. Lewis, 703 N.W.2d at 185.

The Court first considers whether Petitioners are likely to succeed on the merits of their claim. As Respondents have pointed out, Article IV of the Iowa Constitution provides very broad powers to the Governor. With respect to emergency powers, Respondents also point out that the legislature has given the Iowa Governor broad powers to respond to a public health disaster. Examples of this are found in Iowa Code § 29C.6, which authorizes the governor to proclaim a disaster emergency, and in Iowa Code § 135.144, which sets forth additional duties of the Iowa Department of Public Health with respect to public health disasters. The United States Supreme Court has held that "the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety." Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 25, 25 S.Ct. 358, 361, 49 L.Ed. 643 (1905). "[I]n every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at

times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." Id., 197 U.S. at 29, 25 S.Ct. at 362. However, the Iowa Supreme Court has held that it is "a fundamental principle that an emergency does not create power." Duncan v. City of Des Moines, 268 N.W. 547, 552 (Iowa 1936). "It only gives the right to the exercise of power that already exists." Id. "It never gives the right to exercise the power forbidden by the Constitution." Id.

The Court concludes that the Iowa Constitution and Iowa Code chapter 29C specifically delegate certain powers to the Iowa Governor, and Iowa Code chapter 135 specifically delegates certain powers to the Iowa Department of Public Health. There are authorities and responsibilities given to the Iowa Governor and the Department of Public Health under these provisions, and the Court concludes there are powers that "already exist[]" and are not being relied on by the Iowa Governor and the Iowa Department of Public Health solely as provisions that "create power." Pursuant to Duncan, the Iowa Governor and the Iowa Department of Public Health have utilized Iowa Code chapters 29C and 135 to exercise power that already exists.

Relying on these powers, the Iowa Governor and the Department of Public Health have interpreted SF 2310. As Respondents points out, Section 9 of SF 2310 specifically authorizes remote learning *in response to a proclamation of public health disaster emergency, issued by the governor pursuant to section 29C.6 and related to COVID-19*. Further, Section 15 of SF 2310 clearly prevents school districts from providing instruction *primarily* through remote-learning opportunities. Petitioners are not likely to show that Respondents' actions are inconsistent with the specific directives of the Iowa Legislature as set forth in SF 2310, or that the provisions of SF 2310 are conflicting. The Court is persuaded by Respondents' interpretation of SF 2310, i.e., that Section 9 sets forth provisions regarding minimum instructional time requirements for remote learning, while Section 15 specifies that instruction may not take place *primarily* through remote learning unless authorized by proclamation. Additionally, the Court agrees with Respondents that interpreting "primarily" as "at least fifty percent" is a reasonable interpretation of the use of this word in SF 2310. See Merriam-Webster, online edition (2020); Cambridge Dictionary, online edition (2020) (equating "primarily" to "chiefly" and "mainly," respectively).

Petitioners have objected to the Iowa Department of Education using a two-week window to determine whether a district is providing instruction primarily through remote-learning opportunities. However, it is likely to be found reasonable for the Department of Education to use this timeframe, considering scheduling practices and cycles for learning used by schools, and a longer timeframe may result in schools being closed for longer periods of time than may be necessary, due to changing COVID-19 infection rates.

Petitioners have urged that local control should apply for school boards to make decisions about the level of remote-learning made available by their schools. However, the Court is not

persuaded that the authorities relied on by Petitioners overcome the emergency powers given to the Iowa Governor by the Iowa Constitution and by Iowa Code chapter 29C, or the powers delegated to the Iowa Department of Education by Iowa Code chapter 135. There is not specific authorization in the Iowa Code to school boards to make these specific types of emergency decisions, such as is given to the Iowa Governor.

The Court next concludes that Petitioners have not shown that they will be irreparably harmed if a temporary injunction is not put into place. The emergency powers utilized by the Iowa Governor essentially have worked as they were intended to; infection rates in the ICCSD rose to levels that authorized the school board to seek 100% remote-learning, and, having considered the infection rates, the ICCSD was granted permission to proceed with 100% remote-learning. As Respondents point out, the status quo is preserved by the Court denying injunctive relief, where ICCSD has been given permission to resume classes on September 8, 2020 with a 100% remote-learning model. The Court also agrees that any harm from future enforcement proceedings is speculative, in that there are no enforcement proceedings against ICCSD, and any decision by the Court regarding an enforcement proceedings would be dependent on the facts of any such enforcement proceedings brought against ICCSD. Petitioners have an adequate remedy at law in that they could seek judicial review of any enforcement proceedings once they have been filed. Petitioners also have not shown they are likely to suffer an injury if an injunction is not put in place, since they have been granted the option of 100% remote-learning based on current Johnson County infection rates. This and any future decisions regarding remote-learning authorization are made based on the expertise of the Iowa Department of Education, in consultation with the Iowa Department of Public Health, and the decision to allow ICCSD to utilize the 100% remote-learning option demonstrates that these agencies apply their expertise regarding public health conditions in addressing the moving pieces presented by the COVID-19 public health emergency.

Finally, when the harms to the parties are balanced, the facts weigh against putting a temporary injunction in place. The Iowa Legislature passed SF 2310, which was signed into law by Governor Reynolds, and the Court is bound to apply Iowa law in reaching its decisions. While COVID-19 certainly presents the risk of harm to Petitioners' members, staff, and students, there also are risks to students that may result from school closures, as described in Dr. Pedati's affidavit. The risks are compelling and equal on both sides of this argument, and Petitioners cannot show that the harms of which they complain outweigh those of the experiences that students might have if schools are permitted to shutdown indefinitely and without oversight from Respondents.

This is not the type of situation that warrants the extraordinary remedy of temporary injunctive relief. Petitioners have not met their burden of showing they are entitled to temporary injunctive relief, and their request for emergency injunctive relief should be denied.

RULING

IT IS THEREFORE ORDERED that Petitioners' request for emergency injunctive relief is **DENIED**.
Clerk to notify.

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 not 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."

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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.

IN THE IOWA DISTRICT COURT IN AND FOR LINN COUNTY

STATE OF IOWA,	)	
	)	No. FECR105915
Plaintiff,	)	
	)	
vs.	)	**Ruling on Motion to Suppress**
	)	
DAIMONAY DARICE RICHARDSON,	)	
	)	
Defendant.	)	

This matter came before the Court on January 10, 2014, for hearing on the Defendant's Motion to Suppress. Defendant appeared in person and with her Attorneys, Dennis Cohen and Rachel Antonuccio. The State appeared by Linn County Attorney Jerry Vander Sanden and Elena Wolford. Evidence was received and the matter was submitted. The Court now makes the following ruling:

Defendant is charged by Trial Information with Murder in the First Degree. Defendant entered pleas of not guilty to both counts of the Trial Information, and the Trial in this matter is currently set for the 10th day of February, 2014.

On December 30th, 2013, Defendant filed a Motion to Suppress and Exclude Statements, urging that Cedar Rapids Police officers interrogated her while she was in custody without having been Mirandized, that once she was Mirandized, her statements were not made knowingly, voluntarily and intelligently, and that she was denied the right to counsel. Defendant therefore argues that all statements made by her during her police interviews on August 19, 2013, should be suppressed.

The State resists Defendant's Motion to Suppress, and argues that the Defendant was not in custody when she was originally questioned, that once she was Mirandized, she waived her legal rights and made statements to police knowingly, voluntarily and intelligently, and that she did not invoke her right to counsel during the course of questioning.

Evidence was submitted through the testimony of Officer Daniel Myrom, Investigator Matt Denlinger, Investigator George Aboud, and Dr. Frank Gersh. The Court also reviewed exhibits consisting of two videotaped interviews of the Defendant, a transcript of these interviews, a curriculum vitae and Dr. Gersh, a copy of a Search Warrant issued by Judge Casey

Jones on August 12, 2013, to obtain buccal swabs from the Defendant, and a copy of the Juvenile Form Miranda Warning which was utilized by police with the Defendant in this matter.

Findings of Fact

The relevant facts are as follows. Police initially made contact with the Defendant Daimonay Richardson (hereinafter referred to as "Richardson") on August 19, 2013. Investigator Daniel Myrom of the Cedar Rapids Police Department, whose role was to canvass the apartment complex for witnesses, testified that he went to 5663 Kirkwood Blvd. SW on that date. He was canvassing the neighborhood to interview tenants. Julia Butters was one tenant whom he has previously contacted on June 10th, 2013, the date that Ronald Kunkle was found dead in his apartment at that some complex. On August 19th, investigator Myrom had returned to the complex to visit with Julia Butters a second time. He went to apartment 3, Ms. Butters' apartment, and knocked on the door. Richardson, who Myrom recognized from pictures on social media, answered the door. Investigator Myrom indicated that he was surprised to see Richardson there, but wanted to talk to her too, so asked if she would come to the police department. He informed her that she was not under arrest. The police had previously had no contact with Ms. Richardson and asked if she'd be willing to talk. Investigator Myrom's testimony was that they "thought she may have information regarding a homicide."

Richardson agreed to come to the police station. Richardson was told twice that she was not under arrest both at the door of the apartment and at the vehicle. Richardson was not handcuffed or subjected to any search. She voluntarily got into the vehicle, sitting on the passenger side of the front seat. The police drove her to the police station, which was approximately a five minute drive. There was no discussion of the case along the way. Investigator Myrom seemed vaguely aware that there was a warrant for buccal swabs to be taken from Richardson, but he couldn't say for sure. He was also unsure as to whether Richardson had a previous juvenile record or if she had ever been adjudicated a delinquent or convicted of a crime. He did admit that at the point in time that he was involved, which was only for the ride to the police station, no permission to talk to Ms. Richardson was sought from her parents, no attempt was made to contact her parents, no one told her she could contact the parents or have a parent with her, and no one told her that she didn't need to go to the police station at all, although investigator Myrom felt that he had implied that. Investigator Myrom did testify that Richardson displayed no hesitation to going to the police station. Myrom recognized that Richardson may be a witness. The reason that they provided transportation for her was because she was fifteen years old and was unable to drive on her own.

Investigator George Aboud of the Cedar Rapids Police Department was also present when Richardson was first contacted by police. He, consistent with Investigator Myrom's testimony, stated that Richardson was told she wasn't under arrest. He also corroborated

Myrom's testimony that Richardson wasn't subject to any search, was not placed in handcuffs and that there was no conversation with regard to the homicide while en route to the police station. Investigator Aboud states that when they arrived at the police station, they placed Richardson in an interview room and shut the door, and advised someone else that Richardson was there. He had no further contact with her after that. Investigator Aboud stated that Richardson was not told that she had a right not to answer questions, not to speak with them, or to terminate the interview at any time. Significantly, Aboud testified that when they arrived at the police station, they went in through an employee door, then a foyer, then another door, then another door to the youth bureau which was a secured door, then an interview room. There were four doors just to get to the interview room, at least two of which were secured doors. Also, Richardson was initially locked into the interview room, and she was not told of the route she could take to exit.

Cedar Rapids Police Department investigator Matt Denlinger also testified. With regard to the Kunkle case, his duty was to interview possible witnesses. On August 19, 2013, Richardson was the first person he interviewed. Investigator Denlinger was the lead interviewer and Investigator Doyle was present as well. Richardson had been placed in an interview room and his first contact with her was inside the interview room.

The interview room is described as a small 6 x 8 room with a small table and two to three chairs. It is equipped with audio and video recording. The entire interview with Richardson was videotaped, including a second short interview done with Richardson subsequent to her being photographed and fingerprinted.

Investigator Denlinger testified that he did not initially advise Richardson of her Miranda rights, as he considered her a witness to start with. It was his understanding that she was voluntarily present at the police station and he had no reason to believe that Richardson was involved in the Kunkle homicide. He testified that he told Richardson three times during the interview that he wanted to talk to her as a witness. Though he had learned that she was fifteen years old, he made no effort to contact her parent because she was only considered as a witness. He would have made such effort to contact her parent if she were in custody, according to his testimony.

Denlinger testified that Richardson was believed to be simply a witness, and that he never told her she was under arrest, nor did he tell her that she was not free to leave. He also testified his intention was that he was going to give her a ride home, but an hour and a half into the questioning, there was a point at which Richardson had asked if her boyfriend was going to go home and Denlinger advised he was going to go to jail. Richardson then volunteered, "All right. Then we both going to jail. I helped him." She continued with additional details of the Kunkle murder, at which point the interview was concluded for a time so that the investigators could step

out of the interview room and make attempts to reach Richardson's mother. Prior to these statements, when breaks were taken from the questioning, the interview room door had been left open. After this disclosure by Richardson, the investigation room door was closed.

Denlinger's testimony also was that once Richardson's mother, Akeela Abraham, arrived at the police station, he spoke to Ms. Abraham briefly and told her that Richardson had admitted to murdering someone. He then took Abraham to the interview room to confer with Richardson. Denlinger allowed this exchange to occur in private. No time constraints were placed on Richardson being able to confer with her mother. The mute button was pushed on the audio recording and officers stepped away from the door while Richardson conferred with her mother. Once Abraham called him back to the interview room, a Waiver of Rights Juvenile Form was read to Richardson and Abraham. Denlinger filled out the form and read it aloud. Richardson read the waiver of rights portion and signed, and Abraham signed as well. Neither Richardson nor her mother had any questions about the form, and neither showed difficulty in expressing themselves. Denlinger testified that he told Abraham she could be present during the interview and that Abraham said she "didn't want to be there for the details". Both investigators questioning Richardson gave Abraham their phone numbers. Denlinger further testified that Abraham did ask if she needed a public defender for her daughter. When asked this, Denlinger testified that they would continue the interview at another time if she wanted to get an attorney right away. Abraham appeared to be thinking about it, at which point Richardson stated that she just wanted to get the interview over with. At that point it was Denlinger's testimony that Richardson's mother simply left. Initially she went out for a smoke. CRPD did not provide her with transportation; Abraham just left. The interview continued on with only Richardson being present. Richardson never asked for services of or to consult with an attorney, she never invoked her right to remain silent, and she answered all questions. There was no undue pressure, duress, or coercion in the questioning that followed the reading of the Miranda warning. Further, there were no promises or inducements made to Richardson and she did not refuse to answer questions at any point. She was not told she was under arrest or going to be charged.

After her interview, photos of Richardson's injury to her finger and buccal swabs were taken. All of this was done after the Miranda warning was read to her. Richardson was told of the search warrant of the buccal swabs after the second break in questioning but before her admission and before the Miranda was read to her.

Denlinger admitted on cross-examination that prior to questioning Richardson, police had videotape at Kum N Go of Richardson using the decedent's EBT card and food stamp card with D'Anthony Curd. Investigators also knew that Curd was a suspect in the murder. Denlinger admitted that Richardson's use of the card would constitute a theft. Denlinger also admitted that once Richardson had made a disclosure implicating herself in the murder, then she was considered in custody. This occurred at approximately 12:34 p.m. on August 19th. He also

admitted that once they started speaking with Richardson, they did not tell her she could leave or terminate questioning and that if she would have asked to leave, that she would encounter no locked doors, that she had a right to refuse to answer any and all questions and that she had a right to have her parents with her, nor did they tell her she could contact a parent if she wanted prior to questioning her and they did not have permission from her parent prior to speaking with her.

Denlinger estimated that Richardson is 5'2" and 135 pounds and that each of the investigators questioning her were over 6 feet tall. Her back was against the wall with a table in front of her while they were questioning her, and the investigators were between her and the door. Each of the investigators were wearing firearms. Denlinger testified that Richardson never asked to leave, but did tell him on a couple of occasions that she needed to get back to baby sit. When cross examined relative to his deposition testimony, Denlinger had testified in response to the question "she asked you to leave twice, didn't she?" His response was "yep". However, at the time of this hearing, Denlinger testified that he didn't feel she was asking to leave; she simply mentioned she had to get back to baby sit and he told her he'd be quick and put her off. He admitted he was aware of the search warrant to obtain buccal swabs. He also acknowledged that Abraham referred to an attorney twice when she was present.

Denlinger indicated in his testimony that during her interview, Richardson was taken to the bathroom, an officer got her McDonald's to eat, and she was offered drinks as well as a tarpaulin blanket. (She had complained that she was cold). He also stated that Richardson never told him she knowingly used the EBT card and nor did he ever suggest that he intended to arrest her for that. He indicated that Richardson read the waiver aloud and she was agreeable to waiving her rights and he believed that she had.

Clinical psychologist Dr. Frank Sutton Gersh also testified. He is a licensed psychologist who sees adolescents and adults. He evaluated Richardson on December 27, 2013, at the Jones County Jail, spending two to three hours with her. The initial portion of Dr. Gersh's testimony involved whether Richardson would have understood that she was free to leave when initially being questioned by police. His testimony was that he felt that it was significant that the Defendant wasn't told why she was going to the police department, that she could choose not to go and that her mom could be present. He felt that it was significant that it was a four mile trip and that there was no express offer made to bringing her home if she didn't want to be there anymore. Once in the building, he felt that it was significant that there were two locked doors to get to the interview room and then the interview room door was closed upon her initially. Also significant to Dr. Gersh was that Defendant had a substance abuse problem and prior to the interview had been smoking four to five joints on a daily basis. In his interview with her on December 27, 2013, Richardson stated to Dr. Gersh that she had been up most of the night before August 19th until about 4:00 a.m., had only three hours of sleep, had drank a half of a fifth

of vodka that previous night, and had got up in the morning on August 19th and smoked a marijuana cigarette.

Dr. Gersh then further testified with regard to what he felt Richardson's understanding was of the Miranda warning, asking her what the main thrust of the Miranda right was, to which she stated that "I've had to cooperate with police." He also asked her why she stated "let's get it over with" to which she responded that she was tired and hungry and just wanted to get it over with. Dr. Gersh felt that Defendant was a suggestible individual, easily influenced to adopt certain behaviors or facts without being coerced. Richardson had previously been tested by Dr. Rosell who found that Defendant was more suggestible than 90 percent of all people. Further, Rosell's testing indicated that Richardson's IQ was 88.

Dr. Gersh's findings included that Richardson had attended special education classes all throughout her education and had repeated the seventh grade, that she had been raped at the age of eleven or twelve, and that at age fifteen she had been homeless and for two weeks slept under a bridge, and that she did not have supportive relationships with her parents, including that her mom had been physically violent toward her after she stopped going to school. Dr. Gersh felt that all of this would impact her confidence and self-esteem, making her more vulnerable that she couldn't leave. Dr. Gersh also testified that Richardson's two statements indicating she had elsewhere to be were requests to leave, and the fact that the police ignored this gave Richardson the impression that she was not free to leave.

Dr. Gersh administered tests to Richardson to determine her comprehension of her Miranda rights. In his opinion, he felt that Richardson couldn't fully understand her Miranda rights and thought she had to talk to police. He also felt that after Abraham signed the Waiver of Rights and asked "Do you need me to stick around?" and when the officer replied no, we don't need you to stick around, he felt that could have been interpreted by mom as dismissing her, as opposed to her leaving voluntarily. Upon cross-examination, Dr. Gersh did admit that he evaluated Richardson in the context of the information given from Richardson as far as getting little sleep, drinking the night before the interview and using marijuana that morning. He also admits that all of that was information he received from Richardson well after the fact. Dr. Gersh also admitted that Richardson, in her taped interview, was not slurring, seemed to have no difficulty understanding questions, no difficulty in talking about the Miranda rights, and he saw no evidence she was drunk. However, he saw nothing in the interview that indicated she could not understand questions she was being asked; she seemed to be responding appropriately.

With regard to the testing to Richardson's comprehension of the Miranda, he indicated that there are complex words such as "rights", "appointed" and "waiver" that are vague. She understood the words, but he also indicated that officers encouraged Daimonay to "tell the truth" so many times during her interview, that he felt that constituted pressure upon her. Also, Dr.

Gersh admitted that the tests he applied were with regard to the standard Miranda form and not the juvenile Miranda form that Richardson was read.

In review of the interrogation tapes at issue, the Court finds as follows: At 10:53 a.m. on August 19, 2013, Richardson is brought into the interview room and sits down. The door is closed. The room is small with a small table and a few chairs. Investigators thank her for coming down, to which Richardson replies, "Yeah, no problem." At 11:10 a.m. it is established that Richardson is a fifteen year old. She is told "We've got a case we're kind of working on and we thought maybe you could help us out a little bit." Investigators tell her "It kind of involves" the individual she has identified as her boyfriend. They also advise her that he is chatting with some investigators "right now"; and they tell her she isn't in any sort of trouble; that they consider her maybe as a witness. They continue asking her questions that appear largely to be from the standpoint that she may possible a witness to actions of her boyfriend. At 11:17 a.m., investigators hone in on "an incident that happened" at the Kirkwood Apartments where she and D'Anthony Curd (the boyfriend) resided around the time of Ronald Kunkle's homicide. Questions appear to be generally initially aimed at what Richardson may know about her boyfriend's involvement with the decedent. At 11:22 a.m., the investigator is asking about Richardson's usage of the decedent's food stamp card. They indicate that they have video of her using this card and "it looked like, maybe you used it yourself." At 11:31 a.m. Richardson states, "I'm sort of babysitting. I sort of have to get back." A break is taken, and the door is left open. At 11:36 a.m. the detectives reconvene in the interrogation room with Richardson. At 11:37 a.m., investigators tell Richardson, "I don't know if he's trying to get you in trouble necessarily" and "he is over there telling some stuff that doesn't match up with what you're telling us." Richardson asks if D'Anthony Curd is a suspect, and "did he have something to do with this?" The investigator answers, "Yeah, I think maybe." At 11:41 a.m. the investigator states "when you go home today, you want to know that you know you were being honest and you told us, you know, everything." This is one of many statements investigators made to Richardson indicating that they wanted her to tell the truth, or that they felt she was not telling the truth. At 11:46 a.m.. it is established in the interview that Richardson does not have her cell phone with her. At 11:47 a.m., with regard to the food stamp card, Richardson indicates she thought it was D'Anthony's card. At 11:54 a.m. investigators step out of the room and the door is again left open. At noon, the investigators re-enter. They offer to get Richardson a soda. They then state "These are some swabs and we use them to get DNA from you." Investigators repeatedly tell her they feel she is a witness. They tell her D'Anthony Curd is talking to them and making some progress, and "he's not going to be going home today." At 12:08 p.m., it is clear that D'Anthony was telling police things that may have been incriminating about Richardson (or at least that's what the investigators are telling Richardson at that point.)

It is at this point that Richardson seems to be getting more animated with the investigators. She was calmly answering their questions prior to this point. She again says, "No,

actually I'm babysitting. I said I got to get back, so". Investigators leave again at approximately 12:15, and the door again is left open. Around 12:30, investigators confront Richardson with information that ***a female voice from her cellphone called to check the balance of the decedent's bank card.*** At 12:34 p.m., Richardson simply blurts out, not in response to a question, the following: "All right then, we both going to jail. I helped him. I helped D'Anthony murder Ron. I also cut my finger as it was happening. We used kitchen knives. It was D'Anthony that initiated it. He was like Ron got $2,000 on him; let's go get it, and we did. We left him up there." And the utterance goes on at length. Directly after this statement is made, investigators excuse themselves from the room and close the door.

At 1:33 p.m. investigators bring food to Richardson and bring defendant's mother, Akeela Abraham, in to see her. Before the mute button is hit, the child's mother is heard to say "What are they talking about?" The remainder of the discussion, though videotaped, was not audiotaped. Abraham and Richardson appear on video to engage in conversation for the next several minutes. At 1:38 p.m. Abraham knocks on the interview room door to let investigators know that she is through talking with Richardson. Investigators return and the Juvenile Form Waiver of Rights is read to Richardson *and Abraham*. The defendant reads the last paragraph, the actual waiver, aloud. Abraham is still present and has not only heard all of Richardson's rights being read to her, but also hears aloud and sees that her daughter is signing a waiver of those rights. Keeping in mind that the form is intended such that juvenile defendants can understand it, and Abraham is an adult, so should have no difficulty comprehending it.

The investigator then states to Richardson, "If you want to talk to us about this incident a little bit more, I need your signature right there." Richardson signs, and then her mother's signature is procured. After Abraham signs the form, investigator Denlinger states "You gonna be able to stick around out in the lobby or anything like that? Or do you have to leave?" Abraham asks, "Do you need me to stick around?" Denlinger responds, "Nope, we don't necessarily need you to stick around, but if any point you change your mind or whatever regarding this, could you just give us a call and let us know? I can leave you our number." Abraham then turns to Richardson and says, "um, are you sure you're telling them the truth? Everything?" Shortly thereafter Abraham asks "And what about a public defender or something for her?" Denlinger responds, "You're entitled to have one and you're entitled to have one right now if you want but we'd have to end the questioning right now and try this some other time because we don't have one in the building. But it's up to you whether you want to do this now or later. Those are you guys' options." Abraham says "I don't know what to do, I don't know what to do with this, I" and Richardson states fairly directly, "Can we just get it done now?" Abraham states, "Okay, I don't know what to do", then simply leaves the room. It should be noted that prior to leaving her daughter, Richardson and Abraham hug affectionately. When investigators return to the room, they tell Richardson that "mom is sticking around," though it is later learned by investigators that at some point, she actually completely left the facility.

Questioning ensues in a conversational and calm manner at about 1:44 p.m. and continues until 3:49 p.m.. Richardson appears to understand and respond appropriately to all questions posed, and does not make any requests for counsel, nor does she ask for questioning to discontinue at any point.

Conclusions of Law and Discussion

I. At what point was Richardson in custody such that she should have been Mirandized before being subjected to further questioning?

The Supreme Court requires that before beginning a custodial interrogation, the police must inform a suspect: he has the right to remain silent, that anything he says can be used against him in the court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires. Miranda v. Arizona, 384 U.S. 436, 478-79, 86 S.Ct. 1602, 1630, 16 L.Ed. 2d 694, 726 (1966).

To determine if a suspect is in custody, we look to whether the suspect was formally arrested or whether the suspect's freedom of movement was restricted to such a degree as to be associated with a formal arrest. Miranda, at 672 N.W.2d at 759. To determine whether the suspect's freedom of movement was restricted to such a degree, we apply an objective analysis and ask whether a reasonable person in the defendant's position would have understood his situation to be one of custody. State v. Bogan, 774 N.W.2d 676 (Iowa 2009).

The determination as to whether the defendant is in custody is a four-factor test. Factors include the language used to summon the individual, the purpose, place and manner of interrogation, the extent to which the defendant is confronted with evidence of his guilt, and whether the defendant is free to leave the place of questioning. Bogan, at 680, citing Miranda. See also, State v. Pearson, 804 N.W.2d 260 (State of Iowa 2011).

"Two discreet inquiries are essential to the determination (of whether a juvenile is in custody for Miranda purposes): First, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave." State v. Pearson, supra. 554 N.W.2d 555 (Iowa 1996).

Relevant inquiries into whether an individual is deemed to be in custody include: Was the style of questioning confrontational or aggressive; or relaxed and investigatory. State v.

Smith, 546 N.W.2d 916 (Iowa 1996). How many officers were involved, how long was the questioning, was the Defendant's will overborne? Was her capacity for self-determination critically impaired? State v. Smith, supra.

In determining whether an individual is in custody for purposes of ascertaining whether privilege and self-incrimination attaches, the Court must examine all circumstances surrounding investigation; however, ultimate inquiry is simply whether there was formal arrest or restraint on freedom of movement of degree associated with formal arrest, ibid. The only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation. State v. Smith, at 921. "With regard to in custody, courts have examined the facts apparent in the particular case and made custody determinations on a case-by-case basis, the inquiry being whether in the absence of actual arrest, something…[is] said or done by the authorities, either in their manner of approach or in the tone or extent of their questioning, which indicates [to the Defendant] that they would not have heeded a request to depart or to allow the suspect to do so." State v. Smith, at 921. This requires examination of the totality of circumstances with no one particular fact or factor being determinative of the issue. State v. Smith, at 922, citing California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520; 77 L.Ed.2d 1275, 1279 (1983) (remaining citations omitted).

There is a concern that "underage suspects may be more vulnerable than adults to the coercive pressure of a police interrogation." State v. Pearson, at 269, citing J.B.D. v. North Carolina, 564 U.S. at _____, 131 S.Ct. at 2401, 180 L.Ed.2d at 321. ("A reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go.") Because of the "danger of overwhelming a minor Defendant…it as appropriate to consider the age of defendants as an additional factor in making a determination as to custody status." State v. Smith at 923.

Initially, in this case the Court must look at whether Richardson was in custody at any point prior to her having been read her Miranda rights. Though she was not arrested when initially brought in for questioning, the Court must determine whether her freedom of movement was restricted to such a degree that a reasonable person in her position would have understood her situation to be one of custody. The language used to summon Richardson was neutral. It was a simple inquiry to see if she would be willing to come with police to answer some questions. She voluntarily got in the police vehicle, sat in the front seat, and was not frisked or handcuffed. These factors initially mitigate against a finding of custody.

The purpose, place and manner of the interrogation must next be considered. It is not insignificant that Richardson was taken to the police station and placed into an interrogation room. Also, it is not insignificant that once at the police station, Richardson was taken through a number of locked doors, and initially placed within a locked 6-foot by 8-foot room with the door

closed. Though the stated purpose for questioning her was initially that Richardson was simply a witness, Richardson was not told that she was free to leave, and though she had been twice told previously that she was not under arrest, no one told her how she could exit the police station if she chose to do so. While these factors do not necessarily immediately translate to a determination of custody, coupling this lack of freedom of movement with the fact that Richardson is a black fifteen year old female with little if any prior criminal record and little experience with the criminal justice system, a finding of custody becomes more likely.

Richardson is then interviewed by two armed investigators, both of whom are much larger than she. And though their questioning is initially primarily conversational and related to the potential culpability of D'Anthony Curd rather than Richardson, questioning does begin to point in the direction of Richardson's guilt, at least as to the use of the decedent's bank and food stamps cards. Once the questioning hones in on Richardson's involvement, at least as pertained to the bank cards, both the tone of the questioning by investigators and the emotions of the Defendant appear to change on the interview tapes. The investigators become more insistent that Richardson "tell the truth" and be "completely honest" with them. They suggest over and over that she knows more than she is telling, and they tell Richardson that Curd was giving them a statement that allegedly implicates her in some way. They confront her with videotape of her using the decedent's bank card, and they also confront her with evidence that a female voice called the decedent's bank *from her cell phone* to check on account balances. The police also let Richardson know that they have a warrant to collect DNA evidence from her via a buccal swab. In short, the manner of questioning, though not exceedingly aggressive or lengthy, at this point in her interview becomes more confrontational and far less relaxed. All of these factors mitigate in favor of a finding that Richardson was in custody.

Because Richardson is a juvenile, her age does factor in to a finding of custody. Her age and her lack of experience with the criminal justice system coupled with the totality of all other circumstances in place at the time of her initial interview lead the Court to conclude that Richardson would not reasonably have felt that she was free to leave the police station at any point after she was seriously confronted with her use of the decedent's bank cards and with the allegations that Curd was implicating her somehow in a crime. The place and manner of her interrogation were physically limiting in this initial stage of her interrogation, and once Richardson was confronted with evidence of her own potential guilt, it would have been reasonable and likely for her to have concluded that she was not free to leave the place of questioning. Specifically, the Court finds that from the time police begin to hone in on her potential involvement in a crime, which appears to be no later than approximately 11:37 a.m., Richardson was in custody. As such, her statements from that time and until the time she was Mirandized and given access to her parent on August 19, 2013, should be suppressed.

II. Did Richardson, once Mirandized, make her statements knowingly, voluntarily and intelligently?

The State is charged with the burden of proving the voluntariness of a defendant's confession by a preponderance of the evidence, as a pre-requisite to its admission in evidence. And, where the State is unable to sustain its burden, the defendant's inculpatory statements and confession must be suppressed and may not be admitted into evidence. The test of voluntariness of an inculpatory statement or confession is "whether the defendant's will was overborne by the police officers considering 'the totality of the circumstances.'" State v. Rhomberg, 516 N.W.2d 803 (Iowa 1994). Among the circumstances the Court considers as relevant include "the defendant's knowledge and waiver of his Miranda rights." State v. Rhomberg, at 806, citing State v. Munro, 295 N.W.2d 437 at 443 (Iowa 1980 "In State v. Munro, we recognized as significant the defendant's ability to control his conduct enough to negotiate with authorities regarding his rights. Citing State v. Jump,269 N.W.2d 417, 425 (Iowa 1978). (Defendant's physical and emotional condition and reaction to the interrogation is significant); State v. Cullison, 227 N.W.2d at 121, 129 (Iowa 1975). (Any mental weakness the Defendant may possess must be considered). Also, if a person gives responsive answers to questions, that is an indication of the capacity to give a voluntary confession. State v. Reid, 394 N.W.2d 399, 404 (Iowa 1986).

The relinquishment of defendant's rights must be voluntary, in that it was not given as a result of intimidation, coercion or deception." State v. Mortley, 532 N.W.2d 498, 502 (Iowa Ct. App. 1995) citing Moran v. Burbine, 475 U.S. 412, 421 (1986). Also, the question of whether possible drug use prior to statements being made to police affect the voluntariness of a confession was raised in State. v. Edman, 452 N.W.2d 169, 170-171. The question to ask is "do the drugs affect defendant's ability to think rationally?) Ibid.

Factors in determining whether a statement of a criminal defendant was voluntary include: Defendant's age; level of Defendant's prior experiences with law enforcement; whether the Defendant was intoxicated at the time of the statements; whether the defendant was provided with Miranda warnings; intellectual capacity of defendant; whether officers acted in deceptive manner; whether defendant appeared to understand and respond to questions; length of time of detention and interview; defendant's physical and emotional reaction to interrogation; and whether defendant was subjected to any physical punishment such as deprivation of food or sleep. Ibid.

By1:33 p.m. on August 19, 2013, investigators have reached a point in their interview with Richardson that they now consider to her to be in custody. Consistent with the requirements of Iowa Code Chapter 232.11, they contact Richardson's mother, Akeela Abraham. Abraham comes to the station, and is allowed to confer with her daughter. No time limits are

placed on this conferral, and Richardson and Abraham are allowed to speak privately as long as they wish. It is Abraham, not police, that determine when this conferral is concluded.

When investigators return to the room, Richardson and Abraham are both read the Miranda. The form of Miranda used is a juvenile form with simpler language so that a juvenile may understand it. Both Richardson and Abraham sign off on the Miranda waiver. Neither makes any indication that they do not understand the Miranda. Nothing on the videotape of the interview indicates that Abraham's presence is merely an "afterthought", an "empty gesture" or "impotent" as the Defense suggests. Once police make the determination that Richardson was in custody, Richardson's rights and protections per Chapter 232 are followed by police. Abraham is Richardson's parent, not some other random or unrelated individual. Though there is some evidence now that Richardson may have been estranged from Abraham at some point in the past, the police videotape clearly shows that mother and daughter converse about the situation, and at the end of their time together, they embrace warmly.

It should be noted that at all points in time during both the initial interview phase and during the post-Miranda phase of Richardson's interview, Richardson clearly tracked with the questions of the police, and appeared at all times to understand the questions posed to her. The questioning was not of undue length, and was overall generally conversational and non-coercive. She was not made any promises or threats of any kind. She was repeatedly offered food, drink and bathroom breaks. Though she was cold, police offered her and brought her a blanket to wrap around herself.

Whether a confession is deemed to have been made voluntarily is reliant on the totality of all circumstances. State v. Davis, 446 N.W.2d 785. In State v. Rhomberg , *supra.*, in a fact pattern similar to the one at hand, the Court found that a juvenile defendant had voluntarily, knowingly and intelligently confessed. In that case, the juvenile defendant Rhomberg was fifteen and a half years old and was tried as an adult. Rhomberg's verbal IQ was 70 and his full scale IQ was 80. At the interrogation upon arrest, both of the defendant's parents agreed to allow Rhomberg to be questioned, and Rhomberg's mother signed the form. Although invited by the police officer to attend the interrogation, neither parent attended because Ms. Rhomberg was too upset and Mr. Rhomberg took her home. Like in the instant case, Rhomberg met with a doctor in order to ascertain his ability to understand his Miranda rights. Said doctor met with Rhomberg for forty-five minutes and concluded Rhomberg understood some components of the Miranda protection but did not understand others. Rhomberg, at 806. Further in Rhomberg, there was no evidence that officers threatened Rhomberg or promised him anything, or told him he could go home if he gave them a statement. Rhomberg had never asked to see his attorney or any attorney or indicated he wanted to stop talking. He also never asked to see his parents, appeared bewildered or unable to understand the officer's questions.

While in the instant case, Richardson was young and inexperienced, she, like Rhomberg, was also read the Miranda in the presence of her parent, an adult. She was given time to confer with her parent as well. While her intelligence can generally be described as slightly below average, the totality of her interview shows that she was able to comprehend and answer questions clearly. There was no suggestion nor anything apparent in her videotaped interview that suggested Richardson was intoxicated at the time of the statements, nor that she was impaired in any way by drugs or alcohol. Her responses to questions were rational and clear. The Court also finds that the length of time of detention and interview were not burdensome upon Richardson, as the span of the initial portion of the interview was just over an hour and a half, and the interview after she was Mirandized lasted roughly two hours. Richardson's physical and emotional reaction to interrogation did not appear to the Court to be overly negative. Richardson was not subjected to any physical punishment such as deprivation of food or sleep, and though it is clear she was cold, it is equally clear that officers brought her something to wrap in to make her more comfortable.

The question of voluntariness of Richardson's confession, then, ultimately boils down to whether officers acted in deceptive manner to obtain it. The Defendant argues that it was deceptive for investigators to state when asked by Abraham about "a public defender or something" the following:

> You're entitled to have one and you're entitled to have one right now if you want but we'd have to end the questioning right now and try this some other time because we don't have one in the building. But it's up to you whether you want to do this now or later. Those are you guys' options

While the Defendant argues that this language was deceptive, suggesting to Richardson and her mother that her choices were only to give a statement now or to give one later, the Court disagrees. The language used by Denlinger clearly indicates that she can have an attorney "right now" if she wants, and they would have to end questioning and "try this later" if she chose that alternative, or alternatively if she wanted to, she could continue to talk to them. The language "try this later" does not indicate a certainty of anything happening later. Moreover, this language falls directly on the heels of "you're entitled to have [an attorney] and you're entitled to have [an attorney] now if you want," which is a direct and clear reiteration of the Defendant's right to counsel.

The Court does not conclude that Richardson was deceived into providing a confession. She was read her rights, and was allowed to confer with her mother, who also was read the Miranda juvenile form. Richardson's will did not appear overborn at any time during the interviews. The interview which ensued the reading of the Miranda was conversational and

calm. Richardson appears to understand and respond appropriately to all questions posed, and does not make any requests for counsel, nor does she ask for questioning to discontinue at any point. Though Abraham leaves the interview, it appears that she leaves voluntarily. She is never asked or directed to leave, and to the contrary is asked whether she will "stick around." Investigators also provide her with their phone numbers in the event she wishes to talk with them further. For all the foregoing reasons, the Court concludes that the State has proven by a preponderance of the evidence that Richardson's confession was given voluntarily, knowingly and intelligently, and therefore should not be suppressed.

III. Was Richardson denied her right to counsel?

Section 232.11(2) of the Code of Iowa provides in part: "The child's right to be represented by counsel under subsection (1), paragraph a, shall not be waived by a child less than sixteen years of age without the written consent of the child's parent, guardian or custodian. A statement obtained from a juvenile without a valid waiver of counsel under Section 232.11(2) is per se inadmissible in evidence in district court proceedings by operation of Iowa Code Section 232.45(9). In Re: J.A.N., 346 N.W.2d 495, 498 (Iowa 1984). The notification requirements of Section 232.11(2) are triggered when the juvenile is clearly in custody. In the Interest of D.J.K, a minor, S.Ct. of Iowa 1986, 397 N.W.2d 707.

As to the issue of defendant's alleged invocation of her right to counsel, whether the defendant actually invoked the Miranda rights is a question of fact. State v. Johnson, 318 N.W.2d 417 (Iowa 1982). An ambiguous request for counsel after a knowing and voluntary waiver of the Miranda rights does not require law enforcement officials to stop questioning, even to clarify the request. State v. Morgan, 559 N.W.2d 603 (Iowa 1997). A suspect must unambiguously request counsel in order to require cessation of questioning. Defendant's remark that "maybe I should talk to a lawyer" was not a request for counsel and agents were not required to stop questioning him. An ambiguous or equivocal reference to counsel is not a request for counsel and thus there are not grounds for suppression. Police may, but need not, clarify whether a suspect wanted a lawyer. Davis v. United States, 512 U.S. 452 (1994).

The defense seeks to prove through the testimony of Dr. Gersh that Richardson may not have understood her rights, nor understood that she waived them. However, Richardson was not the only one who was read her rights, and she was not the only person who waived those rights on her behalf. Her mother was present and participated in this process alongside her. Pursuant to section 232.11 of the Iowa Code, officers need to procure the parents' written consent of their juvenile child's Miranda waiver. Abraham did hear the Miranda being read, and did sign the Miranda waiver on behalf of her daughter. There was no evidence presented by the defense that

Abraham did not understand the waiver. Moreover, Iowa law does not require that the parent needs to understand the Miranda rights, although the Court suspects Abraham did understand them in light of her inquiry about counsel for Richardson.

To be clear, at no point during Richardson's interviews does she ever invoke her right to counsel However, two statements made by Abraham did refer to attorneys. The first was "[unintelligible] gonna need an attorney," which was hardly audible, and was presented more as a question and not as a demand. This statement was ignored by investigators. The second such statement by Abraham was "And what about a public defender or something for her?" Abraham is an adult. Abraham has been read the juvenile form Miranda, knows what her daughter is being questioned about, and has signed the Miranda waiver. Neither of Abraham's comments can be construed by the Court as an unambiguous, unequivocal request for counsel. As such, the Court cannot conclude that investigators were required to stop questioning Richardson even to clarify Abraham's statements. Even so, Denlinger did stop to respond to Abraham's second statement, and describe, again, that Richardson was entitled to counsel "right now" if she so wished. Abraham did not thereafter invoke Richardson's 6th Amendment right to counsel. Rather, she simply left. Richardson also, having heard the entire conversation, did not ask for counsel. To the contrary, she chose to continue to speak to investigators.

IT IS THEREFORE ORDERED that Defendant's Motion to Suppress with regard to statements made by her to police on August 19, 2013, from 11:37 a.m. until such point as she was read her Miranda rights is hereby GRANTED.

IT IS FURTHER ORDERED that Defendant's Motion to Suppress with regard to statements made by her to police after having been read her Miranda rights on August 19, 2013, is hereby DENIED.

DATED: January 27, 2014. 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

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

On March 7, 2014, this matter came before the Court for hearing on the Defendant's Motion to Change Site of Detention. The State appeared by Linn County Attorney Jerry Vandersanden, and the Defendant appeared personally and with her attorneys Dennis Cohen and Rachel Antonuccio. Evidence, including testimony from the Defendant as well as from Linn County Jail Administrator Pete Wilson, was presented to the Court.

The Defendant, Ms. Richardson, is currently sixteen years of age, with a date of birth of November 15, 1997. She is seven and one-half months pregnant at this time. She has pled guilty to Murder in the Second Degree, and is currently awaiting sentencing. Ms. Richardson is being held by the Linn County Sheriff in the Jones County Jail without bond.

According to her testimony, Ms. Richardson is being held in a large cell which has a window and holds two bunk beds, a toilet, shower and television. The door of this cell has a hatch through which laundry, clothing, cleaning supplies, games and meals can all be passed. Ms. Richardson is able to have visitors, but other than her counsel, and the preacher that comes to hold church at the jail on some Wednesdays, she has apparently not had any visitors at the Jones County Jail. She does have access to a recreation room, but it does not include equipment, so she can only walk around in circles there. She does have access to books, though they may not be the type of books that would interest her as a young female juvenile. For the most part, Ms. Richardson sleeps, plays solitaire or watches television throughout the day, and has very limited access to other people. Her medical needs are currently being addressed by the Jones County Jail and the Linn

County Sheriff's Office cooperatively. Her medical providers are located here in Linn County.

Ms. Richardson reports that she has at times heard other inmates in their cells if they were loud, and has seen other inmates on a few occasions, but has not had any interaction with them. Ms. Richardson reports that she has not gotten into any trouble

while in the Jones County Jail, and cannot remember the last time that she hugged anyone.

Ms. Richardson's chief complaint is that she is isolated, and feels that she is so isolated such that she believes this isolation violates her Constitutional rights that she be free of cruel and unusual punishment. She argues that the Central Iowa Juvenile Detention Center at Eldora, Iowa, would be willing to accept her at this time, and that the Court should enter Orders to so direct that she be transferred there.

Pete Wilson, Administrator of the Linn County Jail, testified that Linn County's jail is not cleared by the housing inspector to house juveniles. When a juvenile is under bail, his jail contacts other jails to see if they will take the juvenile. The Jones County Jail was the closest jail to Linn County that meets all of the criteria for housing a juvenile under bail as set forth in Chapter 356 of the Iowa Code. Importantly, Captain Wilson testified that the Jones County Jail provides sight and sound separation for Ms. Richardson within that facility, but that she might occasionally see other inmates as they are moved around within the facility. Further, Wilson checked with the Cedar County and Iowa County Jails nearby, which are willing to accept juveniles, but since neither of those facilities is currently housing a female juvenile, Ms. Richardson would be in the same situation at either of those facilities. Moreover, the Iowa County Jail contracts with other entities that would make it difficult for them to maintain the required sight and sound separation, and the Cedar County Jail would not be able to tend to Ms. Richardson's medical needs. He testified that he is concerned with transferring Richardson to the Eldora facility due to her medical situation and the proximity to care with her medical providers which are located in Linn County.

Pursuant to Iowa Code Chapter 811, this Court has the authority to set bond over individuals situated in Ms. Richardson's position. This Court has done so previously in this case in accordance with our statutes. Once the Court sets bond on an individual,

pursuant to Iowa Code Chapter 356, the County Sheriff has the discretion to make placement decisions. Iowa Code Section 356.2 states:

> The sheriff **shall have** charge and custody of the prisoners in the jail or other prisons of the sheriff's county, and shall receive those lawfully committed, and keep them until discharged by law. (emphasis added).

Moreover, Iowa Code Sections 356.3 and 356.4 direct that confined individuals be separated by means of their age and gender. Iowa Code Section 356.3 states in pertinent part as follows:

> Any sheriff, city marshal, or chief of police having in the officers' care or custody any prisoner under the age of eighteen years, shall keep such prisoner separate and apart, and prevent communication by such prisoner with prisoners above that age, while such prisoners are not under the personal supervision of such officer…"

Iowa Code Section 356.4 further then states that "all jails shall be equipped with separate cells for men and women. Men and women prisoners shall not be allowed in the same cell within a jail at the same time."

Unfortunately for Ms. Richardson, the Jones County Jail does not presently house any other female individuals under the age of eighteen. If such juvenile females would be placed in the Jones County Jail, they would be placed with Ms. Richardson. Because no other female juveniles are currently housed at Jones County, and because of the sight and sound segregation requirements of the Iowa Code, Ms. Richardson spends most of her time each day alone.

If the Sheriff were agreeable to transferring Ms. Richardson to the Eldora facility, provided that facility were found to be an appropriate placement for her, and provided that her medical needs while pregnant could be met while there, placement at such facility could be a viable option for Ms. Richardson. As it stands, however, it is clear to the undersigned that the statutes of the State of Iowa, and in particular, Iowa Code Section 356.2 dictate that the Linn County Sheriff has discretion with regard to the placement of Ms. Richardson. More and more our justice system is charged with addressing the needs of juvenile offenders who have been charged as adults. It is the

duty of the Sheriff pursuant to this statute to address not only the needs of the juvenile for safety but also the safety of others. Ms. Richardson's situation, while unfortunately isolating, is clearly intended to provide for her safety, and with that provision of safety clearly come some trade-offs.

Ms. Richardson argues that the manner in which she is currently being detained is tantamount to "solitary confinement", and that as such her current detention violates her right to be free of cruel and unusual punishment. Indeed, "The United States Constitution prohibits 'cruel and unusual' punishment, and this prohibition is applicable to the states through the Fourteenth Amendment." State v. Phillips, 610 N.W.2d 840, 843 (Iowa 2000) (citing U.S. Const. amend. VIII; State v. Lara, 580 N.W.2d 783, 784 (Iowa), *cert. denied,* 525 U.S. 1007, 119 S.Ct. 523, 142 L.Ed.2d 434 (1998)). "[T]he Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.' " Kennedy v. Louisiana, 554 U.S. 407, ——, 128 S.Ct. 2641, 2649, 171 L.Ed.2d 525, 538 (2008) (quoting Weems v. United States, 217 U.S. 349, 367, 30 S.Ct. 544, 549, 54 L.Ed. 793, 798 (1910)). Punishment may be considered cruel and unusual "because it is 'so excessively severe that it is disproportionate to the offense charged.' " Phillips, 610 N.W.2d at 843–44 (quoting Lara, 580 N.W.2d at 785). State v. Wade, 757 N.W.2d 618, 623 (Iowa 2008).

Many cases are cited by the Defendant to support this notion. However, the majority of these cases refer to solitary confinement in a very different sense than what Ms. Richardson is experiencing in the case at hand. For instance, in Berch v. Stahl, 373 F.Supp. 412, 420 (W.D.N. Carolina), defendants were completely deprived of clothing, could receive no mail, no use of phone (not even from their attorney), no writing materials, concessions, exercise outside the cell, visitors, toothbrush or books, and sometimes were not allowed to bathe for thirty days at a time. In Kelly v. Brewer, 239 N.W.2d 109 (Iowa 1976), the defendant was held in "the hole" – a completely darkened cell without bedding, eating utensils or even toilet paper. Finney v. Hutto, 548 F.2d 740 (8th Cir. 197) discusses "punitive isolation" and defines it as "confinement in an extremely small cell under rigorous conditions." These are not the conditions that Ms. Richardson is experiencing. Ms. Richardson is provided with clothing and bedding, which is laundered, she is able to receive mail, can use the telephone, has access to her attorneys, is allowed exercise outside of her cell, receives meals and games each day, cleaning supplies and toiletries, and is allowed visitors. She is in a lit cell with a window, is provided with medical care and is able to bathe regularly. Though not posh by any

standard, Ms. Richardson is kept safe, and her needs are met. Her lack of companionship, though unfortunate, is resultant of the requirements of the Iowa Code that provide for her safety.

The Court is only able to review Defendant's placement if it finds a Constitutional level of cruel and unusual punishment is being used. Because I am unable to find that the conditions of Ms. Richardson's detention are cruel and unusual, I am left to the statutes of the State of Iowa to determine the placement issue herein. Pursuant to our statutes, as provided by the Iowa State Legislature, it is the determination of this Court that the discretion for the location of Defendant's detention pending sentencing herein lies with the Linn County Sheriff as provided to him under Iowa Code Section 356.2. The Linn County Sheriff's Office has concerns with regard to Ms. Richardson's continuing ability to have access to her health care providers in Linn County should she be moved to a location that is seventy-five minutes away as she enters the last month of her pregnancy. With these concerns in mind, and for all the foregoing reasons, the undersigned declines to interfere with the Sheriff's discretion in this matter.

Defendant's Motion to Change Site of Detention is therefore DENIED.

DATED: March 14, 2014. Clerk to notify.

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MARY E. CHICCHELLY, JUDGE
SIXTH JUDICIAL DISTRICT OF IOWA