

**IN THE SUPREME COURT OF IOWA
No. 19-1561
CERRO GORDO COUNTY NO. AGCR028389
CERRO GORDO COUNTY NO. AGCR028483**

**STATE OF IOWA,
Plaintiff-Appellee,**

vs.

**WILLIAM F. FETNER,
Defendant-Appellant.**

**APPEAL FROM THE IOWA DISTRICT COURT IN AND FOR
CERRO GORDO COUNTY, IOWA
THE HON. KAREN KAUFMAN SALIC**

APPELLANT'S REPLY BRIEF IN FINAL FORM

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CERTIFICATE OF SERVICE

I certify that on or before January 17, 2020, I, the undersigned counsel served a copy of the “Appellant’s Reply Brief in Final Form” upon the State by electronically transmitting a copy of the same to Thomas Bakke, Criminal Appeals Division of the Iowa Attorney General’s Office through the use of the EDMS system. I, Richard Hollis, further certify that on or before January 17, 2020¹ I served a copy of the “Appellant’s Reply Brief in Final Form” upon Appellant William F. Fetner (whose inmate number is 6273440) by mailing a copy of the same by first-class or priority mail, postage prepaid, to Mr. Fetner, using the following address: “Mount Pleasant Correctional Facility, 1200 East Washington St., Mount Pleasant, IA 52641”.

By: /s/ _____
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¹ Assuming that the snowstorm due to begin on the morning of January 17 does not result in the premature closure of a Des Moines post office or make travel to the same hazardous.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. With all due respect to the District Court, the District Court considered an impermissible sentencing factor not established by any allegation in the record when sentencing Defendant-Appellant William F. Fetner (hereinafter “Fetner”). With all due respect to the District Court, this error violated Fetner’s rights to due process of law pursuant to the Fifth Amendment to the United States Constitution and pursuant to Article I, Section 9 of the Iowa Constitution. With all due respect to the District Court, this error also violated Fetner’s rights to equal protection of the law pursuant to the Fourteenth Amendment to the United States Constitution and pursuant to Article I, Section 1 of the Iowa Constitution.

2. With all due respect to the District Court, the District Court considered an irrelevant sentencing factor not established by any allegation in the record when sentencing Fetner. With all due respect to the District Court, this error violated Fetner’s rights to due process of law pursuant to the Fifth Amendment to the United States Constitution and pursuant to Article I, Section 9 of the Iowa Constitution. With all due respect to the District Court, this error also violated Fetner’s rights to equal protection of the law pursuant to the Fourteenth Amendment to the United States Constitution and pursuant to Article I, Section 1 of the Iowa Constitution.

AMENDED ROUTING STATEMENT

In the Routing Statement filed with his proof brief in the above-captioned matter, the undersigned counsel stated that “this case does not involve ‘substantial constitutional questions as to the validity of a statute, ordinance, or court administrative rule’ within the meaning of Iowa R. App. P. 6.1101(2)(a), ... or ‘substantial issues of first impression’ within the meaning of Iowa R. App. 6.1101(2)(c) ... or ‘substantial questions of enunciating or changing legal principles’ within the meaning of Iowa R. App. P. 6.1102(2)(f).” In response to the undersigned counsel’s proof brief, the State raised as a defense the alleged applicability of Iowa Code Section 814.6(1)(a)(3) to this case, a statute which as this Court is well aware, took effect July 1, 2019. State’s Proof Brief, pgs. 6 and 7. Therefore, because the State has raised this statute as a defense, this case now involves “substantial constitutional questions as to the validity of a statute, ordinance, or court administrative rule” within the meaning of Iowa R. App. P. 6.1101(2)(a), “substantial issues of first impression” within the meaning of Iowa R. App. 6.1101(2)(c), and “substantial questions of enunciating or changing legal principles” within the meaning of Iowa R. App. P. 6.1102(2)(f). Accordingly, this case should be retained by the Supreme Court of Iowa.

In his proof brief, the undersigned counsel stated that “this case meets the criterion for transfer to the Court of Appeals set forth in Iowa R. App. P. 6.1101(3)(a) to the extent that this case involves ‘the application of existing legal principles’.” Now that the State has raised as a defense a statute that took effect less than six months ago, this case no longer involves “the application of existing legal principles” within the meaning of Iowa Code Section 6.1101(3)(a). Instead, this case now involves whether a significant change in the law, however unconstitutional and ill-advised it may be, applies to this case. Accordingly, this case should not be transferred to the Iowa Court of Appeals.

ARGUMENT

I. IOWA CODE SECTION 814.6A DOES NOT PREVENT FETNER FROM WINNING THIS APPEAL.

This issue was raised a defense as the first argument in the State’s Brief. State’s Brief. State’s Proof Brief, pg. 6. The State claims that because Iowa Code Section 814.6(1)(a)(3) applies to this case and because Fetner has not shown good cause, Fetner has no right to bring this appeal. State’s Proof Brief, pgs. 6 and 7. The State correctly notes that both Judgment and Sentence Orders at issue in this appeal states that “[d]efendant may not

appeal the issue of guilt following a plea of guilty without a showing of good cause”. Judgment and Sentence, Cerro Gordo County Criminal Case Number AGCR028389, pg. 2. Judgment and Sentence, Cerro Gordo County Criminal Case Number AGCR028473, pg. 2.

Pursuant to *State v. Roby*, 897 N.W.2d 127, 137 (Iowa 2017), the standard of review for this issue is “*de novo*” because this is a constitutional issue. This issue implicates Fetner’s rights to due process of law pursuant to the Fifth Amendment to the United States Constitution (as applied to state criminal prosecutions by the Fourteenth Amendment to the United States Constitution) and pursuant to Article I, Section 9 of the Iowa Constitution. This issue implicates Fetner’s rights to equal protection of the law pursuant to the Fourteenth Amendment to the United States Constitution and pursuant to Article I, Section 1 of the Iowa Constitution. As noted on pages 30-37 of the brief filed in *State v. Boldon*, Iowa Supreme Court Case Number 19-1159 by Assistant Appellate Defender Mary Conroy, this case also violates the separation of powers doctrine and thereby implicates the provisions of the Iowa Constitution, Article V, Sections 4 and 6. This issue implicates Fetner’s right to effective assistance of counsel pursuant to the Sixth Amendment to the United States Constitution as made applicable to State

Criminal prosecutions by the Fourteenth Amendment to the United States Constitution and pursuant to Article I, Section 10 of the Iowa Constitution.

The mere statements in the Judgment and Sentence orders issued in the underlying criminal cases at issue in this appeal regarding Iowa Code Section 814.6 are statements by the Court, not by the State. Accordingly, because it would not appear that the State preserved error on this point, the State has waived this issue.

At the conclusion of the guilty plea and sentencing proceedings, the Court stated the following.

This is final judgment and sentence for each of these cases. You do have a right to appeal by filing a written Notice of Appeal with the Clerk of Court within 30 days of today's date. If you fail to timely file that, you'll give up your opportunity to appeal. Appeal bond is set in the amount of \$2,000 for each case. You only worry about that if you wish to appeal.

Guilty Plea and Sentencing Transcript, pg. 12, Lines 24 and 25, pg. 13, Lines 1-6.

The Court then asked the County Attorney directly: “[a]ny other record that we require today, Mr. Dalen?” Guilty Plea and Sentencing Transcript, pg. 13, Lines 7 and 8”.

The County Attorney, Carlyle Dalen, then responded: “[n]o your Honor”. Guilty Plea and Sentencing Transcript, pg. 13, Line 9.

With all due respect to the District Court, the District Court did not qualify her statement to Fetner regarding his right to direct appeal by referring, as she did in the Judgment and Sentence Orders pertaining to the cases at issue in this appeal, how the newly enacted Iowa Code Section 814.6(1)(a)(3) might limit Fetner's right to appeal the judgment and sentence issued in each of the cases at issue in this appeal.

With all due respect to the District Court, by not qualifying these statements by making reference to how Iowa Code Section 814.6(1)(a)(3) might limit Fetner's right to appeal the judgment and sentence orders entered in this case, the District Court *unintentionally* made misleading statements to Fetner on the record regarding his appeal rights. The District Court's inclusion of reference to the possible applicability of Iowa Code Section 814.6(1)(a)(3) to Fetner's situation does not correct the problem that the District Court made inadvertently misleading statements to Fetner regarding this appeal.

Having just made this inadvertently misleading statement regarding Fetner's appeal rights, the District Court then gave the County Attorney the opportunity to make additional record. Guilty Plea and Sentencing Transcript, pg. 13, Lines 7 and 8. If the State were concerned about how Iowa Code Section 814.6(1)(a)(3) might limit Fetner's right to appeal, the

State should have spoken up then when the Court gave the State the opportunity to bring anything else of importance to the Court's attention. This was not the awkward situation where counsel has to basically interrupt the Court to make sure record is made on an important issue. Rather, the District Court gave the State the opportunity to make sure the State made any "record that we require today". Guilty Plea and Sentencing Transcript, pg. 13, Line 7. The Court was obviously concerned that a good record was made for appeal. Had the State mentioned how 814.6(1)(a)(3) might limit Fetner's right to appeal, the State would have preserved error for appellate review, and presumably the Court would have made additional statements on the record to Fetner regarding how 814.6(1)(a)(3) might limit Fetner's right to appeal. Neither happened. Accordingly, the issue of how 814.6(1)(a)(3) might limit Fetner's right to appeal was not preserved for appellate review, and the State cannot suddenly raise this as a defense to this appeal. The State has waived this issue for appellate review.

Fetner will now briefly address two issues: why Iowa Code Section 814.6(1)(a)(3) is unconstitutional and why Fetner can show good cause within the meaning of Iowa Code Section 814.6(1)(a)(3). The undersigned counsel has incorporated large segments of this discussion by quoting from (without the use of quotation marks or by making specific attribution to) a

briefs filed by Attorney Mary Conroy in *State v. Boldon*, Iowa Supreme Court Case Number 19-1159. While the undersigned counsel is hopeful that he will not make any errors in this discussion, the undersigned counsel is a contractor with the State Public Defender, and any errors in this discussion cannot be attributed to the Appellate Defender's Office or to Attorney Conroy.

Separation of Powers

As noted starting on page 30 of the Boldon brief, "The separation-of powers doctrine is violated "if one branch of government purports to use powers that are clearly forbidden, or attempts to use powers granted by the constitution to another branch." *Klouda v. Sixth Judicial District Department of Correctional Services*, 642 N.W.2d 255, 260 (Iowa 2002) (quoting *State v. Phillips*, 610 N.W.2d 840, 842 (Iowa 2002)). This doctrine means that one branch of government may not impair another branch in "the performance of its official duties". *Klouda v. Sixth Judicial District Department of Correctional Services*, 642 N.W.2d 255, 260 (Iowa 2002).

As the Court is well aware, Article V, Section 1 of the Iowa Constitution gives Iowa Courts all judicial power. *Franklin v. Bonner*, 207 N.W. 778, 779 (Iowa 1926). Similarly, Article V, Section 4 of the Iowa Constitution gives the Supreme Court jurisdiction over appeals. The Iowa

Constitution gives subject matter jurisdiction to the Iowa Courts. *In Re Guardianship of Matejski*, 419 N.W.2d 576, 577 (Iowa 1988). Iowa Courts have general jurisdiction over all matters brought before them, and the legislature can only limit the *manner* of the Courts’ exercise of their constitutionally-conferred jurisdiction. The legislature cannot take from the Iowa Courts the jurisdiction the Iowa Constitution explicitly gives the Iowa Courts. *In Re Guardianship of Matejski*, 419 N.W.2d 576, 577 (Iowa 1988) citing to *Laird Brothers v. Dickerson*, 40 Iowa 665, 670 (1875).

Whatever arguments may be made concerning the constitutional right to appeal, as a matter of law this Court stated over a half-century ago that “[o]nce the right to appeal has been granted, however, it must apply equally to all. It may not be extended to some and denied to others.” *In re Chambers*, 152 N.W.2d 818, 820 (Iowa 1967) (citing to *Waldon v. District Court of Lee County*, 130 N.W.2d 728, 731 (Iowa 1964)). Although Iowa Code Section 602.4102 contemplates the Iowa Supreme Court handling criminal appeals, the amendment to Iowa Code Section 814.6 would make challenges to guilty pleas unreviewable on direct appeal except where the defendant pled guilty to a Class A felony or established “good cause” for an appeal, and the amendment to Iowa Code Section 814.7 would make claims of ineffective assistance of counsel unreviewable on direct appeal. Iowa

Code Section 602.4102(2) (2019). Thus, Iowa Code Section 814.6 now takes jurisdiction of some appeals from the Iowa Supreme Court. Therefore, the Legislature, by passing newer form of Iowa Code Section 814.6, has thereby deprived the Iowa Supreme Court of some of its subject matter jurisdiction by depriving the Court of its authority to hear certain types of appeals. The Supreme Court of Iowa has both the jurisdiction and the duty to invalidate state actions that violate the state and federal constitutions. *Varnum v. Brien*, 763 N.W.2d 862, 875-76 (Iowa 2009).

The Legislature's amendments to Iowa Code Section 814.6 violates the separation of powers doctrine mandated by Article V, Section 4 of the Iowa Constitution.

Similarly, the Legislature's amendment to Iowa Code Section 814.7 completely eliminates the possibility of a criminal defendant bringing an ineffective assistance of counsel claim on direct appeal, even if the record is adequate to determine this issue. Criminal defendants obviously have a right to effective assistance of counsel. *State v. Ambrose*, 861 N.W.2d 550, 556 (Iowa 2015), citations omitted. The newly enacted version of Iowa Code Section 814.7 violates the separation of powers principle set forth in Article V. Section 4 of the Iowa Constitution because this statute improperly divests the Iowa Appellate Courts of their ability to decide and remedy claimed

deprivations of constitutional rights and therefore improperly intrudes upon the jurisdiction and authority of the judicial branch. *Planned Parenthood of the Heartland v. Reynolds ex. rel. State*, 915 N.W.2d 206, 212 (Iowa 2018).

Equal Protection

The changes to Iowa Code Sections 814.6 and 814.7 violate Fetner's rights to equal protection of law pursuant to the Fourteenth Amendment to the United States Constitution and pursuant to Article I, Section 1 of the Iowa Constitution because these statutes deprive Fetner of the ability to challenge his convictions on direct appeal based upon the facts that he pled guilty and based upon ineffective assistance of counsel.

Iowa Code Sections 814.6 and 814.7 treat Fetner differently than other criminal defendants. He is within a group of criminal defendants who have been convicted following a guilty plea made in District Court. Within this group, the amendment to Iowa Code Section 814.6 has singled out those wrongly sentenced defendants. Whereas defendants who chose to go to trial can get relief on direct appeal, a defendant who pled guilty cannot get relief on direct appeal unless he or she has established good cause for pursuing an appeal. Within this group, by passing the Senate File 589, which enacted the current versions of Iowa Code Sections 814.6 and 814.7, the Legislature made unconstitutional distinctions between those who pled guilty to a Class

a felony and those who pled guilty to any other classification of crime. The Legislature has unconstitutionally treated Fetner and defendants like him differently based upon his decision to forgo certain constitutional rights and plead guilty, thus violating Fetner's rights to equal protection of law pursuant to the Fourteenth Amendment to the United States Constitution and pursuant to Article I, Section 1 of the Iowa Constitution

Secondly, the amendment to Iowa Code Section 814.7 treats Fetner and similarly situated defendants differently. The current version of Iowa Code Section 814.7 has singled out those defendants who were provided ineffective assistance of counsel for disparate treatment. Whereas a defendant who received effective assistance of counsel can obtain relief on direct appeal, a defendant who did not receive effective assistance of counsel cannot obtain relief *on this basis* on direct appeal but must instead pursue postconviction relief while frequently being required to serve his or her sentence. Although in most cases, it is possible to post an appeal bond and stay a criminal sentence, there is no such option in postconviction relief actions. *State v. Macke*, 933 N.W.2d 226, 233 (Iowa 2019). Accordingly, the Legislature has treated Fetner and similarly situated defendants based upon the exercise of the fundamental right of effective assistance of counsel. The right to assistance of counsel was a right explicitly noted in *Gideon v.*

Wainright, 372 U.S. 335, 344 (1963). The right to assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution as made applicable to state criminal prosecutions by the Fourteenth Amendment to the United States Constitution means the right to effective assistance of counsel, pursuant to *United States v. Cronin*, 466 U.S. 648, 654 (1984) and *Evits v. Lucey*, 469 U.S. 387, 395 (1985).

Furthermore, a criminal defendant has a fundamental right in having his or her case dealt with fairly and justly. *State v. Delano*, 161 N.W.2d 66, 74 (Iowa 1968). By depriving Fetner of his right to direct review of his sentence following a guilty plea and a right to review on a direct appeal a claim of ineffective assistance of counsel, the Legislature has deprived Fetner of fundamental rights. Accordingly, the Court should review the issue of the applicability or lack thereof of Iowa Code Section 814.6 and 814.7 using strict scrutiny analysis pursuant to *Varnum v. Brien*, 763 N.W.2d 862, 875-76 (Iowa 2009).

The legislative purpose of this legislation as to reduce the “waste” of resources caused by allegedly frivolous appeals in the criminal justice system. Senate Video 2019-03-28 at 1:49:10-1:49:20, statements of Senator Dawson, <https://www.legis.iowa.gov/dashboard?>

view=video&chamber=S&clipe=s20190328125735925&dt=2019-03=28&offset=3054&bill=SF%20589&status=i.

To the extent statutory changes prevent appellate courts from ruling upon appeals from guilty pleas and claims of ineffective assistance of counsel for which the record is adequate, the legislation creating the current versions of Iowa Code Sections 814.6 and 814.7 is neither narrowly tailored nor rationally related to its purpose because it means that claims that can be resolved on direct appeal cannot be if this legislation is permitted to stand. In *State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004) the Supreme Court of Iowa noted that basically it was a waste of resources for the Court not to address ineffective assistance of counsel claims on direct appeal if the record was adequate to do so. Appeals of guilty pleas will likely involve the Appellate Courts reviewing the record and the briefs to determine if good cause exists for bringing the appeals. Therefore, the amendments to Iowa Code Section 814.6 and 814.7 subvert and completely undermine the Legislature's purpose in passing this legislation are therefore not narrowly tailored or rationally related to the government's professed purpose. Therefore, Iowa Code Sections 814.6 and 814.7 violate Fetner's right to equal protection of law pursuant to the Fourteenth Amendment to the United

States Constitution and pursuant to Article I, Section 1 of the Iowa Constitution.

Effective Assistance of Counsel

The amendments to Iowa Code Sections 814.6 and 814.7 deprive Fetner of his right to effective assistance of counsel pursuant to the Sixth Amendment to the United States Constitution as made applicable to state criminal prosecutions by the Fourteenth Amendment to the United States Constitution and pursuant to Article I, Section 10 of the Iowa Constitution. The amendment to Iowa Code Section 814.7 purports to prohibit an appellate court from deciding a defendant's underlying claim of ineffective assistance of counsel on direct appeal even where the record is adequate to do so. Where a state provides an appeal as of right but denies a defendant the opportunity to have his/her appeal decided on the merits, the "right" to appeal does not comport with due process. *Evits v. Lucey*, 469 U.S. 387, 395 (1985). Moreover, the changes to Iowa Code Sections 814.6 and 814.7 could essentially eliminate Fetner's ability to bring an ineffective assistance of counsel claim because of the likelihood that such a claim would become moot because Fetner will most likely be out of custody and therefore the claims will be moot by the time of any postconviction relief action hearing that might be had if and when Fetner brings a postconviction relief action,

therefore resulting in Fetner not having any meaningful opportunity to have ineffective assistance of counsel claims addressed. An argument exists that defense counsel was ineffective at sentencing for mentioning Fetner's work at a daycare center, which the District Court basically used against Fetner because of mere speculation that Fetner worked at the daycare center while actually under the influence of marijuana.

Due Process

Since the changes to Iowa Code Sections 814.6 and 814.7 violate Fetner's fundamental right to effective assistance of counsel, these changes also violate Fetner's right to due process of law pursuant to Article I, Section 9 of the Iowa Constitution and pursuant to the Fifth Amendment to the United States Constitution as made applicable to state criminal prosecutions by the Fourteenth Amendment to the United States Constitution.

Good cause

As noted above, with all due respect, the District Court inadvertently mislead Fetner at sentencing regarding his appeal rights by not mentioning how Iowa Code Sections 814.6 and 814.7 might affect those appeal rights. Guilty Plea and Sentencing Transcript, pg. 12, Lines 24 and 25 and pg. 13, Lines 1-6. If the statute does not say how the Courts should manage their docket, the Courts have "an inherent common-law power ... to adopt rules

for the management of cases on their dockets”. *Iowa Civil Liberties Union v. Critelli*, 244 N.W.2d 564, 568-69 (Iowa 1976). Iowa Code Section 814.6(1)(a)(3) does not define what “good cause” means for bringing an appeal where a defendant has pled guilty to an offense that is not a Class A felony nor does the statute say what a criminal defendant in Fetner’s situation must do to bring an appeal in such a situation. Therefore, this Court has the power to find that Fetner has shown good cause for bringing this appeal. As noted above, Fetner has done so. Therefore, he should be able to bring this appeal.

As Assistant Appellate Defender Melinda Nye stated on page 20 of the brief she filed in *State v. Drain*, Iowa Supreme Court case number 18-1292, “[t]he Court will usually interpret statutes in a way that avoids a constitutional problem. Simmons v. State Pub. Def., 791 N.W.2d 69, 74 (Iowa 2010).

Fetner requests that the Court please strike down the amendments to Iowa Code Chapter 814 that became effect on July 1, 2019 as unconstitutional because, as discussed above, these provisions violate Fetner’s constitutional rights to equal protection of law, effective assistance of counsel, and due process of law as well as the separation of powers provisions found in Article V, Section IV of the Iowa Constitution.

However, in the alternative, if the Court wishes to avoid these constitutional questions, Fetner requests this Court please interpret Iowa Code Sections 814.6 in a way that avoids these constitutional problems by finding that Fetner has good cause to bring this appeal, namely the fact that (with all due respect) the District Court inadvertently misled Fetner at sentencing regarding his appeal rights by not mentioning how Iowa Code Sections 814.6 and 814.7 might affect those appeal rights, discussed above. Guilty Plea and Sentencing Transcript, pg. 12, Lines 24 and 25 and pg. 13, Lines 1-6.

II. THE DISTRICT COURT’S CONSIDERATION OF AN IMPERMISSIBLE SENTENCING FACTOR VIOLATED FETNER’S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW (PURSUANT TO THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS MADE APPLICABLE TO STATE CRIMINAL PROSECUTIONS BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND PURSUANT TO ARTICLE I, SECTION 9 OF THE IOWA CONSTITUTION) AND TO EQUAL PROTECTION OF THE LAW (PURSUANT TO THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND PURSUANT TO ARTICLE I, SECTION 1 OF THE IOWA CONSTITUTION).

Pursuant to *State v. Roby*, 897 N.W.2d 127, 137 (Iowa 2017), the standard of review for this issue is “*de novo*” because this is a constitutional issue.

In his proof brief, the undersigned counsel stated that [w]ith all due respect to the District Court, there is nothing in the record to support the allegation that Fetner worked in a daycare center. Even if there were such an allegation in the record that Fetner worked at a daycare center, the District Court's assertion that Fetner did so while under the influence of a controlled substance and that parents would remove their children from any daycare center that employed Fetner if the parents became aware of Fetner's criminal history is purely speculative, with all due respect. Therefore, the allegation that Fetner worked at a daycare center while under the influence of a controlled substance was clearly an impermissible sentencing factor.

The undersigned counsel did not notice the reference in the transcript to Fetner's attorney (hereinafter "Defense Counsel") referencing Fetner working at a daycare center. Guilty Plea and Sentencing Transcript, pg. 9, Lines 1-5. The undersigned counsel searched for "daycare" on the PDF file for the transcript using the search function, but that search did not locate this reference, probably because "day" appears on one line and "care" the next. The undersigned counsel did not deliberately misstate the record in this regard.

There was no sworn testimony of any sort regarding this point, nor is there any evidence that this brief statement by counsel was intended to be a

professional statement. Indeed, presumably, Defense Counsel had no personal knowledge of whether Fetner worked at a daycare center or not. The question is whether this admission is binding or not on Fetner. That question turns on whether the admission was “distinct and formal and made for the express purpose of dispensing with formal proof of a fact at the trial” or presumably other court proceeding. *State v. Howell*, 290 N.W.2d 355, 359 (Iowa 1980).

The State points out that Fetner’s attorney admitted that Fetner used marijuana to treat his anxiety. Guilty Plea and Sentencing Transcript, pg. 8, Lines 19-22. Similarly, based upon *State v. Howell*, 290 N.W.2d 355, 359 (Iowa 1980), the question of whether Fetner’s attorney’s comment that Fetner actually used marijuana was an admission binding on Fetner also turns on whether the admission was “distinct and formal and made for the express purpose of dispensing with formal proof of a fact at the trial”.

Even if the State is right to assume and/or imply that the Defense Counsel’s statements regarding Fetner’s work at a daycare center and marijuana usage were admissions binding on Fetner (although Fetner is not conceding this point), there was no expert testimony that drug use by Fetner resulted in Fetner working at a daycare center while under the influence of marijuana. In *Castro v. State*, 795 N.W.2d 789 795, 796 (Iowa 2011) the

Supreme Court of Iowa said that Castro failed to meet his evidentiary burden sufficient to withstand a motion for a summary dismissal because Castro failed to present expert medical testimony that a medication change rendered his guilty plea involuntary and unintelligent. The Court held Castro needed to present expert witness testimony on this point in order to prevent summary dismissal of his postconviction relief action. *Castro v. State*, 795 N.W.2d 789 795, 796 (Iowa 2011). In this case the State failed to prove with expert medical testimony that Fetner was actually under the influence of marijuana when he was working at a daycare center. Based on *In Castro v. State*, 795 N.W.2d 789 795, 796 (Iowa 2011), the absence of expert testimony on this point reduces the allegation that Fetner worked at a daycare center while under the influence of marijuana to mere speculation.

In *State v. Lovell*, 857 N.W.2d 241 (Iowa 2014), the Court noted that the Court “could not evaluate ... the influence” of the impermissible sentencing factors. Therefore, reversal of the sentence was required, which the Court did. The consideration of the allegation that Fetner worked at a daycare center while under the influence of a controlled substance was an impermissible sentencing factor because it was speculation unsupported by necessary expert testimony, with all due respect to the District Court. The District Court based its decision to a large measure upon this unproven

allegation and speculation. Transcript, pg. 11, Lines 21-25, pg. 12, Line 1. It was one of three factors (the others being Fetner’s criminal history and history of use of illegal drugs) that the District Court made more than cursory reference to as part of the sentencing proceedings. Transcript, pg. 11, Lines 11-25, pg. 12, Line 1.

III. THE DISTRICT COURT’S CONSIDERATION OF AN IRRELEVANT SENTENCING FACTOR VIOLATED FETNER’S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW (PURSUANT TO THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS MADE APPLICABLE TO STATE CRIMINAL PROSECUTIONS BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND PURSUANT TO ARTICLE I, SECTION 9 OF THE IOWA CONSTITUTION) AND TO EQUAL PROTECTION OF THE LAW (PURSUANT TO THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND PURSUANT TO ARTICLE I, SECTION 1 OF THE IOWA CONSTITUTION) .

Pursuant to *State v. Roby*, 897 N.W.2d 127, 137 (Iowa 2017), the standard of review for this issue is “*de novo*” because this is a constitutional issue.

As noted above, since the Court considered speculation that Fetner worked at a daycare center while under the influence of marijuana, the Court thereby improperly considered an irrelevant sentencing factor. If there is inadequate proof of a sentencing consideration, then the sentencing consideration is irrelevant. The State challenges this argument by correctly noting that statute provides for the consideration of employment and

substance abuse history. Similarly, in candor to the Court, in *Leveke v. State*, 770 N.W.2d 852 (Iowa App. 2009) the Court noted the propriety of considering a defendant's employment as part of its sentencing determination. Similarly, in *State v. Dunn*, published in table format at 826 N.W.2d 516 (Iowa App. 2012) the Court noted the propriety of considering a defendant's employment and substance abuse history when sentencing a defendant.

The irrelevant sentencing factor here was not the consideration of Fetner's employment or substance abuse history *as individual factors*. The irrelevant sentencing factor, with all due respect to the District Court, was speculation that Fetner worked at a daycare center while under the influence of marijuana.

CONCLUSION AND PRAYER FOR RELIEF

For the reasons stated above, Fetner's sentences violate Fetner's rights to due process and equal protection of law under both the United States and Iowa Constitutions.

WHEREFORE, Fetner respectfully requests the Court please strike the District Court's sentencing orders and reverse and remand these cases for further proceedings before a different judge.

STATEMENT REGARDING ORAL ARGUMENT

In the event that this case becomes the case which the Supreme Court of Iowa decides the constitutional questions concerning the relatively newly enacted Iowa Code Section 814.6(1)(a)(3), then the undersigned counsel requests oral argument in this case.

However, if the constitutional questions concerning the relatively newly enacted Iowa Code Section 814.6(1)(a)(3) have already been decided by the Supreme Court of Iowa in one of numerous cases already pending before this Court prior to this appeal, then Fetner requests non-oral submission of this matter.

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1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 4,863 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).
2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(3) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using a version of Microsoft Word that was produced on or before 2003 in Times New Roman, 14 point type.

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