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 APPLICATION FOR FURTHER REVIEW

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QUESTION PRESENTED FOR FURTHER REVIEW

1. With all due respect to the District Court, the District Court considered an impermissible and irrelevant 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.

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STATEMENT SUPPORTING FURTHER REVIEW

Appellant William Fetner (hereinafter "Fetner") respectfully requests the Supreme Court of Iowa please grant further review of the Court of Appeals of Iowa opinion dated September 23, 2020 regarding the above-captioned matter. The undersigned counsel will hereinafter refer to the Court of Appeals panel that rendered the September 23, 2020 decision in this case as "the Court of Appeals".

This case meets the criterion for further review set forth by Iowa R. App. P. 6.1103(1)(b)(1). Pursuant to Iowa R. App. P. 6.1103(1)(b)(1), with all due respect to the Court of Appeals, an argument exists that "[t]he court of appeals has entered a decision in conflict with … decision[s] of this court or the court of appeals on an important matter", namely *State v. Howell*, 290 N.W.2d 355, 359 (Iowa 1980) and *State v. Lovell*, 857 N.W.2d 241 (Iowa 2014).

STATEMENT OF THE CASE

Fetner requests that the Supreme Court of Iowa please grant further review of the Court of Appeals of Iowa opinion dated September 23, 2020 regarding the above-captioned matter.

ARGUMENT

I. DID THE COURT OF APPEALS ERR BY REJECTING FETNER'S CLAIM THAT THE DISTRICT COURT'S CONSIDERATION OF AN IMPERMISSIBLE AND IRRELEVANT SENTENCING FACTOR VIOLATED FETNER'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW PURSUANT TO THE UNITED STATES AND IOWA CONSTITUTIONS?

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 its opinion (hereinafter "the Opinion"), the Court of Appeals quoted Fetner's attorney's statements at the Guilty Plea and Sentencing hearing about Fetner's marijuana usage and work at a daycare facility. Guilty Plea and Sentencing Hearing Transcript, pg. 8, Lines 19-25 and pg. 9, Lines 1-5. Court of Appeals Opinion, pgs. 2 and 3.

Even if the State is right to assume and/or imply in its brief 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 its opinion the Court of Appeals stated: "[i]n light of Fetner's acquiescence in his attorney's representations, we conclude the district court did not consider an impermissible or irrelevant factor in incorporating those representations in the statement or reasons for the sentence." Court of Appeals Opinion, pg. 3.

There was *no sworn testimony* of any sort regarding whether Fetner worked at a daycare center while under the influence of marijuana, nor is there any evidence that the brief statement by Fetner's counsel referenced in

the Court of Appeals Opinion 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 Court of Appeals' opinion seems to imply that the brief statement by Fetner's counsel referenced in the Court of Appeals Opinion was an admission by Fetner's attorney that was binding upon Fetner, and thus, could be incorporated as part of the factual basis for the District Court's sentencing decision. September 23, 2020 Opinion, pg. 3, first full paragraph. Whether this admission was binding or not upon Fetner depends upon 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 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.

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.

The Court asked Fetner "[i]s there anything you want me to know?" Guilty Plea and Sentencing Transcript, pg. 10, Lines 9 and 10. Fetner answered "[n]o". Guilty Plea and Sentencing Transcript, pg. 10, Line 11. The Court of Appeals panel deciding this case believed this one-word answer constituted acquiescence. Court of Appeals Opinion, pg. 3. With all due respect to the Court of Appeals panel deciding this case, by making this statement, the District Court was asking Fetner whether he wished to exercise his right of allocution. The District Court was not asking Fetner whether he agreed with the statements which Fetner's attorney had just made. Therefore, with all due respect to the Court of Appeals panel deciding this case, Fetner did not adopt his attorney's statements regarding marijuana usage and working at a daycare center as Fetner's own statements. With all due respect to the Court of Appeals panel deciding this case, there was no

"acquiesence" by Fetner to his attorney's statements regarding marijuana usage and working at a daycare center. *Please see Court of Appeals Opinion, pg. 3, first full paragraph.* Thus, with all due respect to the Court of Appeals panel hearing this case and to the District Court, these statements by Fetner do not make the District Court's consideration of the "impermissible" and "irrelevant" sentencing factor of *speculation* that Fetner worked at a daycare center while under the influence of marijuana legally consistent with Iowa case law dealing with the consideration of improper and irrelevant sentencing factors by the District Court when imposing sentence.

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. In this particular situation, with all due respect to the Court of Appeals panel deciding this case, this case should be reversed and remanded to the District Court for further proceedings because it is impossible to determine how the District Court's decision was affected by the "impermissible" and "irrelevant" sentencing factor of *speculation* that Fetner worked at a daycare center while under the influence of marijuana. With all due respect to the Court of Appeals, the Court of Appeals' decision affirming the judgment and sentence of the District Court at issue in this

appeal is in "conflict with … decision[s] of this court" within the meaning of Iowa R. App. P. 6.1103(1)(b)(1), namely *State v. Howell*, 290 N.W.2d 355, 359 (Iowa 1980) and *State v. Lovell*, 857 N.W.2d 241 (Iowa 2014).

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 that the Iowa Supreme Court, sitting as an entire Court, please grant further review of the Court of Appeals' decision of September 23, 2020 in the above-captioned matter, reverse the Court of Appeals' order of September 23, 2020 in this matter and grant Fetner relief as noted below.

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.

By: /s/_____

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This Application for Further Review complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this Application for Further Review contains 1,675 words, excluding the parts of the Application for Further Review exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This Application for Further Review 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 Application for Further Review 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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Dated: October 11, 2020

CERTIFICATE OF SERVICE

I certify that on or before October 12, 2020, I, the undersigned counsel served a copy of the "Appellant's Application for Further Review" 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 October 12, 2020 I served a copy of the "Appellant's Application for Further Review" upon Appellant William F. Fetner (whose inmate number is 6273440) by mailing a copy of the same by first-class mail, postage prepaid, to Mr. Fetner, using the following address: "Clarinda Correctional Facility, 2000 N. 16th St., Clarinda, IA 51632".

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