ELECTRONICALLY FILED DEC 15, 2020 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,)
)
Plaintiff-Appellee,)
)
v.) S.CT. NO. 20-0464
)
JUSTICE MATHIS,)
)
Defendant-Appellant.)

APPEAL FROM THE IOWA DISTRICT COURT
FOR DECATUR COUNTY
HONORABLE DUSTRIA A. RELPH, JUDGE

APPELLANT'S BRIEF AND ARGUMENT

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FINAL

CERTIFICATE OF SERVICE

On the 15th day of December, 2020, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Justice Mathis, 305 W Monroe, Mount Ayr, IA 50854.

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*/s/ Theresa R. Wilson*_____________

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Was the evidence insufficient as a matter of law to support Mathis' convictions for Sexual Abuse in the Second Degree? The complainants' testimony was not detailed or credible enough to be considered substantial.

Authorities

State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983)

State v. Adney, 639 N.W.2d 246, 250 (Iowa Ct. App. 2001)

State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981)

Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984)

A. The evidence was insufficient to establish Mathis committed the sex acts alleged.

State v. Mitchell, 568 N.W.2d 493, 503 (Iowa 1997)

State ex rel. Mochnick v. Andrioli, 216 Iowa 451, 453,
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B. If the Court deems error was not preserved, Mathis asks the Court to consider his alternative claim of ineffective assistance of counsel.

Strickland v. Washington, 466 U.S. 668, 687 (1984)

State v. Brubaker, 805 N.W.2d 164, 174 (Iowa 2011)

State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004)

C. Senate File 589 and its impact on ineffective assistance of counsel claims.

2019 Iowa Acts ch. 140 § 31

Iowa Const. art. III § 26

State v. Macke, 933 N.W.2d 226, 231 (Iowa 2019)

1. The changes to Iowa Code section 814.7 should be invalidated for improperly restricting the role and jurisdiction of Iowa's appellate courts.

Klouda v. Sixth Judicial Dist. Dept. of Correctional Services, 642 N.W.2d 255, 260 (Iowa 2002)

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Iowa Code § 9559 (1919)

Iowa Code § 13607 (1924)

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Iowa Code § 762.51 (1966)

Iowa Code § 793.1 (1966)

Iowa Code § 793.1 (1973)

Iowa Code § 814.6 (1979)

Iowa Const. Art I § 4

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State v. Abrahamson, 696 N.W.2d 589, 593 (Iowa 2005)

Varnum v. Brien, 763 N.W.2d 862, 875-76 (Iowa 2009)

Iowa Const. Art. XII § 1

U.S. Const. amend. VI

U.S. Const. amend. XIV

Iowa Const. art. I § 10

State v. Ambrose, 861 N.W.2d 550, 556 (Iowa 2015)

2. Senate File 589 violates equal protection.

Waldon v. District Court of Lee County, 130 N.W.2d 728, 731 (Iowa 1964)

U.S. Const. amend. XIV

Iowa Const. art. I § 6

State v. Doe, 927 N.W.2d 656, 662 (Iowa 2019)

Varnum v. Brien, 763 N.W.2d 862, 883 (Iowa 2009)

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Emery v. Fenton, 266 N.W.2d 6, 10 (Iowa 1978)

State v. Macke, 933 N.W.2d 226, 233 (Iowa 2019)

Kimmelman v. Morrison, 477 U.S. 365, 374 (1986)

U.S. v. Cronic, 466 U.S. 648, 654 (1984)

Evitts v. Lucey, 469 U.S. 387, 395 (1985)

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State v. Straw, 709 N.W.2d 128, 138 (Iowa 2006)

State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004)

Wiborg v. United States, 163 U.S. 632, 658 (1896)

3. Senate File 589 denies Mathis due process and the right to effective counsel on appeal.

U.S. Const. amend XIV

Iowa Const. art. I, § 9

Griswold v. Connecticut, 381 U.S. 479, 487 (1965)

State v. Lyle, 854 N.W.2d 378, 387 (Iowa 2014)

McKane v. Durston, 153 U.S. 684, 687–88 (1894)

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Harlon Leigh Dalton, Taking the Right to Appeal (More or Less) Seriously, 95 Yale L.J. 62, 66 (1985)

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Griffin v. Illinois, 351 U.S. 12 (1956)

Suzuki v. Quisenberry, 411 F. Supp. 113, 1133 (D. Haw. 1986)

Gregory M. Dyer, Criminal Defendants' Waiver of the Right to Appeal—An Unacceptable Condition of a Negotiated Sentence or Plea Bargain, 65 Notre Dame L. Rev. 649, 651 (1990)

Rosanna Cavallaro, Better Off Dead: Abatement, Innocence, and the Evolving Right of Appeal, 72 U. Colo. L. Rev. 943, 986 (2002)

Kimmelman v. Morrison, 477 U.S. 365, 374 (1986)

Gideon v. Wainwright, 372 U.S. 335, 344 (1963)

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State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004)

Wiborg v. United States, 163 U.S. 632, 658 (1896)

Douglas v. People of State of Cal., 372 U.S. 353 (1963)

4. Alternatively, if this Court chooses to apply Senate File 589 to Mathis' appeal, the Court should adopt a plain error rule.

Jon M. Woodruff, Note, Plain Error by Another Name: Are Ineffective Assistance of Counsel Claims a Suitable Alternative to Plain Error Review in Iowa?, 102 Iowa L. Rev. 1811, 1815 (May 2017)

Wiborg v. United States, 163 U.S. 632, 658 (1896)

United States v. Atkinson, 297 U.S. 157, 160 (1936)

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Tory A. Weigand, Raise or Lose: Appellate Discretion and Principled Decision-Making, 17 Suffolk J. Trial & App. Advoc. 179, 199-241 (2012)

State v. Rutledge, 600 N.W.2d 324, 325 (Iowa 1999)

State v. McCright, 569 N.W.2d 605, 607 (Iowa 1997)

Rhoades v. State, 848 N.W.2d 22, 33-34 (Iowa 2014)

Iowa Code § 814.20 (2017)

State v. Young, 292 N.W.2d 432, 435 (Iowa 1980)

Strickland v. Washington, 466 U.S. 668, 687 (1984)

State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004)

Iowa Code § 663A.1 (2019)

II. Did the District Court err in denying Mathis' objection to a jury instruction that gave special attention and treatment to the testimony of the complainants?

Authorities

State v. Hanes, 790 N.W.2d 545, 549 (Iowa 2010)

State v. Lorenzo Baltazar, 935 N.W.2d 862, 871 (Iowa 2019)

State v. Kuhse, 937 N.W.2d 622, 629 (Iowa 2020)

State v. Stallings, 541 N.W.2d 855, 857 (Iowa 1995)

State v. Marsh, 392 N.W.2d 132, 133 (Iowa 1986)

State v. Milliken, 204 N.W.2d 594 (Iowa 1973)

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State v. Knox, 536 N.W.2d 735, 742 (Iowa 1995)

State v. Beach, 630 N.W.2d 598, 600 (Iowa 2001)

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Iowa Code § 782.4 (1973)

State v. Barnhardt, No. 17-0496, 2018 WL 2230938 at *4 (Iowa Ct. App. May 16, 2018)

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In re Winship, 397 U.S. 358, 361 (1970)

Moore v. Ponte, 186 F.3d 26, 33 (1st Cir. 1999)

State v. Cox, 781 N.W.2d 757, 764 (Iowa 2010)

State v. Reyes, 744 N.W.2d 95, 101 (Iowa 2008)

State v. Milliken, 204 N.W.2d 594, 596-97 (1973)

https://www.logicallyfallacious.com/logicalfallacies/Proving-Non-Existence

State v. Allen, 293 N.W.2d 16, 20 (Iowa 1980)

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because Mathis challenges the constitutionality of recent amendments to the Iowa Code that purport to limit the appellate courts' jurisdiction over claim of ineffective assistance of counsel. In addition, Mathis asks the Court to address the novel issue of whether a "no corroboration" instruction as to a victim's testimony is improper when a defendant also testifies at trial. Compare with State v. Barnhardt, No. 17-0496, 2018 WL 2230938 at *4 (Iowa Ct. App. May 16, 2018)(defendant did not testify); State v. Altmayer, No. 18-0314, 2019 WL 476488 at *5 (Iowa Ct. App. Feb. 6, 2019)(same). Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(a), (c), (d) (2020).

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by Defendant-Appellant Justice Mathis from his conviction, sentence, and judgment for three counts of Sexual Abuse in the Second

Degree, class B felonies in violation of Iowa Code section 709.3(1)(b) (2013-2017), following a jury trial in Decatur County District Court. The Honorable Dustria A. Relph presided over all relevant proceedings.

Course of Proceedings: On January 5, 2018, the State filed a trial information in Decatur County District Court charging Defendant-Appellant Justice Mathis with four counts of Sexual Abuse in the Second Degree, class B felonies in violation of Iowa Code section 709.3(1)(b) (2013-2017). (Information pp. 8-10)(App. pp. 8-10). Mathis pleaded not guilty and waived his rights to a speedy trial. (Written Arraignment; Waiver of Right to Speedy Trial)(App. pp. 11-13).

Mathis, who was 17 at the time the trial information was filed, moved to transfer jurisdiction to juvenile court but later withdrew his request. (Motion to Transfer Jurisdiction; 4/27/18 PTC Tr. p. 2 L.4-p. 16 L.4)(App. pp. 6-7). On September 19, 2018, Mathis consented to a joint trial with his step-grandfather Mickie Atkins, who was also accused of

sexual abuse by the same complainants. (Consent to Joint Trial; Tr. Day 1 p. 16 L.12-p. 18 L.17)(App. p. 16).

On September 13, 2019, the State filed a motion to amend the trial information to clarify the dates of the alleged incidents. (State's Motion to Amend Trial Information)(App. p. 17). Mathis did not object, and the District Court granted the motion. (9/13/19 PTC Tr. p. 5 L.5-p. 6 L.7; Amended Trial Information)(App. pp. 18-20).

Jury trial commenced September 16, 2019. (Tr. Day 1 Tr. p. 1 L.1-25). The District Court dismissed Count II at the close of the State's case and renumbered the counts accordingly. (Tr. Day 4 p. 52 L.6-p. 55 L.1). The jury found Mathis guilty of the remaining counts as charged. (Tr. Day 5 p. 79 L.22-p. 80 L.7; Verdict Forms)(App. p. 51).

Mathis filed a combined motion for new trial and motion in arrest of judgment on December 6, 2019. (Motion for New Trial)(Conf. App. pp. 4-62). The District Court denied the motions following a hearing on January 22, 2020. (Post-Trial

Motions Tr. p. 1 L.1-25, p. 40 L.22-p. 53 L.6; 2/12/20 Order)(App. pp. 52-53).

The District Court held a sentencing hearing on February 19, 2020. (Sent. Tr. p. 1 L.1-25). The court sentenced Mathis to 25 years in prison on each count, with Count III to run consecutively to the other two counts. (Sent. Tr. p. 154 L.17-p. 155 L.4). The court set no mandatory minimum, suspended the sentence, and placed Mathis on probation for five years. (Sent. Tr. p. 155 L.5-11; Judgment Entry p. 1) (App. p. 54). The court imposed a special sentence of lifetime parole, notified Mathis of his duty to register as a sex offender, and ordered him to successfully complete the sex offender treatment program and have no contact with minors as conditions of his probation. (Sent. Tr. p. 155 L.12-16; Judgment Entry p. 3)(App. p. 56). The court imposed sexual abuse surcharges and a probation supervision fee, but suspended the fines and found Mathis had no reasonable

ability to pay category B restitution. (Sent. Tr. p. 156 L.3-13; Judgment Entry pp. 1-2)(App. pp. 54-55).

Mathis filed a timely notice of appeal on March 16, 2020. (Notice)(App. p. 59).

Facts: Stephanie S. lived in Leon, Iowa with her children B.T., 11, and L.S., 9. (Tr. Day 3 p. 92 L.10-p. 93 L.15). Stephanie had three younger children as well. (Tr. Day 3 p. 104 L.19-24). When Stephanie had to work or needed a break, her mother Brenda Atkins would sometimes watch B.T. and L.S., and the children would also visit their grandmother regularly. (Tr. Day 3 p. 93 L.16-16, p. 95 L.13-p. 96 L.22). Brenda lived with her husband Mickie Atkins and her grandson Defendant-Appellant Justice Mathis. (Tr. Day 3 p. 93 L.18-p. 94 L.7).

On November 17, 2016, Stephanie went to check on L.S. and her younger son at bedtime. (Tr. Day 3 p. 103 L.15-p. 104 L.18-p. 105 L.2). She found the boys naked under the covers with their penises close to each others' mouths. (Tr.

Day 3 p. 104 L.12-15, p. 105 L.15-24). At the time, they were 7 and 5, respectively. (Tr. Day 3 p. 105 L.25-p. 106 L.2).

Stephanie asked the boys what they were doing. (Tr. Day 3 p. 106 L.3-4). The younger boy said he learned it from L.S. and L.S. said he learned it from grandpa Mickie. (Tr. Day 3 p. 106 L.14-p. 107 L.18). When asked what he meant, L.S. said Mickie showed him how to do things and made him do things to his sister B.T. (Tr. Day 3 p. 106 L.25-p. 108 L.1).

Stephanie brought B.T. into the bedroom and asked her if it was true that grandpa made her and L.S. do stuff. (Tr. Day 3 p. 108 L.2-14). Stephanie described B.T. as shaking and turning white. (Tr. Day 3 p. 108 L.2-14). When Stephanie reassured B.T. that she would not get into trouble if something happened, B.T. said it did. (Tr. Day 3 p. 108 L.2-14, p. 116 L.8-19). When Stephanie asked them what grandpa made them do, L.S. said grandpa made them take off their clothes and made him lick B.T.'s boobs and her private.

(Tr. Day 3 p. 108 L.19-p. 109 L.9). Stephanie called the police later that night. (Tr. Day 3 p. 109 L.20-p. 110 L.3).

The next day, L.S. told Stephanie he had something else he needed to tell her. (Tr. Day 3 p. 111 L.1-12). Stephanie gave a formal statement to police later that day. (Tr. Day 3 p. 112 L.18-24).

Both children participated in forensic interviews and physical exams at the STAR Center at Blank Children's Hospital in Des Moines. (Tr. Day 3 p. 113 L.11-p. 114 L.11). The physical exams found nothing abnormal. (Tr. Day 4 p. 14 L.3-15, p. 16 L.22-p. 17 L.7). The forensic interviewer talked about the interview process and misunderstandings regarding child sexual abuse, but did not testify as to the statements provided by B.T. and L.S. (Tr. Day 4 p. 23 L.19-p. 49 L.24). Although their interviews were recorded, the recordings were not admitted into evidence. (Tr. Day 4 p. 25 L.15-23, p. 49 L.14-18).

B.T. testified as to numerous instances of sexual contact with Mickie. (Tr. Day 3 p. 38 L.2-p. 45 L.13, p. 54 L.22-p. 66 L.7). As to Mathis, B.T. testified that one day before she turned 11, she and Mathis were lying in bed when Mathis put his penis into her vagina. (Tr. Day 3 p. 45 L.16-p. 46 L.21). She testified this was the only incident with Mathis, that he did nothing else to her, and that he said nothing to her. (Tr. Day 3 p. 46 L.22-p. 47 L.14).

L.S. testified that Mickie had him and his sister engage in sex acts. (Tr. Day 3 p. 83 L.23-p. 85 L.23). As to Mathis, L.S. testified Mathis made him come up to his bedroom a lot and do to him what Mickie made L.S. do to his sister. (Tr. Day 3 p. 86 L.5-p. 87 L.7). L.S. explained Mathis would make him take off his clothes and then Mathis would put his penis up L.S.'s butt, and that this happened more than once. (Tr. Day 3 p. 87 L.11-p. 88 L.9).

Mathis denied committing the acts alleged. (Tr. Day 4 p. 160 L.17-p. 164 L.8). He testified he preferred not to have the

kids in his room as it was cluttered with various things including glass bottles and fantasy blades that could have injured them. (Tr. Day 4 p. 160 L.1-16). The only times B.T. and L.S. were in or near his room is when his grandmother Brenda had the kids wake him up or on one occasion when they played a video game with Mathis and his friend. (Tr. Day 4 p. 151 L.14-22, 158 L.16-p. 160 L.4).

Brenda testified she was not aware of B.T. or L.S. spending any time in Mathis' bedroom, but was aware that he would get angry if they came to his room. (Tr. Day 4 p. 117 L.2-p. 118 L.11). She testified that, with the exception of times when she was hospitalized, she was almost always at her residence when the children would visit because she was unable to travel on her own. (Tr. Day 4 p. 102 L.1-p. 103 L.3, p. 121 L.23-p. 122 L.11).

ARGUMENT

I. The evidence was insufficient as a matter of law to support Mathis' convictions for Sexual Abuse in the Second Degree. The complainants' testimony was not detailed or credible enough to be considered substantial.

Preservation of Error: Error was preserved by the denial of Mathis' motions for judgment of acquittal. (Tr. Day 4 p. 52 L.7-55 L.10, p. 174 L.17-p. 175 L.9). Mathis specifically argued that the complainants' testimony lacked sufficient detail to be either credible or substantial. (Tr. Day 4 p. 52 L.7-p. 53 L.11, p. 55 L.11-14).

Alternatively, appellate review is not precluded if failure to preserve error results from a denial of effective assistance of counsel. State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983).

Scope of Review: The Court considers the evidence in the light most favorable to the State, and it considers all the evidence presented at trial, not just the evidence which supports the verdict. State v. Adney, 639 N.W.2d 246, 250 (Iowa Ct. App. 2001). The verdict must be supported by substantial evidence, "such evidence as could convince a

rational trier of fact that the defendant is guilty beyond a reasonable doubt." Id. The evidence presented must do more than create speculation, suspicion, or conjecture. State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981).

When a defendant asserts a constitutional violation, review is de novo. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984).

Merits: The evidence was not sufficient to support Mathis' convictions for three counts of Sexual Abuse in the Second Degree. The State failed to establish beyond a reasonable doubt that Mathis committed the sex acts against the complainants. His convictions should be vacated.

A. The evidence was insufficient to establish Mathis committed the sex acts alleged.

As to Count I, the State was required to prove the following:

> 1. On or between October 1, 2015, and November 16, 2017, the Defendant performed a sex act upon B.T.
> 2. The Defendant performed the sex act while B.T. was under the age of 12.

(Inst. 19)(App. p. 39).

The majority of B.T.'s testimony at trial dealt with multiple instances of alleged sexual abuse by her step-grandfather, Mickie Atkins. (Tr. Day 3 p. 38 L.8-p. 45 L.15, p. 47 L.15-p. 49 L.10, p. 54 L.9-p. 68 L.6, p. 70 L.17-p. 73 L.12). Her testimony regarding her alleged sexual interaction with Mathis – in full – was as follows:

> Q. Did anything that you didn't want to happen with anybody else happen in this house?
> A. Yes.
> Q. Okay. And can you tell me what happened with somebody else?
> A. Me and Justice were upstairs laying in his bed and then it started happening.
> Q. Okay. And when you say "it started happening", can you tell me what you mean by that?
> A. I mean sex.
> Q. And so, if you can, tell the jury who -- so you said "sex". Who was having sex?
> A. Justice.
> Q. And when you say the word "sex", what do you mean?
> A. I mean he was putting his parts in my parts.
> Q. Okay. And when you say your "parts", which part of your body are you talking about?
> A. My lower parts.
> Q. Okay. And are -- so I need you to be just a

little bit more specific. Which parts on your lower parts was he putting his parts in?

A. My vagina.

Q. And what part was he putting in your vagina?

A. His penis.

Q. And did you want that to happen?

A. No.

Q. And I think you said earlier that you are 11 now?

A. Yes.

Q. And so did this happen before you turned 11?

A. Yes.

Q. Did -- At this house did Justice ever put his parts anywhere else in your body?

A. No.

Q. Okay. Did what you just described to the jury happen more than one time?

A. No.

Q. Just one time?

A. Yes.

Q. Did Justice ever make you put any of his parts in your body?

A. No.

Q. Did he ever make you use your mouth at any time?

A. No.

Q. Did he ever put his mouth anywhere on you?

A. No.

Q. When these things were happened -- happening, did Justice ever tell you -- or say anything to you?

A. No.

(Tr. Day 3 p. 45 L.16-p. 47 L.14).

As to Count II, the State was required to prove:

> 1. On or between October 1, 2015, and November 16, 2017, the Defendant performed a sex act upon L.S.
> 2. The Defendant performed the sex act while L.S. was under the age of 12.

(Inst. 20)(App. p. 40). Count III required the same proof as Count II, with the exception that the sex act occurred on a different date than the sex act in Count II. (Inst. 21)(App. p. 41).

L.S. testified that Atkins would make him and his sister B.T. take off their clothes and have sex while he watched. (Tr. Day 4 p. 84 L.1-p. 85 L.23). As to Mathis, L.S. testified:

> Q. Okay. So can you tell me, did anything that you didn't want to have happen happen at this house?
> A. Yes.
> Q. Okay. Can you tell me a little bit what happened?
> A. Justice made me come upstairs a lot.
> Q. Okay. And when you say "come upstairs", where did he make you come upstairs to?
> A. To his room.
> Q. Is that where he slept?
> A. Yes.

Q. Was that his bedroom?

A. Yes.

Q. Okay. And when Justice would make you come upstairs, what would happen?

A. He did the same thing that Grandpa made me do to Baileigh.

Q. Okay. And you said he would make you do the same thing that Grandpa made you do; is that correct?

A. Yes.

Q. Did he do those things to you or did you do them to him?

A. He did those things to me.

Q. And so when you say that he made you do the same things that Grandpa made you do, can you tell me what that is?

A. He made me and him have sex.

Q. Okay. And, if you can, how did that happen?

A. He took his clothes off.

Q. Okay. And what happened next?

A. He told me to take my clothes off.

Q. And did you do that?

A. Yes.

Q. And then what happened after that?

A. He stuck his private up me; my butt.

Q. And when you say "his private", what part of his body are you talking about?

A. His -- His penis.

Q. And you said that he would put that in your butt?

A. Yes.

Q. Did that happen on more than one day?

A. Yes.

Q. Do you know how many times that happened?

A. No.

(Tr. Day 3 p. 86 L.16-p. 88 L.9).

Normally, the testimony of a complainant – if believed – would be sufficient to support a conviction. As a general rule, the credibility of witness testimony is left to the jury. State v. Mitchell, 568 N.W.2d 493, 503 (Iowa 1997). The Iowa Supreme Court has recognized an exception to the rule:

> "The rule that it is for the jury to reconcile the conflicting testimony of a witness does not apply where the only evidence in support of a controlling fact is that of a witness who so contradicts himself as to render finding of facts thereon a mere guess. We may concede that, ordinarily, contradictory statements of a witness do not make an issue of fact; and that such situation may deprive the testimony of all probative force."

Id. (quoting State ex rel. Mochnick v. Andrioli, 216 Iowa 451, 453, 249 N.W. 379, 380 (1933). This was the exception applied in State v. Smith, where the Iowa Court of Appeals reversed Smith's sexual abuse convictions because "the only evidence against appellant is the statements and testimony of the three girls [and because

when] read separately or together, the accounts of alleged abuse are inconsistent, self-contradictory, lacking in experiential detail, and, at times, border on the absurd." State v. Smith, 508 N.W.2d 101, 103 (Iowa Ct. App. 1993).

The evidence in this case supports a finding that the testimony of the complainants is not sufficiently detailed to be considered credible or substantial enough to support the convictions.

First and foremost, the complainants' testimony is not corroborated. Both children had physical exams completed by a sexual assault nurse examiner and no physical evidence of a sexual assault was found. (Tr. Day 4 p. 14 L.3-15, p. 16 L.22-p. 17 L.7). While Mathis does not dispute that the lack of physical injury is not necessarily inconsistent with prior sexual abuse, the lack of physical injury is wholly consistent with the absence of sexual abuse.

Second, the testimony of the children did not corroborate each other with respect to Mathis. B.T. testified to one instance of alleged sexual abuse with Mathis in his bedroom. (Tr. Day 3 p. 45 L.16-p. 47 L.14). L.S. would have been in the house as well and never observed any sexual interaction between Mathis and B.T. (Tr. Day 3 p. 83 L.7-11, p. 88 L.12-17). L.S., meanwhile, testified to more than one incident of alleged sexual abuse by Mathis in Mathis' bedroom. (Tr. Day 3 p. 86 L.16-p. 88 L.9). Again, B.T. would have been in the house at the time and did not testify to any observations of inappropriate contact between Mathis and B.T. (Tr. p. 83 L.7-11).

Third, in instances involving Atkins, B.T. and L.S. sometimes contradicted each other. L.S. claimed Atkins made him place his penis inside of B.T.'s vagina. (Tr. Day 3 p. 84 L.21-p. 85 L.23). B.T. testified Atkins made L.S. rub against her, but that he did not penetrate her. (Tr. Day 3 p. 43 L.21-p. 44 L.10). B.T.'s testimony also contradicted itself

at times. At trial, she claimed Atkins called her into the living room where he assaulted her the first time, whereas at deposition she testified he did not call her into the living room, but that she walked into the room and saw him naked and that he did not see her. (Tr. Day 3 p. 39 L.4-11, p. 54 L.22-p. 59 L.22). She also testified at trial that the first incident with Atkins happened at the trailer, whereas in her deposition she testified it happened at the new house. (Tr. Day 3 p. 38 L.8-19, p. 64 L.10-p. 65 L.2). B.T. also acknowledged that her deposition testimony was that Atkins wanted to have sex with her in the bedroom, whereas her trial testimony was that they had sex in the laundry room. (Tr. Day 3 p. 44 L.17-25, p. 65 L.3-p. 66 L.7).

Fourth, to the extent jurors might not expect children of B.T.'s and L.S.'s ages to have knowledge of certain sex acts, this is an unhelpful factor in assessing the credibility of the complaints against Mathis. Both complainants testified they were abused by Atkins. (Tr. Day 3 p. 38 L.2-p. 45 L.13, p. 54

L.22-p. 66 L.7, p. 83 L.23-p. 85 L.23). They would have knowledge of sex acts based upon that prior abuse.

Notably, when the complainants initially disclosed to their mother, both named Atkins – not Mathis – as the perpetrator. (Tr. Day 3 p. 106 L.14-p. 109 L.9). On November 16, 2017, Stephanie S. found her younger son with his mouth close to L.S.'s penis as they were laying in bed. (Tr. Day 3 p. 103 L.15-p. 105 L.24). When she asked what they were doing, L.S. said he learned it from Atkins and that Atkins made him and B.T. do things. (Tr. Day 3 p. 106 L.3-p. 108 L.1). When Stephanie confronted B.T. and told her she would not get in trouble, B.T. confirmed L.S.'s statement. (Tr. Day 3 p. 108 L.2-14, p. 116 L.8-19). Neither complainant mentioned Mathis during this conversation.

Mathis, meanwhile, flatly denied committing the acts alleged. (Tr. Day 4 p. 160 L.17-p. 164 L.8). He testified he preferred not to have the kids in his room as it was cluttered with various things including glass bottles and fantasy blades

that could have injured them. (Tr. Day 4 p. 160 L.1-16). The only times the complainants were in or near his room is when his grandmother Brenda had the kids wake him up or on one occasion when they played a video game with Mathis and his friend. (Tr. Day 4 p. 151 L.14-22, 158 L.16-p. 160 L.4).

Brenda testified she was not aware of B.T. or L.S. spending any time in Mathis' bedroom, but was aware that he would get angry if they came to his room. (Tr. Day 4 p. 117 L.2-p. 118 L.11). She testified that, with the exception of times when she was hospitalized, she was almost always at her residence when the children would visit because she was unable to travel on her own. (Tr. Day 4 p. 102 L.1-p. 103 L.3, p. 121 L.23-p. 122 L.11).

The uncorroborated and conflicting testimony of the complainants in this case was not credible enough to provide sufficient evidence for conviction. Mathis' convictions for Sexual Abuse in the Second Degree should be vacated and his case remanded for dismissal.

B. If the Court deems error was not preserved, Mathis asks the Court to consider his alternative claim of ineffective assistance of counsel.

Should this Court deem that defense counsel did not preserve error for any reason, Mathis alternatively claims trial counsel ineffective. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction under·the Sixth Amendment to the United States Constitution has two components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984).

Defendant has the burden to prove both of these elements by a preponderance of the evidence. Id.

Trial counsel's failure to make specific, meritorious objections to the sufficiency of the evidence is a breach of duty

that results in prejudice to the defendant. State v. Brubaker, 805 N.W.2d 164, 174 (Iowa 2011); State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004).

C. Senate File 589 and its impact on ineffective assistance of counsel claims.

Senate File 589 took effect on July 1, 2019. 2019 Iowa Acts ch. 140 § 31; Iowa Const. art. III § 26. The legislation is relevant to Mathis' alternative claim on appeal because it purports to prohibit Iowa's appellate courts from ruling upon claims of ineffective assistance of counsel:

> 814.7 Ineffective assistance claim on appeal in a criminal case.
>
> ~~1.~~ An ineffective assistance of counsel claim in a criminal case shall be determined by filing an application for postconviction relief pursuant to chapter 822~~, except as otherwise provided in this section~~. The claim need not be raised on direct appeal from the criminal proceedings in order to preserve the claim for postconviction relief purposes*, and the claim shall not be decided on direct appeal from the criminal proceedings*.
> ~~2. A party may, but is not required to, raise an ineffective assistance claim on direct appeal from the criminal proceedings if the party has reasonable grounds to believe that the record is adequate to address the claim on direct appeal.~~

> ~~3. If an ineffective assistance of counsel claim is raised on direct appeal from the criminal proceedings, the court may decide the record is adequate to decide the claim or may choose to preserve the claim for determination under chapter 822.~~

2019 Iowa Acts ch. 140 § 31 (emphasis in original).

The Iowa Supreme Court has held that the new legislation is not retroactive in operation and applies based upon the entry of judgment being appealed from. State v. Macke, 933 N.W.2d 226, 231 (Iowa 2019). Mathis was sentenced and filed his notice of appeal after July 1, 2019. (Judgment Entry; Notice)(App. pp. 54-59). Under Macke, the new legislation is applicable to his appeal.

Nonetheless, Mathis contends the new legislation should not be applied to his case because it improperly invades the jurisdiction and authority of the Court and violates equal protection, due process, and the right to counsel. Mathis asks this Court to strike down the statute on these grounds. In the alternative, he asks this Court to adopt a plain error

rule when the issue involves a challenge to the sufficiency of the evidence.

1. The changes to Iowa Code section 814.7 should be invalidated for improperly restricting the role and jurisdiction of Iowa's appellate courts.

Senate File 589 improperly interferes with the separation of powers, with this Court's jurisdiction, and with the Court's role in addressing constitutional violations.

"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 Dist. Dept. of Correctional Services, 642 N.W.2d 255, 260 (Iowa 2002)(quoting State v. Phillips, 610 N.W.2d 840, 842 (Iowa 2000)). The doctrine means that one branch of government may not impair another branch in "the performance of its constitutional duties." Id.

> The Iowa Constitution, like its federal counterpart, establishes three separate, yet equal, branches of government. Iowa Const. art. III, § 1. Our constitution tasks the legislature with making

> laws, the executive with enforcing the laws, and the judiciary with construing and applying the laws to cases brought before the courts.
>
> Our framers believed "the judiciary is the guardian of the lives and property of every person in the State." 1 The Debates of the Constitutional Convention of the State of Iowa 229 (W. Blair Lord rep., 1857) [hereinafter The Debates], http://www.statelibraryofiowa.org/services/collections/law-library/iaconst. Every citizen of Iowa depends upon the courts "for the maintenance of [her] dearest and most precious rights." Id. The framers believed those who undervalue the role of the judiciary "lose sight of a still greater blessing, when [the legislature] den[ies] to the humblest individual the protection which the judiciary may throw as a shield around [her]." Id.

Planned Parenthood of the Heartland v. Reynolds ex rel. State, 915 N.W.2d 206, 212 (Iowa 2018).

All judicial power in Iowa is vested in the Iowa Supreme Court and its inferior courts. Iowa Const. art. V § 1. "Courts constitute the agency by which judicial authority is made operative. The element of sovereignty known as judicial is vested, under our system of government, in an independent department, and the power of a court and the various subjects over which

each court shall have jurisdiction are prescribed by law."

Franklin v. Bonner, 201 Iowa 516, ___, 207 N.W. 778, 779 (1926).

With respect to the jurisdiction of the courts, the Iowa Constitution provides:

> Sec. 4. Jurisdiction of supreme court. The supreme court shall have appellate jurisdiction only in cases in chancery, and shall constitute a court for the correction of errors at law, under such restrictions as the general assembly may, by law, prescribe; and shall have power to issue all writs and process necessary to secure justice to parties, and shall exercise a supervisory and administrative control over all inferior judicial tribunals throughout the state.

Iowa Const. art. V § 4.

> Sec. 6. Jurisdiction of district court. The district court shall be a court of law and equity, which shall be distinct and separate jurisdictions, and have jurisdiction in civil and criminal matters arising in their respective districts, in such manner as shall be prescribed by law.

Iowa Const. art. V § 6.

It should not go unnoticed that the Iowa Constitution mentions that the Court's jurisdiction can be prescribed by the

legislature. Iowa Const. art. V § 4. But the ability of the legislature to "prescribe" the jurisdiction should not be confused with an ability to remove jurisdiction from the Court. Subject matter jurisdiction is conferred upon Iowa's courts by the Iowa Constitution. Matter of Guardianship of Matejski, 419 N.W.2d 576, 577 (Iowa 1988).

Article V Section 4 of the Iowa Constitution confers on the Iowa Supreme Court jurisdiction over appeals and over correction of lower court errors, and the legislature can impose only reasonable restrictions and procedures which do not alter or destroy this fundamental character and function of the Supreme Court. See Stockwell v. David, 1 Greene 115, 116 (Iowa 1848) ("The [Iowa] constitution has clearly defined the jurisdiction of this court, giving it upon the one side appellate jurisdiction in all cases in chancery, and constituting it, upon the other, a court for the correction of errors at law."); Dunbarton Realty Co. v. Erickson, 120 N.W. 1025, 1027 (Iowa 1909) (equity action; "It is true that our state Constitution

(article 5, § 4) gives to the Supreme Court appellate jurisdiction in equitable cases", but legislature can impose "*reasonable* rules and regulations" concerning how an appeal shall be taken and the time within which the right may be exercised) (emphasis added); Tuttle v. Pockert, 125 N.W. 841, 842 (Iowa 1910) (equity action; legislature can prescribe procedure for appeal, meaning trial de novo, and "The form of procedure is unimportant *if such right be not thereby destroyed.*") (emphasis added); Sherwood v. Sherwood, 44 Iowa, 192, 194, 196 (Iowa 1876) (Legislature may enact "regulation affecting the manner of appeal" including "the proceedings necessary to be taken prior to an appeal"; however, once the legislature statutorily established divorce cases as chancery actions, it could not enact a statute that "deprives parties to [such] chancery actions *the right to trials in this [Supreme] court de novo [i.e., the right of appeal], a right secured by the constitution*"; "since the action of divorce is [statutorily established as] an equitable action, it comes to this

court by appeal proper and is triable here anew, under the Constitution, *regardless of the general provisions of [the statute].*") (emphasis added); Brenton v. Lewiston, 236 N.W. 28, 29–30, modified, 238 N.W. 714 (Iowa 1931) (law action; "The Legislature may impose restrictions as by limiting appeals by the amounts in controversy…, *but it may not, by the enactment of restrictions, so change the character of the court as that it shall be other in reviewing a law action than 'a court for the correction of errors at law.*") (emphasis added).

This understanding is reinforced by the second half of Article V section 4, which currently provides the Iowa Supreme Court "shall have power to issue all writs and process necessary to secure justice to parties, and shall exercise a supervisory and administrative control over all inferior judicial tribunals throughout the state." Iowa Const. art. V § 4. Originally, this provision stated only that the Supreme Court "shall have power to… exercise a supervisory control" over inferior courts. Iowa Const. Art. V § 4 (1857). But a 1962

amendment made explicit that the Supreme Court has not only a power but also a duty to exercise its supervisory and administrative control over inferior courts. Iowa Const. Art. V § 4 (1962) ("shall exercise a supervisory and administrative"). Pursuant to this language, the Supreme Court has both the inherent power *and the constitutionally conferred duty* ("shall") to "exercise a supervisory and administrative control over all inferior judicial tribunals", including the "power to issue all writs and process necessary to secure justice to parties". Iowa Const. art. V, § 4. And -- unlike the language preceding the semicolon -- the powers and duties conferred upon the Supreme Court by this latter language is not qualified by the phrase "under such restrictions as the general assembly may, by law, prescribe." Id.

Consistent with this understanding, it appears that, at the time the Iowa Constitution was adopted, there existed in Iowa a right of review to the Iowa Supreme Court from lower court decisions – either by way of what was termed an 'appeal'

(entailing a trial de novo in the Supreme Court) in chancery cases, or by way of what was termed a 'writ of error' (entailing review only for the correction of legal error) in non-chancery cases including those resulting in criminal conviction. Platt v. Harrison, 6 Iowa 79, 81 (Iowa 1858) (The review available following conviction is "by appeal, or writ of error, and not by habeas corpus." Convicted persons have "a perfect, well defined, and complete remedy, in the regular and usual method of appeal"). This 'writ of error' review employed in Iowa for correction of legal error in the lower court "is of common law origin". Stockwell v. David, 1 Greene 115, 117 (Iowa 1848). And such "'writ of error,' which facilitated the correction of legal error by a higher court, was allowed '*as a matter of right'* under English common law." Cassandra Burke Robertson, The Right to Appeal, 91 N.C. L. Rev. 1219, 1237 (2013) (emphasis added).

Indeed, it appears this right of review existed even during Iowa's time as a territory and that such right was then

effectively incorporated into the Iowa Constitution upon Iowa's ascension to statehood. When Iowa was established as a territory in 1938, the Organic Law of the Territory of Iowa[1] vested the judicial power of the Territory in the supreme court, district courts, probate courts, and justices of the peace. Organic Law of the Territory of Iowa, Sec.9 (1938). That instrument stated "The jurisdiction of the several courts herein provided for, both appellate and original…, shall be as limited by law: *Provided, however,* That [….] the said supreme and district courts, respectively, shall possess a chancery as well as common law jurisdiction. […] And writs of error, bills of exception, and appeals in chancery causes, shall be allowed in all cases, from the final decisions of the said district courts to the supreme court under such regulations as may be prescribed by law; [….]." Organic Law of the Territory of Iowa,

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[1] "This act of [the U.S.] Congress [establishing the Territorial Government of Iowa] constituted the Organic Law, i.e., the Constitution, of the Territory of Iowa." Documentary Material Relating to the History of Iowa, Vol. I, p.102, n.1 (Benjamin F. Shambaugh ed., 1897) (hereinafter "History of Iowa").

§ 9 (1938) (italics in original), *accord* History of Iowa, Vol.1 p.109.

That instrument, in specifically reserving from the power to "limit[] by law" the Supreme Court's jurisdiction and substituting in its stead only the authority to prescribe "regulations" "under" which the right of review from final district court judgments (guaranteed "in all cases") may be exercised – makes clear that only *reasonable* regulations concerning the manner of seeking review (and not extinguishment of the *right* of review from final judgment in all cases) were permissible.

These matters were then effectively incorporated into the Iowa Constitutions of 1844, 1846, and 1857. The 1857 Constitution (in language similar but not identical to the 1944 and 1946 Constitutions), stated as follows:

> The Supreme Court shall have appellate jurisdiction only in cases in chancery, and shall constitute a Court for the correction of errors at law, under such restrictions as the General Assembly may, by law, prescribe; and shall have power to issue all writs and process necessary to secure justice to parties,

> and exercise a supervisory control over all inferior Judicial tribunals throughout the State.

Iowa Const. art. V § 4 (1857). See also Iowa Const. Art. 6, §§ 2-3 (1844) (never ratified); Iowa Const. Art. 6, § 3 (1846).

This language in the Iowa Constitution incorporates certain key guarantees which had also existed under its predecessor: it protects both the chancery and common law jurisdiction of the Supreme Court, provides that the Supreme Court be a court of error correction in non-chancery cases, endows the Supreme Court with supervisory responsibility over lower courts, and provides the Supreme Court the power to issue any "writs" or process to "secure justice to parties" in connection with its supervisory responsibility over lower courts.

In this way, the Iowa Constitution designates the Supreme Court a court of correction (with both the power and duty to correct lower court errors) in non-chancery cases; and the qualifying language "under such restrictions as the General Assembly may, by law, prescribe" authorizes

reasonable legislative regulation of the *manner* of obtaining review of lower court errors but does not allow legislative extinguishment of the right of such review or of the Supreme Court's jurisdiction over such review. See also Root v. Toney, 841 N.W.2d 83, 87 (Iowa 2013), as corrected (Dec. 17, 2013) (discussing "limited role" of the legislature in the appellate process, which includes an ability to "set terms and conditions for appeal", including "the power to prescribe by statute the time allowed to file an appeal and to provide for a one-day extension when the deadline falls on a day our clerk of court is closed in whole or in part") (quotation marks omitted).

Defendant's view is also supported by the Iowa Constitution's conferral upon the Supreme Court of the inherent (and unqualified[2]) power to issue "all writs and process necessary to secure justice to parties". Iowa Const. art. V § 4. Under language in Article I section 21 of the

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[2]. As noted above, this conferral of power is not qualified by the phrase "under such restrictions as the general assembly may, by law, prescribe." Iowa Const. art. V § 4.

Wisconsin Constitution stating "Writs of error shall never be prohibited by law," the Wisconsin Supreme Court has held there exists a state constitutional right of appeal in criminal cases which were reviewable by writ at the time of the adoption of the Wisconsin Constitution in 1848. Scheid v. State, 211 N.W.2d 458, 462 (Wis. 1973) (per curiam), *overruled on other grounds* by State v. Van Duyse, 224 N.W.2d 603 (Wis. 1975); See also Aetna Accident & Liab. Co. v. Lyman, 144 N.W. 278, 279-280 (Wis. 1913) (Such constitutional provision "manifestly was intended to preserve the right to issue the writ as it existed in the territory of Wisconsin when the Constitution was adopted"; and "At the time of the adoption of the Constitution, the judicial method by which the Supreme Court reviewed judgments in actions at law was by writ of error....").

While identical language is not included within the Iowa Constitution, the same effect is given by Article V section 4's conferral on the Iowa Supreme Court of the "power to issue all

writs and process necessary to secure justice to parties", without legislative restriction or prescription. Iowa Const. Art. V § 4 (1857); See also Iowa Const. Art. 6 § 3 (1846) (similar). Our Iowa Supreme Court has recognized that Article V section 4 confers upon it the inherent power, independent of statute, "to issue all the common-law writs, including the writ of prohibition." State ex rel. O'Connor v. Dist. Court In & For Shelby Cty., 260 N.W. 73, 78 (Iowa 1935). See also Id. at 76 (quoting Mr. Justice Deemer's "Iowa Pleading and Practice" at Vol.2, sec.1107: "It is doubtful if the legislature has authority to deprive a court of its right to issue the writs and processes necessary to secure justice or of the exercise of its supervisory control over inferior judicial tribunals. It was held by the Supreme Court of Wisconsin that the legislature had no such power, even over the circuit or district courts. If, then, the legislature cannot, by direct action, deprive the courts of their inherent power to issue common law writs necessary to the exercise of their

jurisdiction, it surely will not be held that legislative inaction amounts to a denial of this power. It must be assumed then, that our courts have the right to issue writs of prohibition.”).

Mathis recognizes the Iowa Supreme Court has recited, in the context of criminal as well as civil cases, that the right of appeal is merely statutory. See e.g., State v. Olsen, 162 N.W. 781, 782 (Iowa 1917); Wissenberg v. Bradley, 229 N.W. 205, 209 (Iowa 1929); In Re Durant Comm. Sch. Dist., 252 Iowa 237, 245, 106 N.W.2d 670, 676 (1960). Mathis urges that – at least in the context of criminal convictions for indictable offenses – what is actually meant by such references is not that the legislature can wholly extinguish the defendant’s ability to obtain review of the conviction as a matter of right, but rather that all litigants must follow the legislature’s reasonable statutorily prescribed requirements (such as time limitations for filing a notice of appeal, proper assembly of the record, etc.) to obtain such review – that is, to invoke the *authority* of the Supreme Court. See e.g., Schrier

v. State, 573 N.W.2d 242, 244–45 (Iowa 1997)(distinguishing between a court's subject matter jurisdiction and authority).

Indeed, it appears that the Iowa Legislature has always (until the 2019 Senate File 589 amendment) afforded to Iowa criminal defendants a non-discretionary right of review for correction of error by the Iowa Supreme Court or Court of Appeals, upon final judgments of conviction for indictable offenses. See e.g., Iowa Code ch. Courts, §§ 76–77, p. 124 (Terr. 1839) (writ of error review as matter of course for criminal defendants); Iowa Code ch. 47, §§ 76–77 (Terr. 1843) (same); §§ 3088, 3090–91 (1851) (same); Iowa Code § 4529 (1873) (criminal decisions of district court reviewable to Supreme Court); Iowa Code § 9559 (1919) (same); Iowa Code §§ 13607, 13994 (1924) (entitlement to supreme court review by appeal, for both indictable and non-indictable offenses); Iowa Code § 762.51, 793.1 (1966) (same); Iowa Code § 793.1 (1973) (right of appeal to supreme court in indictable criminal cases); Iowa Code § 814.6 (1979) (right of appeal from all final

judgments of sentence, but only discretionary review for simple-misdemeanor convictions and ordinance-violations).

Both constitutionally and statutorily, our Supreme Court (and the Court of Appeals) is "a court for the correction of errors at law." Iowa Const. Art I § 4; Iowa Code §§ 602.4102, 602.5103 (2019). By seeking to divest Iowa's appellate courts of their ability to decide ineffective assistance of counsel claims on direct appeal, Senate File 589 improperly intrudes upon the inherent role, jurisdiction, and duty of the Iowa Supreme Court, as well as the inherent right of review for correction of legal errors that is conferred on convicted criminal defendants under the Iowa Constitution.

Furthermore, by removing consideration of constitutional claims of ineffective assistance from the realm of direct appeal, even where the *appellate court's judgment* is that the direct appeal record establishes the violation, Senate File 589 intrudes on Iowa appellate courts' independent role in interpreting the constitution and protecting Iowans'

constitutional rights. See State v. Abrahamson, 696 N.W.2d 589, 593 (Iowa 2005) (judgment exercised "must be that of the court – not the sheriff").

The Iowa Supreme Court has both the jurisdiction and the duty to invalidate state actions that conflict with the state and federal constitutions. See Varnum v. Brien, 763 N.W.2d 862, 875-76 (Iowa 2009)(courts are obliged to protect the supremacy of the constitution); Iowa Const. Art. XII § 1. One of the rights enumerated in both constitutions is the assistance of counsel. U.S. Const. amends. VI, XIV; Iowa Const. art. I § 10. The constitutional right to counsel means the right to effective assistance of counsel. State v. Ambrose, 861 N.W.2d 550, 556 (Iowa 2015).

A statute that seeks to divest Iowa's appellate courts of their ability to decide and remedy claimed deprivations of constitutional rights improperly intrudes upon the jurisdiction and authority of the judicial branch.

> No law that is contrary to the constitution may stand. Iowa Const. art. XII, § 1. "[C]ourts must, under all circumstances, protect the supremacy of the constitution as a means of protecting our republican form of government and our freedoms." Varnum v. Brien, 763 N.W.2d 862, 875 (Iowa 2009). Our framers vested this court with the ultimate authority, and obligation, to ensure no law passed by the legislature impermissibly invades an interest protected by the constitution.

Planned Parenthood of the Heartland v. Reynolds ex rel. State, 915 N.W.2d 206, 212-13 (Iowa 2018). "The obligation to resolve this grievance and interpret the constitution lies with this court." Id.

By removing consideration of ineffective assistance claims – specifically – from the realm direct appeal, the legislature is intruding on Iowa appellate courts' independent role in interpreting the constitution and protecting Iowans' constitutional rights. The legislature has violated the separation of powers and impermissibly interfered with the inherent jurisdiction of the Court. The provision of Senate File 589 that prohibits the Court from ruling upon claims of ineffective assistance of counsel should be invalidated.

2. Senate File 589 violates equal protection.

Mathis contends Senate File 589 denies him equal protection under the law because it deprives him of his ability to challenge the sufficiency of the evidence on direct appeal based upon the fact his attorney failed to provide effective assistance of counsel.

"Once the right to appeal has been granted…, it must apply equally to all. It may not be extended to some and denied to others." Waldon v. District Court of Lee County, 130 N.W.2d 728, 731 (Iowa 1964). The amendment to section 814.7 violates equal protection by treating persons who are similarly situated with respect to the purposes of the law differently. U.S. Const. amend. XIV; Iowa Const. art. I § 6; State v. Doe, 927 N.W.2d 656, 662 (Iowa 2019); Varnum v. Brien, 763 N.W.2d 862, 883 (Iowa 2009).

Both the federal and state constitutions provide for equal protection of citizens under the law. U.S. Const. amend. XIV; Iowa Const. art. I § 6. "Like the Federal Equal Protection

Clause found in the Fourteenth Amendment to the United States Constitution, Iowa's constitutional promise of equal protection is essentially a direction that all persons similarly situated should be treated alike." Varnum v. Brien, 763 N.W.2d 862, 878 (Iowa 2009)(internal quotation marks omitted). Accord State v. Doe, 927 N.W.2d 656, 611 (Iowa 2019).

There are three classes of review for an equal protection claim based upon the underlying classification or right involved. Classifications based on race, alienage, or national origin and classifications impacting fundamental rights are evaluated according to strict scrutiny. Varnum v. Brien, 763 N.W.2d at 879. Such classifications are "presumptively invalid and must be narrowly tailored to serve a compelling governmental interest." Id. Intermediate or heightened scrutiny is applied to "quasi-suspect groups. Id. To survive intermediate scrutiny, the law must not only further an important governmental interest and be substantially related

to that interest, but the justification for the classification must be genuine and must not depend on broad generalizations. Id. All other classifications are evaluated using rational basis review, in which a complainant has the "heavy burden of showing the statute is unconstitutional and must negate every reasonable basis upon which a classification may be sustained." Id. See City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439-41 (1985)(discussing different levels of scrutiny under federal equal protection analysis).

The first step in analyzing an equal protection claim is to determine if the legislation is treating similarly situated persons differently. State v. Doe, 927 N.W.2d 656, 611 (Iowa 2019). "[T]o truly ensure equality before the law, the equal protection guarantee requires that laws treat all those who are similarly situated with respect to the purposes of the law alike." Varnum v. Brien, 763 N.W.2d at 883.

Mathis asserts there is a group of criminal defendants who have been convicted based upon insufficient evidence as

shown by the record made in the district court. Within this group, Senate File 589 has singled out those wrongly-convicted defendants who were provided ineffective assistance of counsel for disparate treatment. Whereas a properly represented defendant can obtain relief from his criminal conviction on direct appeal, an improperly represented defendant may not get relief on direct appeal and must instead pursue postconviction relief while, in many cases, being required to serve his sentence.[3] The legislature has treated Mathis and defendants like him differently based upon his assertion of a violation of the constitutional right to effective assistance of counsel.

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3. Although there is an option to post an appeal bond and stay a criminal sentence in most cases, there is no such option for bond in postconviction. See Iowa R. App. P. 6.601 (2019)(supersedeas bond on appeal); Emery v. Fenton, 266 N.W.2d 6, 10 (Iowa 1978)(postconviction applicants are not bailable). The Iowa Supreme Court has acknowledged the significant disadvantages to criminal defendants who must proceed directly to postconviction proceedings in lieu of direct appeal. State v. Macke, 933 N.W.2d 226, 233 (Iowa 2019).

Mathis further contends that his claim of disparate treatment involves the deprivation of a fundamental right. The right to counsel is a fundamental right. Kimmelman v. Morrison, 477 U.S. 365, 374 (1986). The right to counsel "assures the fairness, and thus the legitimacy, of our adversary process." Id. Because the right to counsel is vital to the accused, courts have long recognized that the right to counsel means the right to effective counsel. U.S. v. Cronic, 466 U.S. 648, 654 (1984); Evitts v. Lucey, 469 U.S. 387, 395, (1985).

Accordingly, by depriving Mathis of his right to direct review of his claim of ineffective assistance of counsel, Senate File 589 deprives him of a fundamental right. Strict scrutiny should apply to his claim on appeal. Varnum v. Brien, 763 N.W.2d 862, 879 (Iowa 2009); See City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 440 (1985)(discussing different levels of scrutiny under federal equal protection analysis).

Regardless of whether this Court considers Mathis' claim under strict scrutiny or rational scrutiny, however, Senate File 589 cannot stand. Video from the legislature's discussions regarding the bill indicates it was designed to reduce "waste" caused by "frivolous appeals" in the criminal justice system. Senate Video 2019-03-28 at 1:49:10-1:49:20[4], statements of Senator Dawson, available at https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20190328125735925&dt=2019-03-28&offset=3054&bill=SF%20589&status=i.

To the extent Senate File 589 prevents appellate courts from ruling upon claims of ineffective assistance of counsel for defendants claiming a conviction was obtained upon insufficient evidence, the bill is neither narrowly tailored nor rationally related to its legislative purpose. Mathis recognizes that many claims of ineffective assistance of counsel can require development of additional record in a postconviction

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4. Times listed on video links are approximate.

proceeding. State v. Straw, 709 N.W.2d 128, 138 (Iowa 2006). A claim of ineffective assistance of counsel for failure to properly move for a judgment of acquittal is not one of them. See, e.g., State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004); Wiborg v. United States, 163 U.S. 632, 658 (1896). Such claims can be decided on direct appeal because they require no additional record. State v. Truesdell, 679 N.W.2d at 616. "Preserving ineffective assistance of counsel claims that can be resolved on direct appeal wastes time and resources." Id. Senate File 589 is not only not narrowly tailored or rationally related to the government's professed purpose, but directly contravenes it.

Senate File 589 denies Mathis equal protection under the law and should not be applied to his appeal.

3. Senate File 589 denies Mathis due process and the right to effective counsel on appeal.

Both the Iowa Constitution and the United States Constitution ensure criminal defendants are accorded due process of law. U.S. Const. amend XIV; Iowa Const. art. I, §

9. Due process protects those liberties that are "'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Griswold v. Connecticut, 381 U.S. 479, 487 (1965)(citation omitted). However, under the Iowa Constitution, "we do not rely on a national consensus" regarding fundamental rights. State v. Lyle, 854 N.W.2d 378, 387 (Iowa 2014).

As discussed in Issue I(C)(1) above, the right of review to the Iowa Supreme Court for correction of legal errors is so deeply rooted in the traditions and history of Iowa as to be ranked as fundamental for purposes of Due Process under the Iowa Constitution.

Admittedly, the United States Supreme Court has stated appellate review is not a necessary element of federal due process. McKane v. Durston, 153 U.S. 684, 687–88 (1894). However, these conclusions are subject to much criticism. See e.g., Cassandra Burke Robinson, The Right to Appeal, 91 N.C. L. Rev. 1219, 1221 (2013); Marc M. Arkin, Rethinking the

Constitutional Right to an Appeal, 39 UCLA L. Rev. 503 (1992); Alex S. Ellerson, The Right of Appeal and Appellate Procedural Reform, 91 Columbia L. Rev. 373, 376 (1991).

Notably, after McKane, the U.S. Supreme Court has suggested there may be a right of appeal under the due process clause: "As to the due process clause of the Fourteenth Amendment, it is sufficient to say that, as frequently determined by this court, the right of appeal is not essential to due process, *provided that due process has already been accorded in the tribunal of first instance.*" State v. Ohio ex. rel. Bryant v. Akron Metropolitan Park Dist., 281 U.S. 74, 80 (1930) (emphasis added). "Because it is impossible to be sure that due process was accorded at the trial level without actually reviewing the trial proceedings, an appeal is essential to ensure that due process is accorded to each criminal defendant." Ellerson, The Right to Appeal, at 378. Indeed, approximately 90 years after McKane, in 1983, Justice Brennan believed if the court were squarely faced with

the issue it would hold that federal due process requires a right to appeal a criminal conviction:

> [T]he reversal rate of criminal convictions on mandatory appeals in the state courts, while not overwhelming, is certainly high enough to suggest that depriving defendants of their right to appeal would expose them to an unacceptable risk of erroneous conviction. Of course, a case presenting this question is unlikely to arise, for the very reason that a right of appeal is now universal for all significant criminal convictions.

Jones v. Barnes, 463 U.S. 745, 756 n. 1 (1983) (Brennan, J., dissenting).

Appellate review has become "a fundamental element of procedural fairness as generally understood in this country.'" Harlon Leigh Dalton, Taking the Right to Appeal (More or Less) Seriously, 95 Yale L.J. 62, 66 (1985)(quoting ABA Comm. On Standards of Judicial Administration: Standards Relating to Appellate Courts § 3.10, at 12 (1977)). See also Griffin, 351 U.S. at 18; Suzuki v. Quisenberry, 411 F. Supp. 113, 1133 (D. Haw. 1986). Criminal defendants in the federal system and almost all states have a right to directly appeal their convictions and sentences. See Gregory M. Dyer, Criminal

Defendants' Waiver of the Right to Appeal—An Unacceptable Condition of a Negotiated Sentence or Plea Bargain, 65 Notre Dame L. Rev. 649, 651 (1990); Rosanna Cavallaro, Better Off Dead: Abatement, Innocence, and the Evolving Right of Appeal, 72 U. Colo. L. Rev. 943, 986 (2002). The right of appeal and what it ensures - fairness and a just criminal conviction and sentence – reflect fundamental values in American and Iowa society and the criminal justice system. This Court should recognize a constitutional right of direct appeal under federal and state due process protections.

Furthermore, the right to counsel is a fundamental right. Kimmelman v. Morrison, 477 U.S. 365, 374 (1986)(citing Gideon v. Wainwright, 372 U.S. 335, 344 (1963)). It is so fundamental to due process that it has been made obligatory on the states. Evitts v. Lucey, 469 U.S. 387, 394 (1985). The right to counsel means the right to effective counsel. U.S. v. Cronic, 466 U.S. 648, 654 (1984). This guarantee extends

to the first appeal as of right. Evitts v. Lucey, 469 U.S. at 396.

"A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Id. An appellate attorney need not submit every argument urged by an appellant, but "the attorney must be available to assist in preparing and submitting a brief to the appellate court … and must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim." Id. at 394.

Mathis contends Senate File 589 violates his right to counsel on appeal and, therefore his right to due process, by interfering with appellate counsel's ability to effectively represent him. Senate File 589 purports to prohibit an appellate court from deciding his claim of ineffective assistance of counsel on direct appeal even though the underlying claim of insufficient evidence is one of the rare

ineffective assistance claims that could be decided on direct appeal. State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004); Wiborg v. United States, 163 U.S. 632, 658 (1896). Where a state provides an appeal as of right but refuses to allow a defendant a fair opportunity to obtain an adjudication on the merits of his appeal, the "right" to appeal does not comport with due process. Evitts v. Lucey, 469 U.S. at 405 (citing Douglas v. People of State of Cal., 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956)).

> A system of appeal as of right is established precisely to assure that only those who are validly convicted have their freedom drastically curtailed. A State may not extinguish this right because another right of the appellant-the right to effective assistance of counsel-has been violated.

Id. at 399-400.

Senate File 589 denies Mathis due process and should not be applied to his appeal.

4. Alternatively, if this Court chooses to apply Senate File 589 to Mathis' appeal, the Court should adopt a plain error rule.

Should this Court determine that the legislature can properly prevent Iowa's appellate courts from ruling on claims of ineffective assistance of counsel on direct appeal from a criminal conviction, Mathis asks this Court to adopt plain error review.

Plain error review has been recognized by federal courts since 1896. Jon M. Woodruff, Note, Plain Error by Another Name: Are Ineffective Assistance of Counsel Claims a Suitable Alternative to Plain Error Review in Iowa?, 102 Iowa L. Rev. 1811, 1815 (May 2017). In Wiborg v. United States, the United States Supreme Court was confronted with a claim of insufficient evidence that had not been raised in the trial court. Wiborg v. United States, 163 U.S. 632, 658 (1896). The Court ruled on the merits of the claim and articulated the foundation for the plain error rule, holding "although this question was not properly raised, yet if a plain error was

committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it." Id. The Court would later hold:

> In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.

United States v. Atkinson, 297 U.S. 157, 160 (1936).

The federal plain error rule has been codified in the Federal Rules of Criminal Procedure. Fed. R. Crim. P. 52 (2019). Although the language of the rule does not describe what a "plain error" is or what "substantial rights" are, the advisory committee note says it is a codification of existing law, citing Wiborg. Fed. R. Crim. P. 52 (2019)(note to subdivision (b)).

The United States Supreme Court created a three-part standard for plain error in United States v. Olano. United States v. Olano, 507 U.S. 725, 732-34 (1993). First, there

must be an error, such as a deviation from a legal rule, which has not been affirmatively waived. Id. at 732-33. Second, the error must be plain, meaning clear or obvious. Id. at 734. Third, the error must affect substantial rights, meaning the defendant has the burden of proving the error was prejudicial in that it affected the outcome of the district court proceedings. Id. Other federal and state courts have adopted their own interpretations of the plain error rule. See generally Tory A. Weigand, Raise or Lose: Appellate Discretion and Principled Decision-Making, 17 Suffolk J. Trial & App. Advoc. 179, 199-241 (2012).

The Iowa Supreme Court has repeatedly declined to recognize plain error review. State v. Rutledge, 600 N.W.2d 324, 325 (Iowa 1999); State v. McCright, 569 N.W.2d 605, 607 (Iowa 1997). The Court has justified requiring error preservation in the trial court as follows:

> On closer reflection we think simple justice demands rigid adherence to the rule. The rule does not proceed, as cynics would have it, from some vague fear of blindsiding a trial judge, but rather

> from the very real fear of blindsiding the trial process. Long experience has taught us that the bulk of mistakes made at trial can and will be corrected whenever the trial court is alerted to them. The public should not be required to fund a system that would allow trial counsel to, as lawyers often phrase it, "bet on the outcome."

State v. Rutledge, 600 N.W.2d at 326.

At the same time, Justice Mansfield has recognized that Iowa's appellate courts have generally substituted ineffective assistance analysis for plain error:

> Although we have not said so as a court, I think the reality is that our court has an expansive view of ineffective assistance of counsel. See State v. Clay, 824 N.W.2d 488, 504 (Iowa 2012) (Mansfield, J., concurring specially). In some respects, we are using ineffective assistance as a substitute for a plain error rule, which we do not have in Iowa. See State v. Rutledge, 600 N.W.2d 324, 325 (Iowa 1999) ("We do not subscribe to the plain error rule in Iowa, have been persistent and resolute in rejecting it, and are not at all inclined to yield on the point."). One of those areas is guilty pleas, where we vacate a plea whenever the record does not contain a factual basis for each element of the crime, seemingly without regard to counsel's actual competence. See State v. Gines, 844 N.W.2d 437, 441 (Iowa 2014). In Gines, we said:
>
>> Where a factual basis for a charge does not exist, and trial counsel allows the defendant to

> plead guilty anyway, counsel has failed to perform an essential duty. Prejudice is inherent in such a case. The only inquiry is whether the record shows a factual basis for the guilty plea.
>
> Id. (citation omitted) (internal quotation marks omitted).
>
> Thus, even as we use the terminology "ineffective assistance" as a tool to review criminal convictions, I think it is especially important that we not appear to be criticizing counsel when we are talking about a legal construct of this court. See Clay, 824 N.W.2d at 504 (Mansfield, J., concurring specially) (objecting to any general suggestion that a criminal defense attorney who commits ineffective assistance by our standards has also committed an ethical violation). I join the majority opinion in this case, but I do so without finding fault in the performance of Rhoades's defense counsel.

Rhoades v. State, 848 N.W.2d 22, 33-34 (Iowa 2014) (Mansfield, J., concurring specially).

There is a basis for plain error review in Iowa law. Iowa Code section 814.20 gives the appellate courts broad authority to affirm, modify, or reverse a judgment, order a new trial, or reduce a defendant's punishment. Iowa Code § 814.20 (2017). It was this provision the Iowa Supreme Court relied

upon when it corrected an illegal sentence without the benefit of a motion to do so in the district court. See State v. Young, 292 N.W.2d 432, 435 (Iowa 1980).

> If a sentence is illegal for example, a court mistakenly imposes a ten-year term when the statute authorizes a five-year maximum the practice in this state has been for the district court to correct the illegality when it comes to that court's attention, or for this court to do so or to direct the district court to do so when it comes to this court's attention. Thus rule 23(5)(a) really adds nothing new; it reflects what Iowa courts have been doing. [...] Nothing in rule 23(5)(a) expressly requires a motion thereunder prior to appeal, section 814.20 of the Code authorizes us to dispose of an appeal by affirmation, reversal, "or modification" of the judgment, and we prefer to remain with the prior practice. We thus reject the State's contention that rule 23(5)(a) must be initially applied.

Id.

As a practical matter, there is fairly little difference in the analysis for plain error versus an ineffective assistance of counsel claim. For plain error, the defendant must establish an obvious error occurred in the district court proceedings. United States v. Olano, 507 U.S. 725, 732-34 (1993). For ineffective assistance, the defendant must establish that

counsel breached an essential duty. Strickland v. Washington, 466 U.S. 668, 687 (1984). Counsel must essentially commit error so serious it cannot be said he or she was functioning "as the 'counsel' guaranteed … by the Sixth Amendment." Id. For plain error, the defendant must establish that his substantial rights were violated, meaning that the error impacted the outcome of the proceedings. United States v. Olano, 507 U.S. at 733-34. For ineffective assistance, the defendant must establish that but for the error the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. at 694. The two concepts are different in name only, at least for violations of established law.

In this particular case, there is no basis for differentiating between plain error and ineffective assistance of counsel. Mathis claims that his attorney failed to properly challenge the sufficiency of the evidence to support his convictions. It is the sort of claim that, if established, would

warrant a reversal for ineffective assistance. State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004). It is the same challenge raised in Wiborg, in which the United States Supreme Court first articulated the plain error rule. Wiborg v. United States, 163 U.S. 632, 658 (1896).

The appellate courts are fully capable of ruling upon a sufficiency argument directly. It is simply a question of whether the record already established in the district court supports the legal elements of the offense of conviction. State v. Truesdell, 679 N.W.2d at 616. It is an answer that the appellate courts can provide to defendants without spending needless expense and resources litigating the issue in a separate postconviction proceeding. An early ruling on appeal may also save the citizens of Iowa from the expense incurred by incarcerating a defendant during the pendency of any postconviction proceeding, only to later discover the defendant was wrongfully convicted. See Iowa Code § 663A.1 (2019) (wrongful imprisonment).

Accordingly, if this Court is now prohibited from ruling upon claims of ineffective assistance of counsel, Mathis respectfully asks this Court to adopt a plain error rule to address those claims where error was plain and affected the substantial rights of the defendant.

D. Remedy

Mathis' convictions, sentence and judgment for Sexual Abuse in the Second Degree should be vacated and his case remanded to the District Court for dismissal.

II. THE DISTRICT COURT ERRED IN DENYING MATHIS' OBJECTION TO A JURY INSTRUCTION THAT GAVE SPECIAL ATTENTION AND TREATMENT TO THE TESTIMONY OF THE COMPLAINANTS.

Preservation of Error: Error was preserved by the District Court's denial of Mathis' objection to the challenged instruction. (Tr. Day 5 p. 6 L.18-p. 15 L.11).

Scope of Review: Challenges to jury instructions are reviewed for correction of errors at law. State v. Hanes, 790 N.W.2d 545, 549 (Iowa 2010). "Our review is to determine whether the challenged instruction accurately states the law

and is supported by substantial evidence." Id. Error in an instruction does not require reversal unless it was prejudicial to the complaining party. Id. Preserved errors in jury instructions are presumed prejudicial unless the record affirmatively establishes a lack of prejudice. State v. Lorenzo Baltazar, 935 N.W.2d 862, 871 (Iowa 2019); State v. Kuhse, 937 N.W.2d 622, 629 (Iowa 2020).

Merits: After the close of evidence, the District Court made a record on the instructions to be given to the jury. Mathis objected to Instruction 24, which "indicates that there is no requirement that the testimony of an alleged victim of sexual offenses be corroborated. And it goes on to say the alleged victim's testimony alone, if believed beyond a reasonable doubt, is sufficient to sustain a verdict of guilty." (Tr. Day 5 p. 6 L.18 – p. 7 L.1).

While Mathis acknowledged that the lack of any requirement to corroborate the testimony of an alleged sexual abuse victim was a correct statement of the law, he pointed

out that the Iowa Code also prohibited instructing jurors to use a different standard for evaluating victim testimony. (Tr. Day 5 p. 7 L.2-16, p. 9 L.12-20). Jurors were already going to be given a standard instruction on how to evaluate the credibility of witnesses, whereas the proposed instruction was not standard. (Tr. Day 5 p. 7 L.17-p. 8 L.4, p. 9 L.4-7, 21-25).

Mathis explained the instruction was based on a perception that jurors may be biased to disbelieve alleged sexual assault victims – especially child victims. (Tr. Day 5 p. 8 L.5-15). Given the State's discussion of various myths relating to child sexual abuse in the course of voir dire, however, there was no evidence jurors held any bias against the complainants and, in fact, understood corroboration of their testimony was not required. (Tr. Day 5 p. 8 L.16-p. 9 L.3).

Mathis concluded:

> By specifically highlighting the testimony of the children, the court is treating their testimony with

> greater deference than that of the testimony of any other witness, Your Honor. Including my client, Justice Mathis, who, according to the evidence presented, is a special -- basically a special needs individual. He has -- He took special education. We're not asking for a -- for his testimony to be treated any differently than anyone else's, Your Honor, and we believe that by including that particular sentence that the instruction implies, doesn't state but it implies that a lesser standard should apply to the children's testimony. Which is, in fact, strictly contrary to Iowa Code 709.6.

(Tr. Day 5 p. 10 L.1-13).

The State responded that similar instructions had been upheld in two unpublished Court of Appeals cases. (Tr. Day 5 p. 11 L.14-p. 12 L.12). The State noted the instruction was a correct statement of the law, and argued that "if the jury were to find that their testimony was credible beyond a reasonable doubt that that alone is sufficient to sustain a guilty verdict in this matter." (Tr. Day 5 p. 12 L.7-19).

Mathis responded that the rulings in the unpublished decisions cited by the State had yet to be adopted by the Iowa Supreme Court. (Tr. Day 5 p. 12 L.20-p. 13 L.2). Mathis also argued that such a substantive change in the jury

instructions should come from Iowa's Jury Instructions Committee. (Tr. Day 5 p. 13 L.3-21).

The District Court determined the instruction accurately stated the applicable law and was appropriate because defense counsel mentioned in opening statements that there would be no evidence corroborating the complainant's testimony. (Tr. Day 5 p. 14 L.3-17). The court agreed, however, to shorten the instruction to simply state the law and not to "give any undue prominence to any -- any particular testimony." (Tr. Day 5 p. 14 L.18-p. 15 L.11).

As a result, the jury was instructed "There is no requirement that the testimony of an alleged victim of sexual offenses be corroborated." (Inst. 24)(App. p. 44).

Mathis contends Instruction 24 – while a correct statement of law – nonetheless implied a different standard for the complainants' testimony as compared to other witnesses, including Mathis himself. By telling the jury that the complainants' testimony, specifically, did not require

corroboration, the implication was that the testimony of other witnesses somehow did. Particularly where no other evidence corroborated either the complainants' allegations against Mathis or his denials, the instruction was prejudicial. The District Court erred in giving the instruction and Mathis should receive a new trial.

A trial court has a duty to instruct the jury on the applicable law. State v. Stallings, 541 N.W.2d 855, 857 (Iowa 1995). In addition:

> [An instruction] is not intended to marshal the evidence or give undue prominence to certain evidence involved in the case. State v. Milliken, 204 N.W.2d 594, 596 (Iowa 1973). Trial court ordinarily should not draw attention to specific evidence when instructing the jury. "A trial court must walk a middle course and avoid arguing the case for either side in the instructions." State v. Fagan, 190 N.W.2d 800, 802 (Iowa 1971).

State v. Marsh, 392 N.W.2d 132, 133 (Iowa 1986).

Instructions should not "lead a jury to dissociate the evidence thus emphasized from all other evidence they are duty bound to consider. The proper practice is to give a general

instruction, ... applicable to all witnesses alike." State v. Milliken, 204 N.W.2d 594 (Iowa 1973).

"When a single jury instruction is challenged, it will not be judged in isolation but rather in context with other instructions relating to the criminal charge." State v. Stallings, 541 N.W.2d 855, 857 (Iowa 1995).

Mathis begins by recognizing that the instruction is, in fact, a correct statement of law. The Iowa Rules of Criminal Procedure state that no corroboration is required to support the testimony of a victim. See Iowa R. Crim. P. 2.21(3) (2020). See also State v. Knox, 536 N.W.2d 735, 742 (Iowa 1995)("The law has abandoned any notion that a rape victim's accusation must be corroborated.").

At the same time, an instruction telling jurors no corroboration is required for the testimony of the victim – without a similar advisory as to the testimony of all other witnesses – singles out the complainants' testimony for special consideration. If the court instructs the jury that

corroboration is specifically not required for the complainants, the jury could reasonably infer that it is required for all other witnesses. The concept that "the express mention of one thing implies the exclusion of other things not specifically mentioned" is nothing new – it is regularly used in statutory interpretation. See, e.g., State v. Beach, 630 N.W.2d 598, 600 (Iowa 2001).

This is troublesome in light of Instruction 13, which informed jurors that one of the factors they could consider in deciding which testimony to believe was whether the testimony "is reasonable and consistent with other evidence you believe." (Inst. 13)(App. p. 33). A reasonable juror could read the instruction as saying corroboration is a factor in the credibility analysis. Corroboration is obviously a factor for jurors to use, but jurors could interpret Instructions 13 and 24 together and believe that the lack of corroboration was more problematic for other witness' testimony than it was for the testimony of the complainants.

The Iowa Code recognizes that instructions should not treat victims differently than other witnesses:

> No instruction shall be given in a trial for sexual abuse cautioning the jury to use a different standard relating to a victim's testimony than that of any other witness to that offense or any other offense.

Iowa Code § 709.6 (2019). While this statute is consistent with a change in prior law that required corroboration of complainant's testimony in cases of sexual abuse, see Iowa Code § 782.4 (1973), it goes beyond that revision. It does not simply state that no corroboration of a sexual assault complainant's victim is necessary; it flatly prohibits a district court from instructing jurors that there are different standards for witnesses' testimony. Instruction 24 violates this directive.

This issue has been addressed in two unpublished decisions by the Iowa Court of Appeals. State v. Barnhardt, No. 17-0496, 2018 WL 2230938 at *4 (Iowa Ct. App. May 16, 2018); State v. Altmayer, No. 18-0314, 2019 WL 476488 at *5

(Iowa Ct. App. Feb. 6, 2019). Mathis contends Barnhardt was wrongly decided. The instruction in Altmayer, at least, informed jurors they were to evaluate the testimony of the alleged victim the same way they would evaluate the testimony of any other witness before then informing jurors that corroboration was not necessary for the victim's testimony. State v. Altmayer, No. 18-0314, 2019 WL 476488 at *5 (Iowa Ct. App. Feb. 6, 2019). The instruction in Barnhardt, which was the same as in this case, does not provide similar protection against different treatment for the testimony of a complainant and other witnesses. Furthermore, in neither case does it appear the defendant testified at trial or presented any other witnesses in his defense, unlike in this case.

Because the resolution of this case rested primarily on the testimony of the complainants as compared to the testimony of the defendant -- along with the weight to be given to each -- "[i]t was therefore of prime importance to defendant that the case not be weakened by special judicial comment" on

the weight to be given the complainants' testimony as distinguished from the testimony of other witnesses. State v. Bester, 167 N.W.2d 705, 710 (Iowa 1969). The District Court should have sustained Mathis' objection to Instruction 24.

When a court gives an improper instruction, this Court will review the error according to whether or not it is of a constitutional magnitude. State v. Hanes, 790 N.W.2d 545, 550 (Iowa 2010). "When an error is of a constitutional dimension, the State must show beyond a reasonable doubt the error did not result in prejudice." Id. If the error is not of a constitutional magnitude, "we presume prejudice and reverse unless the record affirmatively establishes there was no prejudice." Id. at 551.

Mathis contends Instruction 24 violated his due process right to a fair trial. When faced with a due process challenge to criminal jury instructions, the Iowa Supreme Court first considers "subjective, open-ended considerations, such as fair play and fundamental concepts of justice, … [and then] takes

into account more objective factors, such as historical practice and contemporary consensus." State v. Becker, 818 N.W.2d 135, 153 (Iowa 2012), overruled on other grounds by Alcala v. Marriott Int'l Inc., 880 N.W.2d 699, 708-09 (Iowa 2016) (standard of review).

"The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation." In re Winship, 397 U.S. 358, 361 (1970). "Evidentiary charges in jury instructions that relieve the government of its burden of proving each element of the offense beyond a reasonable doubt violate the Due Process Clause of the Fourteenth Amendment." Moore v. Ponte, 186 F.3d 26, 33 (1st Cir. 1999).

This Court also recognizes that instructions, rules, and statutes violate due process when they "violate fundamental concepts of justice which define the community's sense of fair play and decency." See State v. Becker, 818 N.W.2d at 151 (citing State v. Cox, 781 N.W.2d 757, 764 (Iowa 2010) and

State v. Reyes, 744 N.W.2d 95, 101 (Iowa 2008)). In State v. Milliken, the Iowa Supreme Court recounted the history of its warning to trial courts to avoid emphasizing certain evidence or facts in instructions so that they do not "lead a jury to dissociate the evidence thus emphasized from all other evidence they are duty bound to consider." State v. Milliken, 204 N.W.2d 594, 596-97 (1973)(citing cases dating as far back as 1908).

Instruction 24 violates due process because it places particular emphasis on the lack of need for corroboration of the complainants' testimony, while potentially misleading jurors to believe corroboration is necessary for other witnesses. This relieves part of the burden on the State, as it allows jurors to view the complainants' testimony in a more favorable manner than other witnesses' testimony.

This is particularly problematic given that Mathis testified in his own defense. Mathis testified to a general denial – he did not commit the acts alleged. (Tr. Day 4 p. 160

L.17-p. 164 L.8). Because he was asserting a general denial, there was nothing substantive to corroborate. Logically, he would not be able to prove an act never happened. Proving Non-Existence, available at https://www.logicallyfallacious.com/logicalfallacies/Proving-Non-Existence (last visited August 3, 2020). Legally, he was not required to do so. State v. Allen, 293 N.W.2d 16, 20 (Iowa 1980)(state has burden to prove all elements of an offense beyond a reasonable doubt).

As described in more detail in Issue I above, meanwhile, the complainants' testimony was not only not corroborated but also contradictory at times. Both children had physical exams completed by a sexual assault nurse examiner and no physical evidence of a sexual assault was found. (Tr. Day 4 p. 14 L.3-15, p. 16 L.22-p. 17 L.7).

B.T. and L.S. contradicted each other. L.S. claimed Atkins made him place his penis inside of B.T.'s vagina. (Tr. Day 3 p. 84 L.21-p. 85 L.23). B.T. testified Atkins made L.S.

rub against her, but that he did not penetrate her. (Tr. Day 3 p. 43 L.21-p. 44 L.10). B.T.'s testimony also contradicted her deposition testimony on several occasions. (Tr. Day 3 p. 38 L.8-19, p. 39 L.4-11, p. 44 L.17-23, p. 54 L.22-p. 59 L.22, p. 64 L.10-p. 66 L.7).

To the extent jurors might not expect children of B.T.'s and L.S.'s ages to have knowledge of certain sex acts, this is an unhelpful factor in assessing the credibility of the complaints against Mathis. Both complainants testified they were abused by Atkins. (Tr. Day 3 p. 38 L.2-p. 45 L.13, p. 54 L.22-p. 66 L.7, p. 83 L.23-p. 85 L.23). They would have knowledge of sex acts based upon that prior abuse. Notably, when the complainants initially disclosed to their mother, both named Atkins – not Mathis – as the perpetrator. (Tr. Day 3 p. 106 L.14-p. 109 L.9).

Regardless of whether the State has the burden to show the lack of prejudice beyond a reasonable doubt or whether this Court presumes prejudice unless the record affirmatively

establishes otherwise, the record in this case establishes the requisite harm requiring a new trial.

CONCLUSION

For all of the reasons discussed in Issue I above, Defendant-Appellant Justice Mathis respectfully requests this Court vacate his convictions, sentence, and judgment for three counts of Sexual Abuse in the Second Degree and remand his case to the District Court for dismissal. Alternatively, for the reasons discussed in Issue II above, he respectfully requests a new trial.

REQUEST FOR NONORAL SUBMISSION

Counsel requests not to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $7.37, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

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*/s/ Theresa R. Wilson*__________ Dated: *12/15/20*______

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