IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. KARI SCHWARTZ, Defendant-Appellant.	SUPREME COURT NO. 22-0390

APPEAL FROM THE IOWA DISTRICT COURT
FOR BUCHANAN COUNTY
HONORABLE JOHN BAUERCAMP, SENIOR JUDGE

APPLICANT'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED SEPTEMBER 27, 2023

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CERTIFICATE OF SERVICE

On the 11th day of October, 2023, 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 Kari Schwartz, 124 Hanna Blvd., Waterloo, IA 50701.

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QUESTIONS PRESENTED FOR REVIEW

I. Whether it is error to instruct the jury that "hugging" constitutes per se "sexual conduct" when the statutory definition does not include hugging?

II. Whether the district court erred by refusing to allow Schwartz to introduce evidence that the school's investigation into Schwartz's misconduct resulted in an "unfounded" finding?

III. Whether the application of Iowa Code section 907.3's exclusion of deferred or suspended sentencing options without a jury finding that Schwartz was a mandatory reporter and A.S. was under eighteen years of age violates Schwartz's rights under the Sixth and Fourteenth Amendments to the United States Constitution?

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STATEMENT IN SUPPORT OF FURTHER REVIEW

Because the court of appeals has decided important issues of law that should be decided by the Iowa Supreme Court, Kari Schwartz requests this court grant her application for further review of the Court of Appeals' September 27, 2023, decision affirming her conviction and sentence. Iowa R. App. P. 6.1103(b)(2).

Three issues in this case warrant review by the Iowa Supreme Court. First, Iowa Code section 907.3 prohibits the sentencing court from considering less punitive sentencing options such as deferred judgment and suspended sentences if the defendant is convicted of an offense in chapter 709 and two additional facts are shown: the person is a mandatory reporter and the victim is under the age of eighteen. In this case, the jury was not asked to make findings regarding those additional facts, and Schwartz contended that without jury findings on those additional facts, the application of the enhancement violated her Sixth Amendment rights, as held in Alleyne v.

United States, 570 U.S. 99 (2013) and Apprendi v. New Jersey, 530 U.S. 466 (2000). The court of appeals avoided answering the constitutional question by concluding the prohibition on considering deferred and suspended sentencing options did not amount to a more severe punishment and therefore didn't implicate Schwartz's Sixth Amendment rights.

This case also asks the court to consider the application of the decisions in State v. Thoren, 970 N.W.2d 611 (Iowa 2022) and State v. Huston, 825 N.W.2d 531 (Iowa 2013), concluding evidence of an unfavorable administrative investigation was inadmissible against a defendant, in the inverse situation. Do these cases prohibit the admission of favorable results of an administrative investigation when offered by the defendant? The court of appeals avoided the issue by concluding error was not preserved. However, it was the State who initially characterized the results of the investigation as "unfounded" when seeking to exclude the evidence. "Schwartz only wanted in what the State wanted out." (Opinion, p. 16). Although

Schwartz did not make a further offer of proof beyond the agreed-upon characterization of the results of the investigation, it was not necessary in this case as the record is clear what Schwartz wanted admitted at trial.

And finally, the court of appeals concluded the district court's alteration of the statutory definition of "sexual conduct" to include "hugging" as per se sexual conduct in the jury instructions was cured by a consideration of the rest of the jury instructions. This result is not only incorrect, but it encourages district court to alter statutorily defined elements of criminal offenses.

Wherefore, Kari Schwartz respectfully requests this court grant further review of the Court of Appeals' September 27, 2023 decision.

STATEMENT OF THE CASE

Nature of the Case. Kari Schwartz seeks further review of the court of appeals' decision affirming her conviction and

sentence for sexual exploitation by a school employee, a class D felony in violation of Iowa Code § 709.15(3)(a) (2009).

Course of Proceedings. After a jury trial, Schwartz was found guilty of sexual exploitation by a school employee by pattern, practice or scheme. (App. p. 15). Schwartz appealed arguing the evidence was sufficient to support her conviction, the district court improperly instructed the jury, the district court erroneously excluded evidence that the school's investigation was unfounded, and the district court's application of Iowa Code § 907.3 to Schwartz was unconstitutional because there were no jury findings on the facts needed to support the sentencing enhancement. (Opinion, p. 2). The court of appeals affirmed on all grounds. (Opinion, p. 8-20).

Facts. In the fall of 2009, Kari Schwartz was an art teacher at Independence High School, and A.S. was her student. (11/4/21 Trial Tr. Day 2, 31:7–35:20). In October, A.S. told another teacher that she felt uncomfortable with various email

and text messages she'd received from Schwartz. (11/4/21 Trial Tr. Day 2, 52:13-53:25; 180:17-182:7; 11/5/21 Trial Tr. Day 5, 10:13-12:2) (Conf. App. pp. 12, 14, 16). An investigation was launched, and Schwartz left her teaching position. (11/4/21 Trial Day 2, 86:8-87:4; 88:17–89:1; 103:12-105:7; 184:15-188:25; 189:7-9).

Ten years later, A.S. reported for the first time that Schwartz had also touched her inappropriately in a stairwell at school. (11/4/21 Trial Tr. Day 2, 71:16-74:1; 78:9-81:5; 114:12–116:22). When she spoke with police, she explained she reported it because she'd learned Schwartz was teaching at another school and because she thought the statute of limitations on any criminal prosecution would expire upon her 28th birthday. (11/4/21 Trial Tr. Day 2, 90:17-91:20; 105:8-11).

Kari Schwartz denied touching A.S. inappropriately in the stairwell. She acknowledged that she sent messages and emails that could be misinterpreted, but denied that they were

ever intended to be sexual or romantic in nature. Rather she knew A.S. was going through some personal issues and was only trying to "build her up." Schwartz testified that she was alone in the stairwell with A.S. but that she only sat next to her on the stairs and put her arm around her in a sort of side hug while A.S. cried. She never groped her or put her hand down her pants as A.S. alleged. She realized later that some of the language she used in the emails sounded bad out of context, but at the time she believed she was doing what A.S. needed. (11/8/21 Trial Tr. Day 4, 158:24-168:11; 171:20-173:15; 229:13-18).

ARGUMENT

I. The court of appeals wrongly determined the district court's incorrect instruction defining "sexual conduct" as cured by other jury instructions.

A. <u>Error Preservation</u>. Schwartz objected to the court's inclusion of "hugging" in the definition of "sexual conduct" in Jury Instruction Number 16. (11/9/21 Trial Tr. Day 5 9:13-10:10). The State resisted, and the court overruled Schwartz's

objection. (11/9/21 Trial Tr. Day 5 10:11-11:18; 14:16-22). Error has been preserved. State v. Ondayog, 722 N.W.2d 778, 785 (Iowa 2006).

B. Standard of Review. Challenges to jury instructions are reviewed for correction of errors at law. State v. Benson, 919 N.W.2d 237, 241 (Iowa 2018). If a jury instruction misleads the jury or materially misstates the law, the appellate court will reverse and remand for a new trial. Id. at 241-42.

C. Discussion. Schwartz was prosecuted for sexual exploitation by a school employee under Iowa Code § 709.15 (3)(a)&(b) (2009). The statute defines sexual exploitation in relevant part as "[a]ny sexual conduct with a student for the purpose of arousing or satisfying the sexual desires of the school employee or student." Iowa Code § 709.15(3) (2009). The Code then provides examples of sexual conduct: "Sexual conduct includes but is not limited to the following: kissing, touching of the clothed or unclothed inner thigh, breast, groin,

buttock, anus, pubes, or genitals; or a sex act as defined in section 702.17." Iowa Code § 709.15(3) (2009).

In this case, instead of using the statutory definition of sexual conduct, the district court altered the language of the statute and added "hugging" to the list of per se sexual conduct, purportedly relying on the holding in State v. Wickes, 910 N.W.2d 554, 567 (Iowa 2018).

However, in Wickes, the Iowa Supreme Court concluded "hugs *can* constitute sexual conduct under Iowa Code section 709.15(3)(a)(2)." Wickes, 910 N.W.2d at 567 (emphasis added). The Court also recognized that a hug could also be innocent of any sexual intent: "It is important to note that nothing should prohibit teachers from hugging students for reassurance, comfort or in congratulation without putting themselves at risk of being charged with the crime of sexual exploitation." Wickes, 910 N.W.2d at 566.

While the State acknowledged the district court's instruction was not an accurate statement of the law, (State's

Brief p. 28-29), the court of appeals concluded the instruction was not error in this case and the rest of the marshalling instructions cured any error that might exist. Opinion, pp. 14-15.

The court of appeals erred in two respects. First, the misstatement of the law is not cured by the marshalling instruction requiring the jury to find Schwartz engaged in "sexual conduct" with A.S. as part of a scheme and that she "did so" with the specific intent to arouse or satisfy her sexual desires. (App. p. 13). It is more likely that the opposite happened: Once the jury was instructed that hugging was per se sexual conduct, the jury's consideration of whether Schwartz acted to gratify her sexual desires would be improperly affected.

Further when the jury receives a jury instruction misstating the law, a presumption of prejudice arises and reversal is required unless the record affirmatively establishes a lack of prejudice. State v. Murray, 796 N.W.2d 907, 908 (Iowa 2011). The court of appeals did not review the record

with consideration of the appropriate presumed prejudice. This was not a case of overwhelming evidence. It was clear Schwartz had hugged A.S., but the nature of the hugs was highly contested. Further, the jury's request for additional documents during deliberations demonstrates that it struggled deciding who to believe, A.S. or Schwartz. (Conf. App. p. 26).

In addition to being incorrect, the court of appeals resolution of this issue encourages district courts to alter statutory elements of criminal offenses. Rather any alteration of statutory language when instructing juries should be discouraged. The district court relied on a misinterpretation of holding of Wickes and the court of appeals' opinion encourages the very thing Wickes was careful to discourage: "It is important to note that nothing should prohibit teachers from hugging students for reassurance, comfort or in congratulation without putting themselves at risk of being charged with the crime of sexual exploitation." Wickes, 910 N.W.2d at 566.

D. Conclusion. Because the court of appeals erred in affirming Schwartz's conviction despite the misstatement of the law in the jury instructions and because this result discourages teachers in this State from providing appropriate encouragement and comfort to their students through innocent physical contact, this court should grant Schwartz's application for further review, vacate her conviction and remand her case for a new trial.

II. The court of appeals erred in concluding error was not preserved on Schwartz's claim that she should have been allowed to introduce evidence that the school's investigation into her misconduct resulted in an "unfounded" finding.

A. Error Preservation. The State moved in limine to exclude as irrelevant "evidence that a past investigation by the Independence High School and the Iowa Board of Education determined that the conduct was 'unfounded'." (App. p. 12). Thus, it was the State that first characterized the results of the investigation as "unfounded." Schwartz resisted. (11/4/21 Trial Tr. Day 2, 7:22-12:14). During argument on the issue,

the parties agreed that the Board of Education's conclusion was "unfounded" and that the school's investigation was also "unfounded," although the principal disagreed with that finding. (11/4/21 Trial Tr. Day 2 7:22-9:12). The district court granted the State's motion before trial. (11/4/21 Trial Tr. Day 2, 12:15-22). The court initially ruled that no mention of the school's investigation was allowed, but upon reconsideration after discussion with both parties, decided the investigation could be referenced but prohibited any discussion of the results. (11/4/21 Trial Tr. Day 2, 12:25-14:20).

Because Schwartz resisted the State's motion in limine, a hearing was held on the issue, and the court issued a definitive ruling on the admissibility of the evidence, error was preserved. State v. Alberts, 722 N.W.2d 402, 407 (Iowa 2006). See also Lee v. State, Polk Cnty. Clerk of Ct., 815 N.W.2d 731, 739 (Iowa 2012) ("In particular, " 'the requirement of error preservation gives opposing counsel notice and an opportunity to be heard

on the issue and a chance to take proper corrective measures or pursue alternatives in the event of an adverse ruling.' ").

B. Standard of Review. The appellate court will review evidentiary rulings for an abuse of discretion. State v. Thoren, 970 N.W.2d 611, 620 (Iowa 2022). " 'A district court abuses its discretion when it bases its decisions on grounds or reasons clearly untenable or to an extent that is clearly unreasonable . [or] if it bases its conclusions on an erroneous application of the law.' " Id. (quoting Stender v. Blessum, 897 N.W.2d 491, 501 (Iowa 2017)).

C. Discussion. The evidence that the prior investigation ended in an "unfounded" conclusion was relevant. " '[R]elevance is a relatively low bar....' " State v. Thoren, 970 N.W.2d 611, 622 (Iowa 2022) (quoting State v. Neiderbach, 837 N.W.2d 180, 238 (Iowa 2013) (Appel, J., concurring specially)). Although the Supreme Court concluded a DHS founded child abuse report against the defendant was not relevant and should have been excluded in a later criminal trial, that holding does not end the

inquiry in Schwartz's case. State v. Huston, 825 N.W.2d 531, 537 (Iowa 2013) ("Whether or not the abuse report was deemed founded is irrelevant to any issue for the jury to decide."). First, more recent Supreme Court authority indicates the result in Huston is not a blanket holding regarding the relevance of all administrative investigations in criminal cases. In Thoren, the Supreme Court reached a different conclusion about the relevance of an administrative investigation: "That Thoren was investigated by the Board using different standards does not in itself make evidence from the investigation irrelevant to the criminal charges." Thoren, 970 N.W.2d at 622. The court considered the State's theories of relevance and either rejected them or found them of minimal value. Some purposes proposed by the State were improper—for example the State argued the evidence was relevant because the administrative investigation and conclusions made it more likely that Thoren also committed sexual abuse in the current case. However, propensity evidence is not permitted: "Evidence about the

Board's investigation cannot be used when its sole relevance is to enhance the credibility of the victim." Thoren, 970 N.W.2d at 622. However, that is not the purpose the evidence in this case—in this case, the evidence is exculpatory evidence being offered *by* the defendant to alleviate the improper prejudice inherent in the evidence about the investigation.

In this case, the jury learned Schwartz was investigated and shortly after she left her employment with Independence School District. (11/4/21 Trial Day 2, 88:20-89:1; 188:20-25). The obvious inference is that the school concluded Schwartz left her job because she had acted improperly. Thus, the evidence that the result of the investigation was an "unfounded" finding was exculpatory and relevant to the jury's determination of guilt in the criminal case. This is demonstrated by the request to see "results of the internal school investigation" and the "public document to the school board showing the conclusion of Kari's employment." (Conf. App. p. 26).

The circumstances of this case also reduce the risk that the jury might defer to the school's findings rather than independently review the evidence and reach their own verdict. See Thoren, 970 N.W.2d at 623-24; Huston, 825 N.W.2d at 537-38. As described above, the jury was fully aware that the school's investigation only considered some of the allegations against Schwartz by A.S. The evidence at trial made it clear A.S. did not allege any improper touching by Schwartz at the time of the school's investigation in 2009, while that was a central allegation in the criminal proceedings. With this distinct factual scenario, the jury would be less likely to substitute the school's judgment for its own. Any remaining concern about the potential prejudicial impact of the results of the investigation could have been alleviated with the use of a limiting instruction. See State v. Richards, 879 N.W.2d 140, 152-53 (Iowa 2016) (relying on limiting instruction given to jury to alleviate the danger of unfair prejudice resulting from admission of prior bad acts evidence).

D. Conclusion. The court of appeals erred in concluding error was not preserved on this issue. The district court abused its discretion in excluding the evidence of the results of the school's investigation. Because the record does not affirmatively establish a lack of prejudice, Schwartz's conviction should be vacated and her case remanded for a new trial.

III. The court of appeals erred in concluding the application of Iowa Code section 907.3's exclusion of deferred or suspended sentencing options did not implicate Schwartz's rights under the Sixth and Fourteenth Amendments to the United States Constitution.

A. Error Preservation. In a posttrial motion, prior to sentencing, Schwartz argued that section 907.3's prohibition of consideration of deferred and suspended sentencing options pursuant to Iowa Code § 907.3 violated her Sixth Amendment rights. (App. pp. 16-19); (Sentencing Tr. 4:10-19). The court rejected Schwartz's argument and concluded it had no discretion to suspend or defer Schwartz's sentence. (Sentencing Tr. 7:4-14; 16:2-13). Because Schwartz lodged

her objection to the application of the Iowa Code § 907.3 prior to sentencing, error has been preserved. See State v. Davison, 973 N.W.2d 276, 280 (Iowa 2022). As well, illegal sentences may be challenged at any time, including claims that a sentence is unconstitutional. State v. Bruegger, 773 N.W.2d 862, 872 (Iowa 2009).

B. Standard of Review. Constitutional claims are reviewed de novo. State v. Davison, 973 N.W.2d at 280.

C. Discussion. Iowa Code section 907.3 provides suspended and deferred sentencing options are generally available to the district court when sentencing a defendant. Iowa Code § 907.3(1-3) (2021). However, "this section does not apply to a . . . a violation of chapter 709 committed by a person who is a mandatory reporter of child abuse under section 232.69 in which the victim is a person who is under the age of eighteen." Iowa Code § 907.3 (2021). Because there were no jury findings in this case that Schwartz was a mandatory reporter and that A.S. was under eighteen at the time of the

offense, the court's refusal to consider the lesser sentencing options authorized in section 907.3 was a violation of Schwartz's Sixth Amendment rights.

The Sixth Amendment guarantees that those accused a crime have the right to a trial by an impartial jury. U.S. Const. Amend VI. "This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt." Alleyne v. United States, 570 U.S. 99, 104 (2013).

In Apprendi, the U.S. Supreme Court determined that the Sixth Amendment requires that any fact that increases the prescribed range of penalties for a crime beyond the statutory prescribed maximum must be submitted to a jury and proven beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

Later, in Alleyne, the Court overruled Harris v. United States, 436 U.S. 545 (2002), and held that any fact that increases the minimum prescribed punishment must also be

proven beyond a reasonable doubt to comport with the Sixth Amendment. Alleyne, 570 U.S. at 114.

> Any fact that, by law, increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt. Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an "element" that must be submitted to the jury.

Alleyne, 570 U.S. at 102 (citing Apprendi, 530 U.S. at 120). "[F]acts increasing the legally prescribed floor *aggravate* the punishment." Alleyne, 570 U.S. at 113. It does not matter that the defendant could have received the same sentence with or without that fact. Alleyne, 570 U.S. at 114–15.

"Elevating the low-end of a sentencing range heightens the loss of liberty associated with the crime: the defendant's 'expected punishment has increased as a result of the narrowed range' and 'the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish.' " Alleyne, 570 U.S. at 113 (quoting Apprendi, 530 U.S. at 522 (Thomas, J., concurring)).

In this case, the district court was not allowed to consider lesser sentencing options if certain facts existed—if Schwartz was convicted of an offense under chapter 709, if she was a mandatory reporter and if the victim was under eighteen years of age. Iowa Code § 907.3. Thus, section 907.3 "increas[es] the legally prescribed floor" and "heightens the loss of liberty" associated with a conviction under chapter 709. See Alleyne, 570 U.S. at 113. The court of appeals erred in concluding Alleyne did not apply and Schwartz's Sixth Amendment rights were not implicated. Rather, because there are no jury findings that Schwartz was a mandatory reporter and A.S. was under age eighteen, the sentencing scheme violates Schwartz's rights under the Sixth Amendment. Alleyne, 570 U.S. at 114-15.

"When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' and the judge exceeds his proper authority." Davison, 973 N.W.2d at 287

(quoting Blakely v. Washington, 542 U.S. 296, 304 (2004)). Accordingly, Schwartz's sentence should be vacated and her case remanded for a new sentencing hearing in which the court considers the lesser sentencing options available in section 907.3. See Davison, 973 N.W.2d at 288.

D. Conclusion. Because the district cannot be prohibited from considering suspended and deferred sentencing options without jury findings that Schwartz was a mandatory reporter and A.S. was under age eighteen, as required by the Sixth and Fourteenth Amendments, Schwartz's sentence should be vacated and her case remanded for a new sentencing hearing in which all the options under section 907.3 are considered.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was $3.71, 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 FURTHER REVIEWS

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

> [X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style, font 14 point and contains 3,652 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

/s/ Melinda J. Nye Dated: 10/11/23

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