IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff–Appellee, v. JESSE LEE McCOLLAUGH, Defendant–Appellant.	S. CT. NO. 23–0600

APPEAL FROM THE IOWA DISTRICT COURT
FOR BOONE COUNTY
THE HONORABLE JAMES B. MALLOY, JUDGE

APPELLANT'S BRIEF AND ARGUMENT

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ROUTING STATEMENT

The Iowa Supreme Court should retain this case because the issues raised involve a substantial issue of first impression in Iowa. Iowa R. App. P. 6.903(2)(d), 6.1101(2)(c) (2022). It requests the Court determine the question of the proper interpretation of the statutory interpretation of Iowa Code section 728.12, which prohibits the sexual exploitation of a minor, and section 728.1, which defines "prohibited sexual act." *See* Iowa Code §§ 728.1, 728.12 (2022). Specifically, this brief presents the issue of whether a minor, who is unaware she is being videotaped, engages in the "prohibited sexual act" of nudity "for the purpose of arousing or satisfying the sexual desires of a person who may view" the video, when she does the normal, everyday activity of using the toilet to go to the bathroom.

STATEMENT OF THE CASE

Nature of the Case: Defendant–Appellant Jesse Lee McCollaugh appeals his conviction, sentence, and judgment following a bench trial and verdict finding him guilty of sexual

exploitation of a minor, in Boone County District Court Case No. AGCR115533.

Course of Proceedings: On November 16, 2022, the State filed a trial information charging McCollaugh with sexual exploitation of a minor, an aggravated misdemeanor, in violation of Iowa Code section 728.12(3) and 903B.2 (2022). (11/16/2022 Trial Information) (App. pp. 4-6). The district court returned the trial information, finding it did not provide probable cause to support the offense. (Order Returning Trial Information) (App. pp. 7-9). The following day, the State filed another trial information charging the same offense, and the district court approved this indictment. (11/17/2022 Trial Information; Order Approving Trial Information) (App. pp. 10-13). On December 6, 2022, McCollaugh filed a written arraignment and plea of not guilty. (Written Arraignment) (App. pp. 14-15). He also waived his right to a speedy trial within ninety days. (Written Arraignment) (App. pp. 14-15).

On January 31, 2023, McCollaugh filed a written waiver of his right to a jury trial. (Waiver Jury Trial) (App. pp. 16-17).

A bench trial was held on March 1, 2023. (Trial 3:1–10:7); (Verdict) (App. pp. 18-21). Prior to the trial, the district court conducted a colloquy with McCollaugh and found he knowingly and voluntarily waived his right to a jury. (Trial 3:12–4:10) (Verdict) (App. pp. 18-21). The parties stipulated to a bench trial on the minutes of testimony and State's Exhibit 1, which was a USB drive containing two short videos. (Trial 4:11–4:15:13) (Verdict) (App. pp. 18-21). McCollaugh waived his right to have the verdict announced in open court, and he consented to having the district court file its written ruling when it reached a verdict instead. (Trial 8:16–10:5) (Verdict) (App. pp. 18-21). The district court filed its written findings of fact, conclusions of law, and verdict on March 3, 2023; the court found McCollaugh guilty as charged. (Verdict) (App. pp. 18-21).

Prior to the sentencing hearing, a presentence investigation report was filed, and it recommended the court suspend a two-year prison sentence and place McCollaugh on probation. (PSI pp. 10–11). The sentencing hearing was held

on April 11, 2023. (Sentencing Order) (App. pp. 22-26). After hearing the parties' arguments and giving McCollaugh an opportunity to speak, the district court heard a victim impact statement from R.A.'s mother. (Sentencing 3:9–8:14).

The district court then ordered McCollaugh to serve an indeterminate prison term not to exceed two years. (Sentencing 12:2–16) (Sentencing Order) (App. pp. 22-26). The court imposed a $855 fine and the fifteen percent surcharge. (Sentencing 10:6–9) (Sentencing Order) (App. pp. 22-26). The court also ordered McCollaugh to register as a sex offender and pay the related civil penalty. (Sentencing 10:9–19, 11:10–22) (Sentencing Order) (App. pp. 22-26). The district court also imposed the ten-year special sentence, pursuant to Iowa Code 903B.2. (Sentencing 10:20–11:2). Lastly, the court entered a no-contact order with R.A. for five years. (Sentencing 11:3–20).

McCollaugh timely appealed. (Notice) (App. p. 27).

Facts: For the bench trial, the parties stipulated to the minutes of testimony filed by the State and State's Exhibit 1, which support the following facts:

On approximately April 7, 2022, McCollaugh's wife, Raylee McCollaugh[1], was unpacking his bag after he returned from a trip. (Mins. Test. pp. 1, 15–16) (Conf. App. pp. 4, 18-19). In the bag, Raylee found three cell phones. (Mins. Test. p. 15–16) (Conf. App. pp. 18-19). On one of the cell phones, Raylee found a "significant amount of pornography", a video taken outside her mother's bedroom of her mother undressing, and a video taken from outside a bathroom of Raylee's younger sister, R.A., using the toilet in the bathroom. (Mins. Test. pp. 15–16) (Conf. App. pp. 18-19). After this discovery, Raylee confronted McCollaugh, and he admitted to possessing the phone and its contents. (Mins. Test. p. 15) (Conf. App. p. 18).

[1] This brief subsequently refers to Raylee McCollaugh as Raylee and Defendant–Appellant as McCollough to avoid confusion.

On April 10, 2022, Raylee contacted law enforcement regarding the videos. (Mins. Test. p. 16) (Conf. App. p. 19). Raylee gave the phone to the police, and they received a search warrant for its contents. (Mins. Test. pp. 16–17, 22) (Conf. App. pp. 19-20, 25). Law enforcement talked with Raylee, her mother, and her sister. (Mins. Test. pp. 15–17) (Conf. App. pp. 18-20). R.A. was not aware she was videotaped inside the bathroom, and she told law enforcement she felt upset and violated. (Mins. Test. p. 17) (Conf. App. p. 20).

As a result of the search warrant, the police discovered the phone contained two videos taken of R.A. in the bathroom. (Mins. Test. p. 17) (Conf. App. p. 20). R.A. told police the bathroom in the videos was from a residence that she moved out of when she turned eighteen. (Mins. Test. p. 17) (Conf. App. p. 20). Time stamps established the videos of R.A. were created on July 8, 2017. (Mins. Test. p. 16–17) (Conf. App. pp. 19-20). The video clips show R.A. in a bra, with her shorts pulled down, using the toilet, and wiping with toilet paper; R.A.'s mons pubis is visible. (State's Ex. 1). R.A. was fifteen

years old on July 8, 2017. (Mins. Test. p. 16; Protected Information Form) (Conf. App. pp. 19, 37).

ARGUMENT

I. There is insufficient evidence to sustain McCollaugh's conviction for sexual exploitation of a minor because R.A. did not engage in nudity for the purposes of arousing or satisfying the sexual desires of a person who may view the video clips of her.

Error Preservation: A motion for judgment of acquittal is a means for challenging the sufficiency of the evidence to sustain a conviction. *State v. Abbas*, 561 N.W.2d 72, 73 (Iowa 1997). In a bench trial, the court is the fact finder and its finding of guilt necessarily includes a finding that the evidence was sufficient to sustain a conviction. *Id.* Thus, the Iowa Supreme Court has found a criminal defendant is not required to file a motion for judgment of acquittal in order to preserve a challenge to the sufficiency of the evidence. *Id.* at 74. Moreover, "[a] defendant's trial and the imposition of sentencing following a guilty verdict are sufficient to preserve error with respect to any challenge to the sufficiency of evidence raised on direct appeal." *State v. Crawford*, 972

N.W.2d 189, 201 (Iowa 2022); *see also Abbas*, 561 N.W.2d at 74. Thus, the sufficiency of the evidence supporting McCollaugh's conviction is properly in front of this Court.

Standard of Review: The Court reviews both challenges to the sufficiency of the evidence and claims involving statutory interpretation for correction of errors at law. *State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012); *Doe v. State*, 943 N.W.2d 608, 609 (Iowa 2020) (citation omitted).

Discussion: The Court reviews a trial court's findings following a bench trial as it would a jury verdict. *State v. Weaver*, 608 N.W.2d 797, 803 (Iowa 2000). A district court's finding of guilt is binding on the appellate court unless the appellate court determines the record lacked substantial evidence to support the finding of guilt. *Abbas,* 561 N.W.2d at 74 (citing *State v. Torres*, 495 N.W.2d 678, 681 (Iowa 1993)). "In reviewing challenges to the sufficiency of evidence supporting a guilty verdict, appellate courts consider all of the record evidence viewed 'in the light most favorable to the State, including all reasonable inferences that may be fairly drawn

from the evidence.'" *Sanford*, 814 N.W.2d at 615 (citation omitted).

The Court should uphold the verdict only if it is supported by substantial evidence in the record as a whole. *Id.* "Evidence is substantial if it would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt." *State v. Kemp*, 688 N.W.2d 785, 789 (Iowa 2004) (citing *State v. Webb*, 648 N.W.2d 72, 75 (Iowa 2002)). However, consideration must be given to all of the evidence, not just the evidence supporting the verdict. *State v. Petithory*, 702 N.W.2d 854, 856–57 (Iowa 2005) (citation omitted). "The evidence must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture." *Webb*, 648 N.W.2d at 76 (citing *State v. Hamilton*, 309 N.W.2d 471, 479 (Iowa 1981)). If the evidence only raises "suspicion, speculation, or conjecture", then it is not substantial. *State v. Howse*, 875 N.W.2d 684, 688 (Iowa 2016) (citation omitted).

The State has the burden of proving "every fact necessary to constitute the crime with which the defendant is charged."

Webb, 648 N.W.2d at 76 (citation omitted); *see also State v. Limbrecht*, 600 N.W.2d 316, 317 (Iowa 1999) (citation omitted) ("That record must show that the State produced substantial evidence on each of the essential elements of the crime."). In relevant portion, Iowa Code section 728.12(3) provides:

> It shall be unlawful to knowingly purchase or possess a visual depiction of a minor engaging in a prohibited sexual act or the simulation of a prohibited sexual act.

Iowa Code § 728.12(3) (2022). Iowa Code section 728.1(7) provides the definition of "prohibited sexual act" as including "[n]udity of a minor for the purposes of arousing or satisfying the sexual desires of a person who may view a visual depiction of the nude minor." Iowa Code § 728.1(7)(g) (2022).

The State only charged McCollaugh with possessing a visual depiction of a minor engaging in the prohibited sexual act of nudity "for the purposes of arousing or satisfying the sexual desires of a person who may view a visual depiction of the nude minor." (11/17/2022 Trial Information) (App. pp. 10-11); Iowa Code § 728.1(7)(g). The State did not allege the visual

depiction involved any other prohibited sexual act. (11/17/2022 Trial Information) (App. pp. 10-11). In this case, the State failed to establish sufficient evidence that R.A. engaged in nudity that was for the purposes of arousing or satisfying the sexual desires of a person who may view the visual depiction of her nudity.

When the Court interprets a statute, it considers the plain meaning of the statutory language. *State v. Nall*, 894 N.W.2d 514, 518 (Iowa 2017) (citations omitted); *State v. Hearn*, 797 N.W.2d 577, 583 (Iowa 2011) ("The starting point of interpreting a statue is analysis of the language chosen by the legislature."). The Court has said, "'[w]e do not inquire what the legislature meant; we ask only what the statute means.'" *Doe*, 943 N.W.2d at 610 (citation omitted). The Court "seek[s] to determine the ordinary and fair meaning of the statutory language at issue." *Id.* (citations omitted). When it undertakes to determine the meaning of the language at issue, the Court takes "into consideration the language's relationship

to other provisions of the same statute and other provisions of related statutes." *Id.* (citations omitted).

The plain language of the statute requires that R.A. had to *engage in nudity for the purpose* of arousing or satisfying the sexual desires of the viewer. *See State v. Schiebout*, 944 N.W.2d 555, 672 (Iowa 2020) (citations omitted) (internal quotation marks omitted) ("We interpret and apply statutes using 'the legislature's chosen statutory language, not what it should or might have said."). The record establishes that she did not. R.A. did not know that she was being viewed by anyone, much less a specific person or group. (Mins. Test. pp. 1, 17) (Conf. App. pp. 4, 20). Nor was she aware that she could be viewed by someone at a later time, as she was not aware she was being recorded or that her image was being captured. (Mins. Test. pp. 1, 17) (Conf. App. pp. 4, 20). Because the State failed to show that R.A. engaged in nudity for the purpose of arousing the person viewing the nudity, as required under the plain language of the statute, McCollaugh's

conviction is not supported by sufficient evidence. Dismissal is required. *See Schiebout*, 944 N.W.2d at 672.

Additionally, the nature of the nudity depicted in the video clips McCollough possessed is not prohibited by the statute. The Iowa Supreme Court has noted Iowa Code section 728.12(3) "prohibits the purchase and possession of child pornography." *State v. Robinson*, 618 N.W.2d 306, 313 (Iowa 2000). The current chapter 728 initially arose as "obscenity and indecency" statute. *Id.* Originally, the statute only prohibited the dissemination or exhibition of obscene materials to minors, the admission of minors to premises where obscene material was exhibited, and performing lascivious acts with persons under the age of sixteen. *Id.* (citations omitted). In 1976, the legislature added provisions addressing "hard-core pornography and child pornography". *Id.* (citing 1976 Iowa Acts. ch. 1245, § 2804 (codified at Iowa Code § 728.4 (1979))).

In 1978, the legislature first created the crime of sexual exploitation of a minor.[2] *Id.* (citing 1978 Iowa Acts. ch. 1188, § 1 (codified at Iowa Code § 728.12(1) (1979))). The 1978 legislation's stated purpose was "to prohibit a person from photographing a child involved in certain prohibited sexual acts." 1978 Iowa Acts. ch. 1188. The statute only criminalized the sexual exploitation of a minor by persuading, enticing, or causing the minor to engage in a prohibited sexual act intending that the act be photographed or filmed, or otherwise preserved. *Robinson*, 618 N.W.2d at 316 (citing 1978 Iowa Acts. ch. 1188, § 1 (codified at Iowa Code § 728.12(1) (1979))). This legislation defined "[p]rohibited sexual acts" as "[n]udity of a child for the purpose of arousing or satisfying the sexual desires of a person who may view a depiction of the nude child." 1978 Iowa Acts. ch. 1188, § 1 (codified at Iowa Code § 728.1(7) (1979)).

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[2] The crime was initially defined as sexual exploitation of a "child", but the legislature amended the statutory language from child to "minor" in 1980. *Robinson*, 618 N.W.2d at 316 n.3 (citing 1989 Iowa Acts ch. 263, § 3).

A few years later, in 1983, the legislature amended the statute to also prohibit the promotion of "any material depicting a live performance of a child engaged in a prohibited sex act." *Id.* (citing 1983 Iowa Acts. ch. 167, § 4 (codified at Iowa Code § 728.12(2) (Supp. 1983)). Then in 1986, the legislature expanded the crime to "add a third alternative prohibiting the purchase of a print or visual medium 'depicting a child engaging in a prohibited sexual act.'" *Id.* (quoting 1986 Iowa Acts ch. 1176, § 3 (codified at Iowa Code § 728.12(3) (1987)). In 1989, the legislature created another alternative of sexual exploitation of a minor, which prohibited "not only the purchase of child pornography, but also the mere possession of child pornography." *Id.* (citing 1989 Iowa Acts ch. 263, § 3 (codified at Iowa Code § 728.12(3) (1989)).

The Iowa Supreme Court has noted "the crime of sexual exploitation is 'to prohibit the production of sexually explicit material whose subject is, in whole or part a child or children.'" *State v. Hunter*, 550 N.W.2d 460, 466 (Iowa 1996), *overruled on other grounds by State v. Robinson*, 618 N.W.2d

306, 312 (Iowa 2000) (quoting 4 John L. Yeager & Ronald L. Carlson, *Iowa Practice: Criminal Law & Procedure* § 641, at 160 (1979)). In *Hunter*, the Court described the statute as banning visual depictions "of children in sexually provocative poses" and approvingly cited the U.S. Supreme Court's characterization of the prohibited material as "'visual depictions of children performing sexual acts or lewdly exhibiting their genitals.'" *Id.* (quoting *New York v. Ferber*, 458 U.S. 747, 763 (1982)).

Other state courts have found the act of a minor using the bathroom in some state of nudity does not constitute child pornography. *See, e.g.*, *State v. Whited*, 506 S.W.3d 416 (Tenn. 2016) (reversing defendant's conviction for child sexual exploitation when the videos the defendant secretly recorded showed two minors in various states of nudity in the bathroom); *Lockwood v. State*, 588 So.2d 57, 58 (Fla. Dist. Ct. App. 1991) (per curiam) (reversing the defendant's conviction when the videotape showed "the innocent, normal everyday occurrence of a female child undressing, showering,

performing acts of female hygiene and donning her clothes"); *State v. Gates*, 897 P.2d 1345, 1352 (Ariz. Ct. App. 1994), *superseded by statute*, 1996 Ariz. Sess. Laws, ch. 112, §§ 1, 3, *as recognized in State v. Chandler*, 418 P.3d 1109, 1111 (Ariz. Ct. App. 2017) ("The children filmed by Appellant . . . were not engaged in sexual conduct. The tapes show normal, nonsexual conduct for children changing clothes or taking a shower in what they think is a private setting with no one watching. The third tape frequently focuses on the genitals and pubic areas of minors, but the photographic images used as material for the third tape show children engaged in normal, nonsexual conduct that is appropriate for the age and activity being photographed"). In those cases, the courts have found that "mere voyeurism, when the minor is nude but not doing anything sexual, is insufficient to sustain a conviction for . . . child pornography." *Whited*, 506 S.W.3d at 445 (citations omitted). Likewise, this Court should find Iowa's sexual-exploitation-of-a-minor statute requires the "prohibited sexual act" to be something more than normal, everyday activities

where the minor is in a state of nudity; the nudity must be sexual, lewd, or lascivious in nature.

As outlined above, the Iowa sexual-exploitation-of-a-minor statute was enacted to combat child pornography, sexually explicit materials depicting children, and the lewd exhibition of children's genitals. *See Hunter*, 550 N.W.2d 460, 466 (citations omitted). By definition, pornography is material "depicting sexual activity or erotic behavior that is designed to arouse sexual excitement." *See* Pornography, *Black's Law Dictionary*, (Bryan A. Garner, ed., 11th ed. 2019). The video clips in this case are not pornography, as they are not sexual in nature nor do they show erotic behavior. Nothing in the videos show R.A. engaging in lewd, lascivious, or sexual behavior. (State's Ex. 1). Rather, they simply show R.A. normally using the toilet in the bathroom. (State's Ex. 1). In the video clips, R.A. is "engaging in everyday activities that are appropriate for the settings and are not sexual or lascivious . . . ." *See Whited*, 506 S.W.3d at 447.

Accordingly, the record lacks substantial evidence supporting the conclusion that R.A. engaged in the "[p]rohibited sexual act" of nudity, as her nudity was incidental to an everyday, normal activity that was appropriate for the setting, as opposed to nudity that was sexually explicit, which would be "for the purposes of arousing or satisfying the sexual desires" of a potential viewer. Therefore, this Court should remand McCollough's conviction for sexual exploitation of a minor to the district court for dismissal. *See Limbrecht*, 600 N.W.2d at 317 (citation omitted).

***Conclusion*:** Defendant–Appellant Jesse Lee McCollaugh respectfully requests the Court reverse his conviction for sexual exploitation of a minor and remand to the district court for dismissal of the charge.

II. The district court erred by considering and relying on an improper factor when it determined McCollaugh's sentence.

Preservation of Error: The Court may review a defendant's argument that the district court considered an improper factor and abused its discretion during their

sentencing on direct appeal, even in the absence of an objection in the district court. *See State v. Thomas*, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994); *State v. Young*, 292 N.W.2d 432, 434–35 (Iowa 1980) (reviewing an improper factor claim despite no objection was made at the sentencing hearing); *see also State v. Cooley*, 587 N.W.2d 752, 754 (Iowa 1998) ("It strikes us as exceedingly unfair to urge that a defendant, on the threshold of being sentenced, must question the court's exercise of discretion or forever waive the right to assign the error on appeal.").

Standard of Review: The Court reviews a sentence imposed in a criminal case for correction of errors at law. Iowa R. App. P. 6.907 (2022); *see also State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002). "A sentence will not be upset on appellate review unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure such as the trial court's consideration of impermissible factors." *State v. Witham*, 583 N.W.2d 677, 678 (Iowa 1998) (citing *State v. Wright*, 340 N.W.2d 590, 592 (Iowa 1983)).

Discussion: When sentencing a defendant, a court may not consider facts, allegations, or offenses that are not established by the evidence or admitted by the defendant. *Witham*, 583 N.W.2d at 678 (citations omitted); *State v. Black*, 324 N.W.2d 313, 316 (Iowa 1982). Thus, facts that are not proven by the State or admitted to by the defendant, but considered by the court, amount to improper sentencing considerations. *See id.* at 315–17; *State v. Gonzalez*, 582 N.W.2d 515, 517 (Iowa 1998).

During sentencing, the State argued the district court should impose a prison sentence, stating:

> I think the Court should consider the harm done to this victim, the deterrence effect that a prison sentence could have, and the severity of the crime. We have a grown man who violated the privacy of not even a random person but a family member that he was living with. He kept a picture of her in a state of nudity on his phone, and the only reason that he would want to keep that is for his own sexual gratification. *We don't know how often he viewed it. It could have been every day. He could have been violating the privacy of this girl every single day*.

(Sentencing 4:4–24) (emphasis added). How often McCollaugh had viewed the video was an unproven fact.

There is nothing in the record that establishes McCollaugh ever viewed the video clip. The prosecutor did not prove or charge McCollaugh with the alternative of invasion of privacy that punishes the unlawfully *viewing* of a video of a nonconsenting person.[3] *See* Iowa Code § 709.21 (2022). The minutes of testimony reveal law enforcement did a forensic analysis of the phone, but the State did not present any evidence of when, if ever, the videos were played or accessed on the phone.

[3] The State did initially charge McCollaugh with two counts of invasion of privacy for the taking the videos of R.A. and her mother. *See* (Mins. Test. pp. 3–10) (Conf. App. pp. 6-13). However, the district court dismissed that case because the trial information was filed outside the three-year statute of limitations. *See* (EDMS Boone Co. AGCR115354 Order Dismissal – D31); Iowa Courts Online, State of Iowa v. McCollaugh, Jesse Lee, Case 02081 AGCR115354 (Boone), https://www.iowacourts.state.ia.us (last visited Sept. 13, 2023); *see also* Iowa R. Evid. 5.201(b)(2), (c)(2) (2022) (allowing the court to judicially notice if the facts "[c]an be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"). The State initiated the underlying case less than two weeks after the trial court dismissed the invasion-of-privacy case. (11/17/2022 Trial Information) (App. pp. 10-11); (Sentencing 11:6–19) (mentioning the presence of a prior no-contact order on the previous case).

Nor did McCollaugh ever admit to watching the video clips of R.A. Rather, he specifically denied he watched the videos. In his allocation, he told the district court:

> The only thing I would like to add is we keep bringing up the fact of reviewing the pictures and what not. *The picture was on a broken phone that had to be sent in to the state to even be viewed as to what was on it. So the fact of it ongoing is obviously not an option. It was on a nonworking phone. I just want to add it was not ever reviewed or revisited* or any of that stuff that we keep bringing up.

(Sentencing 7:2–12) (emphasis added).

Therefore, the allegation the prosecutor made that McCollaugh watched the video and violated R.A.'s privacy every day for the last five years was unproven. Nor did McCollaugh admit to watching the video clips of R.A. Accordingly, the prosecutor's allegation that McCollaugh repeatedly violated R.A.'s privacy was an improper sentencing consideration. *See Black*, 324 N.W.2d at 316; *Gonzalez*, 582 N.W.2d at 517.

In order to establish reversible error, the defendant must show the court was not just "merely aware" of the improper

sentencing factor, but that the sentencing court "relied" on it in rendering its sentence. *State v. Ashley*, 462 N.W.2d 279, 282 (Iowa 1990) (citations omitted). Where such a showing is made, however, the reviewing court "cannot speculate about the weight a sentencing court assigned to an improper consideration and the defendant's sentences must be vacated and the case remanded for resentencing." *Gonzalez*, 582 N.W.2d at 517 (citations omitted). This is so even if the impermissible factor was "merely a secondary consideration." *State v. Lovell*, 857 N.W.2d 241, 243 (Iowa 2014) (internal quotation marks omitted) (citation omitted). "The important focus is whether an improper sentencing factor crept into the proceedings; not the result it may have produced of the manner it may have motivated the court." *Thomas*, 520 N.W.2d at 313 (citation omitted).

It is clear from the sentencing court's remarks that it was not "merely aware" of the impermissible factor but actually considered and relied on it. *See Ashley*, 462 N.W.2d at 282. The district court did not disavow the prosecutor's statements

regarding McCollaugh allegedly viewing the videos every day for the last five years. Rather, the court specifically noted that it considered "all of the things we've talked about here" before announcing it was imposing a prison sentence. (Sentencing 12:8–13). Thus, the improper consideration "crept into the proceedings", and McCollaugh is entitled to a new sentencing hearing. *See Thomas*, 520 N.W.2d at 313. "In order to protect the integrity of our judicial system from the appearance of impropriety," resentencing must be "before a different judge." *See Lovell*, 857 N.W.2d at 243.

Conclusion: Defendant–Appellant Jesse Lee McCollaugh respectfully requests this Court remand for a new sentencing in front of a different judge.

REQUEST FOR NONORAL SUBMISSION

Counsel requests this case be submitted without 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 $2.13, 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

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