IN THE SUPREME COURT OF IOWA

19-1297

KENNETH LEE DOSS

V.

STATE OF IOWA

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
HONORABLE JUDGE RICHARD B. CLOGG.

DEFENDANT-APPELLANT'S FINAL BRIEF

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PROOF OF SERVICE

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CERTIFICATE OF FILING

I, the undersigned, hereby certify that on April 1, 2020, I will file this document by submitting the document via electronic filing with the Clerk of the Supreme Court. Participants in the case who are registered with the EDMS will be served by EDMS.

__/s/ Raya D. Dimitrova_____

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STATEMENT OF THE CASE

This is an appeal by the Appellant, Kenneth Doss (hereinafter "Appellant"), from the Order Denying Postconviction Relief in the District Court for Warren County, Iowa, before the Honorable Richard B. Clogg, presiding.

STATEMENT OF THE FACTS

Course of Proceedings and Disposition in District Court:

On March 21, 2017, Appellant filed an Application for Postconviction Relief. (Application for PCR) (App. p. 6). The Application asked to eliminate the unconstitutional conditions of his special sentence and remand for entry of a sentence without the unconstitutional conditions, or in the alternative, reverse his conviction and remand his case for a new trial. (Application for PCR) (App. p. 6). Appellant filed a pro se letter with the district court, asking it to reconsider or correct his special sentence. (Motion to Reconsider) (App. p. 6). The district court denied the motion and stated Appellant's complaints will be addressed in the postconviction relief trial. (Order Denying Motion to Reconsider) (App. p. 18). Attorney Angela Campbell was appointed to represent Appellant in his PCR trial. (Appearance) (App. p. 11).

A non-jury trial was held on May 24, 2019. (Trial Held Order) (App. p. 20). On July 29, 2019, the district court found Appellant's trial counsel was not ineffective, that the court had no duty to inform him of the rules of his special parole

sentence, Appellant had not suffered prejudice, and the rules of his special sentence are constitutional. (Order Denying PCR) (App. p. 60). Appellant filed a timely Notice of Appeal on August 2, 2019. (Notice of Appeal) (App. p. 69).

Facts: Appellant was charged with one count of Sex Abuse in the Third Degree, in violation of Iowa Code § 709.4(2)(B), a Class C felony, one count of Lascivious Acts with a Child in violation of Iowa Code § 709.8, a Class D felony, and one count of Indecent Contact with a Child in violation of Iowa Code § 709.12, an Aggravated Misdemeanor. (Amended Trial Information, FECR023573, 12/11/2006) (App. p. 5). This trial information was orally amended at the time of plea and Appellant ultimately pled guilty to one count of Lascivious Acts with a Child, a Class C felony, in violation of Iowa Code § 709.8. (Tr. p. 3, lines 17-25; p. 4, lines 1-14).

Appellant was represented by Blair Bennett at the time of the plea. At the time of the PCR trial Bennett did not recall representing Appellant. (Tr. p. 21, lines 13-16). With no recollection of representing Appellant, Bennett relied on his general practice testifying he would not get a copy of the special sentence prior to an individual plea to a sex offense, thus, he did not believe he had shown the special sentence to Appellant prior to his plea. (Tr. p. 23, lines 4-7). Although Bennett could not be certain, he testified he does not believe he would have known, or told, Appellant that the special sentence would have included not being able to attend

church or having a girlfriend without permission. (Tr. p. 23, lines 1-16). Additionally, Bennett agreed he probably did not go through any of the rules of the special sentence with Appellant prior to his plea. (Tr. p. 24, lines 17 – 21). Finally, Bennett testified he does not remember whether he went through the sex offender treatment contract with clients, or with Appellant specifically, prior to the plea. (Tr. p. 24, lines 22-25; p. 25, lines 1).

Appellant testified he is currently incarcerated at Newton Correctional Facility as a result of violating the rules of his special sentence. (Tr. p. 29, lines 20-25). Appellant testified he has a clear recollection of the conversations he had with Bennett leading up to his plea. (Tr. p. 30, lines 7-17). Appellant testified he had not seen copies of any rule for his special parole sentence, or the rules for sex offender treatment prior to his plea. (Tr. p. 32, lines 1-25; p. 33, lines 1-12). Prior to his plea, Appellant did not know what the rules for his special sentence were going to be, and while relying on Bennett's assistance – Appellant believed, "as long as I followed the law, I would be okay." (Tr. p. 33, lines 13-19). Appellant testified he and Bennett never had a conversation about the specific rules for his special sentence. (Tr. p. 34, lines 3-6). Appellant was unaware he could violate a rule of his special sentence – sending him back to prison, without violating the law. (Tr. p. 34) (lines 1-8).

On April 11, 2007, Appellant was sentenced to 10-years in prison, suspended and a lifetime probation parole under Iowa Code § 903B.1 (2005). (Exhibit 4; Exhibit 6) (App. p. 27; 44). On December 17, 2007, his probation was revoked, and he was ordered to serve the ten-year prison sentence. (Exhibit 8) (App. p. 46). After serving seven years and nine months, and discharging the ten-year prison sentence, Appellant was placed on parole to serve his lifetime special sentence pursuant to Iowa Code § 903B.1. (Tr. p. 31, lines 10-24). Appellant first saw the Parole Order & Agreement merely three (3) days prior to being discharged from his prison sentence. (Tr. p. 32, lines 1-13). On August 14, 2015, Appellant signed the Parole Order & Agreement (Exhibit 1) (App. p. 22). Appellant's probation officer, Joseph Swaim, confirmed that Appellant would not have been able to review Parole Order & Agreement prior to going to prison because it is generally prepared and presented to the inmate after they are in prison, and prior to discharge. (Tr. p. 17, lines 15 – p. 19, lines 1). Swaim further testified Appellant would not have been able to be released from prison and begin serving his special sentence until he signed the non-negotiable agreement. (Tr. p. 8, lines 11-20).

On October 31, 2016, Appellant was presented with and signed the required Sex Offender Treatment Program Rules & Conditions Contract. (Exhibit 2) (App. p. 25). According to Swaim, Appellant would not have gotten a copy of the Sex Offender Treatment Program Rules and Conditions before getting out of prison and

would not have even known those rules prior to leaving prison because the "prison does not go through those rules with them." (Tr. p. 18, lines 2-7). The treatment contract was mandatory and if Appellant refused to sign it, he may have been sent back to prison. (Tr. p. 10, lines 22-25; p. 11, lines 1-12). Hence, Appellant did not know of the mandatory conditions and rules he would be subjected to for his life special sentence until August 14, 2015 for some rules, and October 31, 2016, for the remaining rules.

Appellant was subsequently revoked for violations of the terms of his special sentence imposed in FECR02573. Appellant is currently yin the custody of the Iowa Department of Corrections. Petition for postconviction relief was filed March 21, 2017. Relief was denied on July 29, 2019. Notice of Appeal was filed August 2, 2019. (Notice of Appeal) (App. p. 69).

ROUTING STATEMENT

Because this case involves an issue of first impression, transfer to the Iowa Court of Appeals would not be appropriate pursuant to Iowa Rules of Appellate Procedure. Iowa R. App. P. 6.1101(2)(c).

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AS APPELLANT WAS NOT ADEQUATELY INFORMED OF THE EXTENT OF THE RULES AND REQUIREMENTS OF THE SPECIAL SENTENCE AT THE TIME OF HIS PLEA.

Error preservation: Appellant filed a timely notice of appeal, thus properly preserving the issue of sentencing for appeal.

Standard of review: Claims of ineffective assistance of counsel are reviewed de novo. *State v. Clay*, 824 N.W.2d 488, 494 (Iowa 2012). This is the standard as such claims have their "basis in the Sixth Amendment to the United States Constitution." *State v. Canal*, 773 N.W.2d 528, 530 (Iowa 2009).

Discussion: Appellant has been denied effective assistance of counsel required by the Sixth Amendment to the U.S. Constitution and Article I, section 10 of the Iowa Constitution when he was inadequately informed of the consequences of his plea prior to the entry of his plea, and he has suffered prejudice as a result. A successful ineffective-assistance-of-counsel claim requires proof by a preponderance of the evidence that (1) trial counsel failed to perform an essential duty, and (2) prejudice resulted. *State v. Bearse*, 748 N.W.2d 211, 214–15 (Iowa 2008).

To prove counsel failed to perform an essential duty, Appellant "must show that counsel's performance was deficient" meaning that counsel "made errors so serious that counsel was not function as the 'counsel' guaranteed to defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). In measuring counsel's performance, the court must determine "whether counsel's assistance was reasonable considering all of the circumstances." *Id*. at 688.

Further, the court measures counsel's performance against the standard of a reasonably competent attorney. *State v. Straw*, 709 N.W.2d 128, 138 (Iowa 2006).

As it relates to the first prong, Appellant received ineffective assistance of counsel as he was not advised of the rules of his special sentence prior to his guilty plea, which are a direct consequence of the plea. Second, even if this Court finds the rules of Appellant's special sentence are collateral, Mr. Bennett was ineffective as he misinformed him of the consequences. Lastly, Appellant has suffered prejudice in either situation.

A. The Rules of Appellant's Special Sentence are a Direct Consequence of the Plea

A defendant waives several constitutional rights upon entering a guilty plea. *State v. Boone*, 298 N.W.2d 335, 337 (Iowa 1980). For this waiver to be valid, there must be an intentional relinquishment of known rights. *Id*. Due process requires defendants enter a guilty plea both voluntarily and intelligently. *Id*. To enter a guilty plea voluntarily and intelligently, a defendant must have a full understanding of the consequences of the plea. *Id*. The United States Supreme Court has stated, defendants have a constitutional right to be informed of the consequences of their plea, especially ones "intimately related to the criminal process." *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010).

Iowa Courts must ensure defendants understand "the direct consequences of the plea including the possible maximum sentence, as well as any mandatory

minimum punishment." *State v. Carney*, 584 N.W.2d 907, 908 (Iowa 1998). A court does not have to ensure however, the defendant is informed of all indirect and collateral consequences of a guilty plea. *Id*. A consequence is neither indirect or collateral if it "represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." *State v. Warner*, 229 N.W.2d 776, 782 (Iowa 1975) *overruled on other grounds by State v. Morrison*, 323 N.W.2d 254, 256 (Iowa 1982).

The Supreme Court of Iowa was faced with this issue in *State v. Hallock*, 764 N.W.2d 598 (Iowa 2012). In *Hallock*, the Court had to determine whether the mandatory Iowa Code section 903B.2 ten-year parole provision was a direct consequence of the plea. *Id*. at 604-05. Iowa Code Section 903B.2 states:

> A person convicted of a misdemeanor or a class "D" felony offense under chapter 709…shall also be sentenced in addition to any other punishment provided by law, to a special sentence committing the person into the custody of the director of the Iowa Department of Corrections for a period of ten years, with eligibility for parole as provided in chapter 906. The special sentence imposed under this section shall commence upon completion of the sentence imposed under any applicable criminal sentencing provisions for the underlying criminal offense and the person shall begin the sentence under supervision as if on parole.

The defendant in *Hallock* claimed his plea was not made knowingly and voluntarily. *Id*. at 604. Specifically, the defendant claimed he was never informed of this provision and argued he was not informed of the maximum possible punishment that might result from his plea as required by Iowa Rule of Criminal Procedure 2.8(2)(b)(2). *Id*. The State countered by stating section 903B.2 is

merely a collateral consequence and the court had no obligation to inform him of this special sentencing provision. *Id*. at 605.

The Supreme Court of Iowa agreed with the Defendant. *Id*. The Court found section 903B.2 to be a sentencing provision. *Id*. Specifically, the Court found the title – "Special Sentence," as well as the subchapter entitled "special sentencing" to be instructive. *Id*. The Court went on to say, "[t]he provision's language includes 'sentenced' and 'special sentence.' It is the court, not the parole board or the Iowa Department of Corrections, that imposes this special sentence." *Id*. at 605; *see also State v. Kress*, 636 N.W.2d 12, 20-21 (Iowa 2001). Lastly, the Court found that application of this section could subject Hallock to "additional imprisonment in excess of the maximum imprisonment to which he was sentenced for the underlying crime." *Id*. at 605.

Here, the district court incorrectly found the rules of Applicant's special sentence were merely collateral and offered no reason to support the conclusion. In fairness to the district court however, many consequences of guilty pleas have been held to be collateral: limitations on parole eligibility[1], deportation[2], prohibition of carrying a firearm upon conviction of third-degree theft[3], ineligibility for a deferred judgement or suspended sentence and probation due to

[1] *Kinnersly v. State*, 494 N.W.2d 698, 700 (Iowa 1993).
[2] *Mott v. State*, 407 N.W.2d 581, 583 (Iowa 1987).
[3] *Saadiq v. State*, 387 N.W.2d 315, 325 (Iowa 1986).

prior convictions[4], penal consequences of companion charge or effect of instant charge on the strength of the prosecutions proof in companion case[5], and the effect of a conviction upon future convictions.[6]

Importantly, the special sentence is lifetime probation, non-negotiable, and automatic upon entering his plea and being released from custody. Further, Appellant can violate a rule of his special sentence without necessarily violating the law, effecting the range of his punishment. Hence, Appellant could be imprisoned for looking up local churches on the internet to take his girlfriend and her kid to. (Exhibit 2) (App. p. 25). This is a direct consequence of entering his plea and would violate many of the rules in his special sentence. Moreover, the rules in Appellant's special sentence are significantly more intrusive than the effect of future convictions, parole eligibility and ability to lawfully carry a firearm as listed above. Given the circumstances, this Court should find that the rules of Applicant's special sentence were a direct consequence of entering his plea and trial counsel and the Court failed to advise him of the rules. Without being advised of the rules of his special sentence, Appellant entered a guilty plea unknowingly and involuntarily. *See Hallock*, 764 N.W.2d at 604. Thus, Appellant's plea is invalid.

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[4] *State v. Woolsey*, 240 N.W.2d 651, 653-54 (Iowa 1976).
[5] *State v. Warner*, 229 N.W.2d 776, 782 (Iowa 1975).
[6] *State v. Christensen*, 201 N.W.2d 457, 459 (Iowa 1972).

B. Even if the Rules of the Special Sentence are Collateral, Mr. Bennett Misinformed Appellant About the Special Sentence, Rendering his Assistance Ineffective

Even if this Court determines rules of Appellant's special sentence were "collateral," Appellant's trial counsel was ineffective for misinforming him. Specifically, the Supreme Court of Iowa has stated "there is no constitutional requirement that a judge provide advice relating to parole or the possibility of sentence deferral." *Meier v. State*, 337 N.W.2d 204, 207 (Iowa 1983). However, "that does not leave a court, or *an attorney*, to misinform a defendant regarding collateral consequences of his plea." *Id*. (emphasis added). The Second Circuit Court of Appeals found misstatements by defense counsel defeats a defendant's opportunity to enter a guilty plea knowingly and voluntarily. *Strader v. Garrison*, 611 F.2d 61, 65 (2d Cir. 1979). The Court in *Meier* quoted *Strader* saying:

> One would not suppose that the collateral consequence rule [under which information regarding parole eligibility is not initially required]…would apply in a situation in which defendant's guilty plea was induced by actual misadvise respecting some collateral consequence when the consequence was of substantial importance to the defendant.
> 611 F.2d at 63.

In this case, Defendant was misinformed of the consequences of his plea, contrary to the holding in *Meier*. Mr. Bennett testified he has no independent recollection of representing Appellant. (Tr. p. 21, lines 13-20). Mr. Bennett testified he cannot remember what he told Appellant prior to the plea about the special sentence and the rules of the special sentences. (Tr. p. 25, lines 8-11). Further, Mr. Bennett stated he does not believe he would have retrieved a copy of

the special sentence rules from the probation and parole office prior to someone's plea to review it with the client. (Tr. p. 23, lines 4-8).

When specifically asked whether he would have had an understanding of what was going to be required of Appellant on the special sentence prior to the plea, Mr. Bennett testified he would merely have "some knowledge." (Tr. p. 23, lines 9-14). When asked whether it was possible he did not know Appellant would not be allowed to attend church, Mr. Bennett responded, "[i]t certainly is." (Tr. p. 23, lines 17-25). Mr. Bennett also testified it is possible he did not know Appellant would be required to obtain permission prior to having a girlfriend. (Tr. p. 23, lines 1-6).

Similar to Mr. Bennett, Appellant did not know the rules of his special sentence prior to his plea. In support of this conclusion, Appellant stated he had not seen a copy of any rules for his special sentence of the rules for the sex offender treatment program prior to his plea. (Tr. p. 32, lines 1-25; p. 33, lines 1-12). Appellant additionally testified Mr. Bennett told him as long as he followed the "actual law" he would be okay. (Tr. p. 33, lines 13-19). Appellant was misinformed by counsel he could violate a rule of his special sentence – sending him back to prison, that was not a violation of the law. (Tr. p. 34, lines 1-8).

Thus, the holding in *Meier* renders Mr. Bennett ineffective for misinforming Appellant regarding the consequences of his plea, regardless of whether they are

collateral. *Meier*, 337 N.W.2d at 207. Additionally, misadvise as to the consequence of a plea does not involve trial tactics or strategies, and places counsel below the range of normal competency. *Kress*, 636 N.W.2d at 21-22. This Court should find Mr. Bennett breached an essential duty to Appellant by misinforming him of the conditions of his special sentence and Appellant entered his plea unknowingly and involuntarily. *See Hallock*, 764 N.W.2d at 604.

C. Appellant has Suffered Prejudice Due to Ineffective Assistance of Counsel

In analyzing the prejudice prong, Appellant must establish he would not have entered the guilty plea but for the breach of duty by counsel. *State v. Brubaker*, 805 N.W.2d 134, 143 (Iowa 2001). A causal connection between the alleged breach of duty and the guilty plea must be established. *See State v. Utter*, 803 N.W.2d 647, 652 (Iowa 2011). Here, Appellant has shown he has suffered prejudice due to Mr. Bennett breaching an essential duty.

Specifically, Appellant testified he would not have plead guilty if he was going to have to follow the rules of his special sentence for the rest of his life. (Tr. p. 34, lines 12-18). Further Appellant testified there were specific rules that had he known of prior to entering a guilty plea, he would not have plead guilty. Specifically, he would not have pled guilty if he knew any of the rules of his special sentence included:

1) Not having a girlfriend (Tr. p. 34, lines 19-25; p. 35, lines 1-8);

2) Having to get permission and taking a class in order to be considered to be allowed to ever have a girlfriend (Tr. p. 35, lines 9-15);

3) Not being able to leave the country without permission (Tr. p. 35, lines 16-22);

4) Not being allowed to go to church (Tr. p. 36, lines 15-24);

5) Not being allowed to get a counselor or mental health treatment without permission from the Department of Corrections (Tr. p. 37, lines 4-25; p. 38, lines 1-3);

6) Not being allowed to see family members under the age of 18 (Tr. p. 38, lines 4-13);

7) Not being allowed to have pictures of family members or pictures of a girlfriend's kids under the age of 18 (Tr. p. 14, lines 14-24);

8) Not being able to start of quit a job without permission (Tr. p. 38, line 25; p. 39, lines 1-8);

9) Not being allowed to spend the night somewhere without permission (Tr. p. 39, lines 23-25; p. 40, lines 1);

10) Being subject to a curfew (Tr. p. 40, lines 6-8);

11) Being on GPS monitoring (Tr. p. 40, lines 9-14);

12) Being required to live in a halfway house as part of his special sentence (Tr. p. 40, lines 15-22);

13) Being subject to search of his home without a warrant at any time (Tr. p. 40, lines 23-25; p. 41, lines 1-4);

14) Not being allowed to go to the casino or to Las Vegas with his family (Tr. p. 41, lines 5-20);

15) Being required to complete sex offender treatment while on the special sentence after discharging his sentence (Tr. p. 41, lines 23-25; p. 42, lines 1-15);

16) Having his parole officer be able to show up at his work or his house at any time and announce to anyone there what his conviction was for (Tr. p. 47, lines 2-25; p. 48, lines 1-6);

In addition to the specific rules that each would have individually prevented him from pleading guilty, Appellant testified had he known collectively – including knowing that he had to register for life rather than register for 10 years as he was told, he would not have entered a guilty plea. (Tr. p. 36, lines 25; p. 37, lines 1-3; p. 42-44; p. 46, lines 1-4). Unbeknownst to Appellant, the rules were surprisingly "more strict that what [he] had in prison" and "really effected" him. (Tr. p. 45, lines 18-25; p. 46, lines 12-16). Thus, Appellant has shown but for his trial counsel's errors, he would not have plead guilty.

Moreover, Appellant is currently incarcerated for violating the rules that are not in and of themselves violations of law. First, he was accused of having a girlfriend and accessing the internet. (Tr. p. 49, lines 9-17). Second, Appellant was accused of having a picture of his girlfriend's son that was taken at Appellant's work in a public space, violating the rules. (Tr. p. 49, lines 18-25; p. 50, line 1). Lastly, Appellant was accused of having his sister and her friend visit him at his home, in violation of the rules. (Tr. p. 50, lines 7-14). Thus, Appellant has shown he suffered prejudice from Mr. Bennett's errors – he would not have pled guilty if counsel properly advised him of the consequences of his plea.

II. THE DISTRICT COURT ERRED IN HOLDING THE RULES OF APPELLANT'S SPECIAL SENTENCE AND PAROLE ARE CONSTITUTIONAL AND LEGAL AS APPLIED TO HIM

Error preservation: Appellant filed a timely notice of appeal, thus properly preserving the issue of sentencing for appeal.

Standard of review: Claims of ineffective assistance of counsel are reviewed de novo. *State v. Clay*, 824 N.W.2d 488, 494 (Iowa 2012). This is the standard as such claims have their "basis in the Sixth Amendment to the United States Constitution." *State v. Canal*, 773 N.W.2d 528, 530 (Iowa 2009).

Discussion: A challenge to an illegal sentence may be made at any time. Additionally, the Iowa Supreme Court has held that constitutional challenges to the special sentence are to be made after the offenders begin serving their special sentence. *State v. Tripp*, 776 N.W.2d 855, 858-59 (Iowa 2010). Here, Appellant argues the district court erred in finding the rules and requirements of his special sentence parole that ban or restrict his ability to use the internet, date, attend church, attend counseling, and associating with people of his choice are unconstitutional and illegal as applied to him.

A. Use of the Internet

The rules of Appellant's special sentence places a total ban on Appellant's use of the internet. (Exhibit 2) (App. p. 25). The rule reads, "I will not view, access or use the Internet through any means." (Exhibit 2) (App. p. 25). This

claim is subject to intermediate scrutiny. *State v. Aschbrenner*, 926 N.W.2d 240, 251-52 (Iowa 2019). "In order to survive intermediate scrutiny, a law must be 'narrowly tailored to serve a significant government interest." *Packingham v. North Carolina*, 137 S.Ct. 1730, 1736 (2017). "To satisfy [intermediate scrutiny], a regulation need not be the least speech-resetrive means of advancing the Government's interests." *Turner Broad. Sys., Inc., v. F.C.C.*, 512 U.S. 622, 662, 114 S.Ct. 2445, 2459 (1994). The Court must consider whether "the means chosen…'burden substantially more speech than is necessary to further the governments legitimate interests.'" *Id*.

In today's world, "one of the most important forums for people to share ideas is the internet." *Aschbrenner*, 926 N.W.2d at 250. In *Packingham*, a North Carolina statute was found unconstitutional because it was a felony for a sex offender to access any social media site "where the sex offender knows that the site permits minor children to become members or to create or maintain personal web pages." *Packingham*,137 S.Ct. at 1733-38. Further, a Nebraska statute was found in violation of the First Amendment where it banned sex offenders from using social networking sites. *Doe v. Nebraska*, 898 F.Supp.2d 1086, 1107-22 (D. Neb. 2012).

Similar to *Packingham* and *Doe*, Appellant is challenging the total ban on his use of the internet. *See Aschbrenner*, 926 N.W.2d at 250. Here, the State has a

legitimate interest in protecting children, minors, and others from sex offenders. However, the means are not substantially related. An outright ban on the use of the internet has already been held unconstitutional by the United States Supreme Court as it is over-intrusive. *Packingham*, 137 S.Ct. at 1736. Further, Appellant's ban on his use of the internet is for *any website*, not just one allowing minor to become members as in *Packingham*. *See id*. Thus, the Court should find this rule of Appellant's special sentence, unconstitutional.

B. Dating, Attending Church, Obtaining Counseling, and Other Restrictions

The rules of Appellant's special sentence restricting or banning his dating, church attendance, obtaining counseling, and restriction on who he can associate with unnecessarily violate his First Amendment Rights to Association and his rights under article I, section 7 of the Iowa Constitution. *See United States v. Behren*, 65 F.Supp.3d 1140 (Dist. Colo. 2014). In *Behren*, the Court noted a ban on dating may constitute a greater restriction on liberty than is necessary or may violate the First Amendment right to association. *Id*. Restrictions on dating may be allowable if they are reasonably related to Appellant's characteristics, however, even moderate restrictions may violate the First Amendment. *See United States v. Caravayo*, 809 F.3d 269 (5th Cir. 2015) (restriction that prevented offender convicted of possession child pornography from dating a woman with children under the age of 18 found to violate the First Amendment).

Here, the rules of the special sentence apply to every person discharged from prison who is being required to take, or retake, the sex offender treatment program. (Tr. p. 10, lines 17-25; p. 11, lines 1-7). "Typically, those rules are intact for a time period until evaluations and assessments and decisions have been made by the psychologist for further programming or not further programming and some type of staffing can be done regarding the individual." (Tr. p. 11, lines 13-21). Appellant never experienced such individualized assessment.

Further, Appellant violated rules of this special sentence that are not crimes. (Tr. p. 14, lines 3-25; p. 15, lines 1-9). Appellant's parole officer, Mr. Swaim, testified the rules in the special sentence do not change unless he get's permission to change the rules. (Tr. p. 15, lines 4-14). As such, there has not been an individualized finding that Appellant should not have a girlfriend, not be able to attend church, not be allowed to travel outside the country to visit his family, or not be able to seek his own counseling and mental health services. All of these rules apply to everyone in the sex offender program and no individualized finding has been made that Appellant needs such restrictions. Hence, these rules violate his First Amendment rights to association and his rights under article I, section 7 of the Iowa Constitution. To the extent this Court determines the federal constitution does not make these rules unconstitutional, Iowa's constitution should be read to do so.

The rules of Appellant's special sentence have prevented him from being fully rehabilitated. Any person who has served their full sentence should be allowed to date adult women and have unrestricted access to his family.[7] Appellant should not be restricted from attending church where he can be a leader of change, an inspiration, and a law-abiding follower of Christ. Appellant should be able to engage in romantic relationships with adult women. Further, Appellant should be allowed to seek mental health counseling services without restrictions. Likewise, Appellant should be allowed to see his preferred licensed counselor as he is the one dealing with mental health issues, not the State.

All of these rules unreasonably restrict his right to association. There is no rational basis for not allowing a man, who has completed his term of incarceration, to be restricted from activities normally thought to be admirable. Appellant should not feel as if he has more restrictions now as he did in jail, thus, this Court should find the rules of Applicant's special sentence violate his right to association under the First Amendment and article I, section 7 of the Iowa Constitution.

These provisions not only violate the Appellant's right to association. The challenged rules also individually, and collectively, violate Appellant's right to be free from cruel and unusual punishment, in violation of the Eighth Amendment and

[7] Appellant does not argue that if a no contact order or some other unusual circumstance exists that he should be able to have unrestricted access. Rather, he argues he should not be restricted under his circumstances.

article I, section 17 of the Iowa Constitution. Appellant further urges this Court to find the challenged rules violate his right under the Fifth and Fourteenth Amendments, as well as article I, section 9 of the Iowa Constitution as they deprive him of liberty and property without due process of law and are unreasonable, arbitrary, and capricious.

For these reasons, this Court should remove the challenged rules of Appellant's special sentence and he be released from prison for the violations of the unconstitutional rules of his special sentence.

CONCLUSION

For the reasons stated above, the district court holding should be vacated and this case be remanded with directions to the district court to either (1) direct the district court to reverse his conviction and remand for a new trial or (2) eliminate the unconstitutional conditions of his special sentence and for entry of a sentence without the unconstitutional conditions.

NOTICE OF ORAL ARGUMENT

Notice is hereby given that upon submission of the cause to the Supreme Court of Iowa, Appellant hereby requests to be heard in oral argument.

/s/Raya. D. Dimitrova

ATTORNEY'S COST CERTIFICATE

I hereby certify that the cost of printing the foregoing Appellant's Proof Brief and Argument was the sum of $ 0.00.

/s/ Raya D. Dimitrova
Raya D. Dimitrova

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

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/s/ Raya D. Dimitrova 4/1/2019
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