IN THE SUPREME COURT OF IOWA
No. 19-1561
CERRO GORDO COUNTY NO. AGCR028389
CERRO GORDO COUNTY NO. AGCR028483

STATE OF IOWA,
Plaintiff-Appellee,

vs.

WILLIAM F. FETNER,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT IN AND FOR CERRO GORDO COUNTY, IOWA
THE HON. KAREN KAUFMAN SALIC

APPELLANT'S OCTOBER 30, 2019 BRIEF IN FINAL FORM

Submitted by: Richard Hollis
Attorney at Law
AT0003608
P.O. Box 12153
Des Moines, IA 50312
(515) 255-3426 phone no.
e-mail: attorneyhollis@hotmail.com
ATTORNEY FOR
WILLIAM F. FETNER
APPELLANT

CERTIFICATE OF SERVICE

I certify that on or before February 13, 2020, I, the undersigned counsel served a copy of the "Appellant's October 30, 2019 Brief in Final Form" upon the State by electronically transmitting a copy of the same Attorney Bakke of the Criminal Appeals Division of the Iowa Attorney General's Office through the use of the EDMS system. I, Richard Hollis, further certify that on or before February 14, 2020 I served a copy of the "Appellant's October 30, 2019 Brief in Final Form" upon Appellant William F. Fetner (whose inmate number is 6273440) by mailing a copy of the same by first-class or priority mail, postage prepaid, to Mr. Fetner, using the following address: "Mount Pleasant Correctional Facility, 1200 East Washington St., Mount Pleasant, IA 52641".

By: /s/_____

Richard Hollis
Attorney at Law
AT0003608
P.O. Box 12153
Des Moines, IA 50312
(515) 255-3426 phone no.
e-mail: attorneyhollis@hotmail.com
ATTORNEY FOR
WILLIAM F. FETNER
APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

AUTHORITY	PG. NUMBERS
OTHER AUTHORITY	
Iowa Code Section 124.401(5).	11
Iowa Code Section 321.561.	11
Iowa Constitution, Article I, Sections 1 and 9.	6-8, 13, 14, 19, 20, 21, 25
United States Constitution, Fifth and Fourteenth Amendments.	6-8, 13, 14, 19, 20, 21, 25

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. With all due respect to the District Court, the District Court considered an impermissible sentencing factor not established by any allegation in the record when sentencing Defendant-Appellant William F. Fetner (hereinafter "Fetner"). With all due respect to the District Court, this error violated of Fetner's rights to due process of law pursuant to the Fifth Amendment to the United States Constitution and pursuant to Article I, Section 9 of the Iowa Constitution. With all due respect to the District Court, this error also violated Fetner's rights to equal protection of the law pursuant to the Fourteenth Amendment to the United States Constitution and pursuant to Article I, Section 1 of the Iowa Constitution.

2. With all due respect to the District Court, the District Court considered an irrelevant sentencing factor not established by any allegation in the record when sentencing Fetner. With all due respect to the District Court, this error violated of Fetner's rights to due process of law pursuant to the Fifth Amendment to the United States Constitution and pursuant to Article I, Section 9 of the Iowa Constitution. With all due respect to the District Court, this error also violated Fetner's rights to equal protection of the law pursuant to the Fourteenth Amendment to the United States Constitution and pursuant to Article I, Section 1 of the Iowa Constitution.

ROUTING STATEMENT

Pursuant to Iowa R. App. P. 6.1101, this case should be transferred to the Court of Appeals because this case does not meet any of the criteria for retention of a case in the Supreme Court of Iowa. This case does not involve "substantial constitutional questions as to the validity of a statute, ordinance, or court administrative rule" within the meaning of Iowa R. App. P. 6.1101(2)(a). This case does not involve "substantial issues in which there appears to be a conflict between a published decision of the court of appeals or supreme court" within the meaning of Iowa R. App. P. 6.1101(2)(b). This case does not involve "substantial issues of first impression" within the meaning of Iowa R. App. 6.1101(2)(c). This case does not involve "fundamental and urgent issues of broad public importance requiring prompt or ultimate determination by the supreme court" within the meaning of Iowa R. App. 6.1101(2)(d). Obviously, this case is not a "lawyer discipline" case within the meaning of Iowa R. App. P. 6.1101(2)(e). This case does not involve "substantial questions of enunciating or changing legal principles" within the meaning of Iowa R. App. P. 6.1102(2)(f).

This case meets the criterion for transfer to the Court of Appeals set forth in Iowa R. App. P. 6.1101(3)(a) to the extent that this case involves "the application of existing legal principles".

STATEMENT OF THE CASE

On August 11, 2019 Fetner signed "Written Plea of Guilty" forms for the cases at issue in this appeal. Fetner also placed his initials next to various statements contained in these forms, thereby indicating his agreement with these specific statements. Written Plea of Guilty Documents, Cerro Gordo County Criminal Case Numbers AGCR028389 and AGCR028473. Amended Appendix (hereinafter "A"), pgs. 29-36.

At the Guilty Plea and Sentencing Proceedings occurring on September 16, 2019 the Court accepted Fetner's pleas of guilty to the charges at issue in this appeal, namely, Driving While Barred (an Aggravated Misdemeanor) and Possession of a Controlled Substance – Third Offense (Marijuana), also an Aggravated Misdemeanor. Plea of Guilty and Sentencing Transcript (hereinafter "Transcript"), pg. 5, Lines 24 and 25 and pg. 6, Lines 1 and 2; Judgment and Sentence, Cerro Gordo County Criminal Case Number AGCR028389, pg. 1, paragraph 2; Judgment and Sentence, Cerro Gordo County Criminal Case Number AGCR028473, paragraph 2. A, pgs. 37 and 40.

The Court sentenced Fetner "to an indeterminate prison term not to exceed two years" for each charge. Transcript, pg. 12, Line 7; Judgment and Sentence, Cerro Gordo County Criminal Case Number AGCR028389, pg. 1,

paragraph 4; Judgment and Sentence, Cerro Gordo County Criminal Case Number AGCR028473, pg. 1, paragraph 4. A, pgs. 37 and 40. The Court ordered that the prison sentences "be served consecutively." Transcript, pg. 12, Line 9; Judgment and Sentence, Cerro Gordo County Criminal Case Number AGCR028389, pg. 1, paragraph 4; Judgment and Sentence, Cerro Gordo County Criminal Case Number AGCR028473, pg. 1, paragraph 4. A, pgs. 37 and 40. The Court imposed but suspended a $625 fine and 35 percent surcharge on the fine with regard to the Driving While Barred charge. Judgment and Sentence, Cerro Gordo County Criminal Case Number AGCR028389, pg. 1, Paragraph 5; Transcript, pg. 12, Lines 9 and 10. A, pg. 40.

With regard to the Possession of a Controlled Substance – Third Offense (Marijuana) charge, the Court imposed but suspended a fine of $625 plus a 35 percent surcharge on the fine. Judgment and Sentence, AGCR028473, pg. 1, paragraph 5; Transcript, pg. 12, Lines 9 and 10. A, pg. 37. The Court also ordered Fetner to pay the $10 D.A.R.E. surcharge and the $125 Law Enforcement Initiative Surcharge. Judgment and Sentence, Cerro Gordo County Criminal Case Number AGCR0284373, pg, 1, Paragraph 5 and Transcript, pg. 12, Lines 11 and 12. A, pg. 37. The Court also ordered Fetner to obtain a substance abuse evaluation "follow through with all

treatment recommendations and produce evidence of completion to the Clerk of Court. Judgment and Sentence, AGCR028473, pg. 1, Paragraph 6; Transcript, pg. 12, Lines 12-14. A, pg. 37.

STATEMENT OF THE FACTS

On August 11, 2019 Fetner signed "Written Plea of Guilty" forms for the cases at issue in this appeal. Fetner also placed his initials next to various statements contained in these forms, thereby indicating his agreement with these specific statements. Written Plea of Guilty Documents, Cerro Gordo County Criminal Case Numbers AGCR028389 and AGCR028473. A, pgs. 29-36.

At the Guilty Plea and Sentencing Proceedings occurring on September 16, 2019, the Court accepted Fetner's pleas of guilty to the charges at issue in this appeal, namely, Driving While Barred (an Aggravated Misdemeanor) in alleged violation of Iowa Code Section 321.561 and Possession of a Controlled Substance – Third Offense (Marijuana), in alleged violation of Iowa Code Section 124.401(5) also an aggravated misdemeanor. Plea of Guilty and Sentencing Transcript (hereinafter "Transcript"), pg. 5, Lines 24 and 25 and pg. 6, Lines 1 and 2. Judgment and Sentence, Cerro Gordo County Criminal Case Number

AGCR028389, pg. 1, paragraph 2; Judgment and Sentence, Cerro Gordo County Criminal Case Number AGCR028473, paragraph 2. A, pgs. 37, 40.

The Court sentenced Fetner "to an indeterminate prison term not to exceed two years" for each charge. Transcript, pg. 12, Line 7. Judgment and Sentence, Cerro Gordo County Criminal Case Number AGCR028389, pg. 1, paragraph 4. Judgment and Sentence, Cerro Gordo County Criminal Case Number AGCR028473, pg. 1, paragraph 4. A, pgs. 37 and 40. The Court ordered that the prison sentences "be served consecutively". Transcript, pg. 12, Line 9. Judgment and Sentence, Cerro Gordo County Criminal Case Number AGCR028389, pg. 1, paragraph 4; Judgment and Sentence, Cerro Gordo County Criminal Case Number AGCR028473, pg. 1, paragraph 4. A, pgs. 37, 40. The Court imposed but suspended a $625 fine and 35 percent surcharge on the fine with regard to the Driving While Barred charge. Judgment and Sentence, Cerro Gordo County Criminal Case Number AGCR028389, pg. 1, paragraph 5; Transcript, pg. 12, Lines 9 and 10. A, pg. 40.

With regard to the Possession of a Controlled Substance – Third Offense (Marijuana) charge, the Court imposed but suspended a fine of $625 plus a 35 percent surcharge on the fine. Judgment and Sentence, Cerro Gordo County Criminal Case Number AGCR028473, pg. 1, paragraph 5;

Transcript, pg. 12, Lines 9 and 10. A, pg. 37. The Court also ordered Fetner to pay the $10 D.A.R.E. surcharge and the $125 Law Enforcement Initiative Surcharge. Judgment and Sentence, Cerro Gordo County Criminal Case Number AGCR0284373, pg, 1, paragraph 5 and Transcript, pg. 12, Lines 11 and 12. A, pg. 37. The Court also ordered Fetner to obtain a substance abuse evaluation "follow through with all treatment recommendations and produce evidence of completion to the Clerk of Court. Judgment and Sentence, Cerro Gordo County Criminal Case Number AGCR028473, pg. 1, paragraph 6; Transcript, pg. 12, Lines 12-14. A, pg. 37.

ARGUMENT

I. THE DISTRICT COURT'S CONSIDERATION OF AN IMPERMISSIBLE SENTENCING FACTOR VIOLATED FETNER'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW (PURSUANT TO THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS MADE APPLICABLE TO STATE CRIMINAL PROSECUTIONS BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND PURSUANT TO ARTICLE I, SECTION 9 OF THE IOWA CONSTITUTION) AND TO EQUAL PROTECTION OF THE LAW (PURSUANT TO THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND PURSUANT TO ARTICLE I, SECTION 1 OF THE IOWA CONSTITUTION).

Pursuant to *State v. Roby*, 897 N.W.2d 127, 137 (Iowa 2017), the standard of review for this issue is "*de novo*" because this is a constitutional issue.

Error was not preserved with respect to this issue. However, the failure of Fetner's attorney to preserve error with respect to this issue in the lower court does not matter because "errors in sentencing need not be challenged first in the district court" and "illegal sentences may be corrected at any time". *State v. Lathrop*, 781 N.W.2d 288, 292-93 (Iowa 2010).

The Appellant requests the Court please analyze this claim pursuant to the relevant provisions of both the Iowa and United States Constitutions because the "[i]ndependent state constitutional law is now a well-established part of our state's legal fabric" as noted by Justice Appel in his concurring opinion in *State v. Baldon*, 829 N.W.2d 785 (Iowa 2013).

The Court briefly recited a number of sentencing factors on the record at the guilty plea and sentencing proceedings at issue in this appeal. Transcript, pg. 10, Lines 14-22. The Court also briefly recited sentencing factors in the Judgment and Sentence documents filed in connection with the criminal cases at issue in this appeal. Judgment and Sentence, Cerro Gordo Criminal Case Number AGCR028389, pg. 1, paragraph 3; Cerro Gordo

County Criminal Case Number AGCR028473, pg. 1, paragraph 3. A, pgs. 37 and 40.

When sentencing Fetner, the District Court considered Fetner's criminal history. Transcript, pg. 11, Lines 1-19. The District Court stated that Fetner's "criminal history … [was] only one of the factors that I look at, but it's clear that, you know, you are persistent in your use of an illegal substance". Transcript, pg. 11, Lines 20 and 21.

The Court also stated the following as part of its reasons for imposing the sentence:

> I'm terrified you've been helping in a day care. I would think that if the parents knew your history, they would definitely pull their children out of, you know, any day care. It's not safe for you to be caring for children if you're under the influence". Transcript, pg. 11, Lines 21-25, pg. 12, Line 1.

The Court stated that "[f]or the reasons stated, these sentences are not suspended and they are ordered to be served consecutively." Transcript, pg. 12, Lines 8 and 9. Thus, the District Court considered unproven allegations that Fetner worked in a daycare center and speculation that Fetner did so while under the influence of a controlled substance as a factor in imposing not only prison sentences for both charges but ordering these sentences run consecutively.

With all due respect to the District Court, there is nothing in the record to support the allegation that Fetner worked in a daycare center. Even if there were such an allegation in the record that Fetner worked at a daycare center, the District Court's assertion that Fetner did so while under the influence of a controlled substance and that parents would remove their children from any daycare center that employed Fetner if the parents became aware of Fetner's criminal history is purely speculative, with all due respect. Therefore, the allegation that Fetner worked at a daycare center while under the influence of a controlled substance was clearly an impermissible sentencing factor.

In *State v. Lovell*, 857 N.W.2d 241 (Iowa 2014), the Court noted that the Court "could not evaluate ... the influence" of the impermissible sentencing factors. Therefore, reversal of the sentence was required, which the Court did.

The consideration of the allegation that Fetner worked at a daycare center while under the influence of a controlled substance was an impermissible sentencing factor because there was no evidence in the record to support this allegation and speculation, with all due respect to the District Court. The District Court based its decision to a large measure upon this unproven allegation and speculation. Transcript, pg. 11, Lines 21-25, pg. 12,

Line 1. It was one of three factors (the others being Fetner's criminal history and history of use of illegal drugs) that the District Court made more than cursory reference to as part of the sentencing proceedings. Transcript, pg. 11, Lines 11-25, pg. 12, Line 1.

In *State v. Chambers*, No. 13-0984, 847 N.W.2d 236, 2014 Iowa App. LEXIS 227 (Iowa App. 2014) the Court noted that "[o]ur goal [in reviewing sentencing decisions] is … to determine whether the decision rests on an untenable or improper ground. *See State v. Gartin*, 271 N.W.2d 902, 910 (Iowa 1978)." In this case, the Court's decision regarding sentencing was based in part on "an untenable or improper ground", namely the consideration of the allegation that Fetner worked at a daycare center while under the influence of a controlled substance. Furthermore, even if there were evidence in the record that Fetner worked at a daycare center, the Court's assumption that Fetner did so while under the influence of a controlled substance is also speculative. Transcript, pg. 11, Line 25, pg. 12, Line 1. Just because Fetner was alleged to repeatedly use marijuana does not necessarily mean that he was under the influence of marijuana while working at the daycare center, *even if the record were to show that Fetner worked at a day care center, which the record does not.*

Accordingly, the consideration of the allegation that Fetner worked at a daycare center while under the influence of a controlled substance was an "improper ground" within the meaning of *State v. Chambers*, No. 13-0984, 847 N.W.2d 236, 2014 Iowa App. LEXIS 227 (Iowa App. 2014) and *State v. Gartin*, 271 N.W.2d 902, 910 (Iowa 1978). The consideration of the allegation that Fetner worked at a daycare center while under the influence of a controlled substance was also error because this ground was "untenable" within the meaning of *State v. Chambers*, No. 13-0984, 847 N.W.2d 236, 2014 Iowa App. LEXIS 227 (Iowa App. 2014) and *State v. Gartin*, 271 N.W.2d 902, 910 (Iowa 1978) on this basis. This factor was untenable because it was wholly unsupported by the record.

Although the District Court clearly gave this factor significant weight, even if this Court disagrees and is unsure as to how *much* this factor influenced the District Court's sentencing decision, pursuant to *State v. Lovell*, 857 N.W.2d 241 (Iowa 2014), the sentences for these cases must be reversed and these cases must be remanded for new sentencing proceedings. That being said, the record is quite clear that the District Court gave this improper factor a significant amount of weight because it is only one of three factors that the Court made any more than cursory reference to on the record when stating the reasons for imposing the chosen sentence, including,

most significantly, for imposing consecutive prison terms for misdemeanor offenses. Transcript, pg. 11, Line 25, pg. 12, Line 1.

Similarly, pursuant to *State v. Chambers*, No. 13-0984, 847 N.W.2d 236, 2014 Iowa App. LEXIS 227 (Iowa App. 2014) and *State v. Gartin*, 271 N.W.2d 902, 910 (Iowa 1978) the undersigned counsel respectfully submits it is necessary for this Court to reverse the sentences imposed and remand this case to the District Court for new sentencing proceedings.

In *McMillan v. United States*, 477 U.S. 79, 102 F.3d. 278, 65 S.Ct. 241 (1986) the Court noted that sentencing factors can be proven by a mere preponderance of the evidence and that the Due Process Clause of the Fifth Amendment to the United States Constitution as applied to the Fourteenth Amendment to the United States Constitution does not require that sentencing factors be proven by a higher standard of proof than "the preponderance of the evidence". *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct 2340, 147 L.Ed. 435 (2000) and cases based on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct 2340, 147 L.Ed. 435 (2000) such as *Alleyne v. United States*, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). have undermined *McMillan v. United States*, 477 U.S. 79, 102 F.3d. 278, 65 S.Ct. 241 (1986) to the extent that a court cannot make factual findings that increase the statutory minimum or statutory maximum for an offense using

the preponderance of the evidence. Indeed, such findings must be made by the jury. *Alleyne v. United States*, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013).

With all due respect to the District Court, the allegation that Fetner worked at a daycare center under the influence of a controlled substance is improper because there was *no* evidence in the record that would support this conclusion by the preponderance of the evidence standard set forth in *McMillan v. United States*, 477 U.S. 79, 102 F.3d. 278, 65 S.Ct. 241 (1986) or any other standard of proof.

With all due respect to the District Court, for the reasons set forth above, the Court's consideration of an "improper" and "untenable" factor in sentencing Fetner (namely Fetner's alleged working at a daycare center under the influence of a controlled substance) violated Mr. Fetner's rights to due process of law pursuant to the Fifth Amendment to the United States Constitution as made applicable to state criminal prosecutions by the Fourteenth Amendment to the United States Constitution and pursuant to Article I, Section 9 of the Iowa Constitution, were violated. In all due respect, Fetner's rights to equal protection of law pursuant to the Fourteenth Amendment to the United States Constitution and pursuant to Article I, Section 1 of the Iowa Constitution were also violated by the Court's

consideration of "improper" factors and an "untenable" factor in sentencing Fetner.

II. THE DISTRICT COURT'S CONSIDERATION OF AN IRRELEVANT SENTENCING FACTOR VIOLATED FETNER'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW (PURSUANT TO THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS MADE APPLICABLE TO STATE CRIMINAL PROSECUTIONS BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND PURSUANT TO ARTICLE I, SECTION 9 OF THE IOWA CONSTITUTION) AND TO EQUAL PROTECTION OF THE LAW (PURSUANT TO THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND PURSUANT TO ARTICLE I, SECTION 1 OF THE IOWA CONSTITUTION) .

Pursuant to *State v. Roby*, 897 N.W.2d 127, 137 (Iowa 2017), the standard of review for this issue is "*de novo*" because this is a constitutional issue.

Error was not preserved with respect to this issue. However, the failure of Fetner's attorney to preserve error with respect to this issue in the lower court does not matter because "errors in sentencing need not be challenged first in the district court" and "illegal sentences may be corrected at any time". *State v. Lathrop,* 781 N.W.2d 288, 292-93 (Iowa 2010).

The Appellant requests the Court please analyze this claim pursuant to the relevant provisions of both the Iowa and United States Constitutions

because the "[i]ndependent state constitutional law is now a well-established part of our state's legal fabric" as noted by Justice Appel in his concurring opinion in *State v. Baldon*, 829 N.W.2d 785 (Iowa 2013).

Even if there were evidence in the record showing Fetner worked at a daycare center while under the influence of a controlled substance, such evidence would not be relevant to the two general considerations of sentencing set forth in Iowa Code Section 901.5, namely "the rehabilitation of the defendant" and the "protection of the community". Iowa Code Section 901.3 lists issues that a presentence investigation report is supposed to address. These are specific factors that the Court can consider when addressing the more general sentencing considerations set forth in Iowa Code Section 901.5, namely what sentence will best promote "the rehabilitation of the defendant" and "the protection of the community".[1] Even if there were evidence in the record that Fetner worked at a daycare center, such evidence would not be relevant to the more specific sentencing considerations set forth in Iowa Code Section 901.3.

According to the Criminal Complaint filed in connection with Cerro Gordo Criminal Case Number AGCR028389, Fetner was arrested for the driving while barred charge on a "highway/road/alley", not at a daycare

[1] No presentence investigation report was prepared with regard to the cases at issue in this appeal.

center. According to the Criminal Complaint filed in connection with Cerro Gordo County Criminal Case Number AGCR028473, Fetner was arrested in the parking lot of a Casey's convenience store, not a daycare center.

With all due respect to the District Court, the District Court gave "significant weight" within the meaning of the cases cited above to the irrelevant factor that Fetner allegedly worked at a daycare center while under the influence of a controlled substance. This irrelevant factor is only one of three factors that the Court made any more than cursory reference to on the record when stating the reasons for imposing the chosen sentence, including, most significantly, for imposing consecutive prison terms for misdemeanor offenses. Transcript, pg. 11, Line 25, pg. 12, Line 1.

With all due respect to the District Court, the District Court erred by considering the allegation that Fetner allegedly worked at a daycare center while under the influence of a controlled substance.

As noted above, this Court should use the *de novo* standard of review for this issue because it is a constitutional issue. *State v. Roby*, 897 N.W.2d 127, 138 (Iowa 2017). Moreover, Fetner can show that this sentencing error is so serious that it would still constitute error even if reviewed pursuant to the more stringent abuse of discretion standard, with all due respect to the District Court. In *State v. Roby*, 897 N.W.2d 127, 138 (Iowa 2017) the Court

noted that "[a] discretionary sentencing factor … may be [an abuse of discretion] if a sentencing court … gives significant weight to an improper or *irrelevant* factor", quoting from *People v. Hyatt,* 316 Mich. App. 368, 891 N.W.2d 549, 576 (Mich. App. 2016), which in turn quoted from *United States v. Haack,* 403 F.3d 997, 1004 (8th Cir. 2005).

In *State v. Zarate,* 908 N.W.2d 831, 856 (Iowa 2019) the Court quoted from *State v. Roby,* 897 N.W.2d 127, 138 (Iowa 2017) for this proposition. Similarly, in *United States v. Feemster,* 572 F.3d 455 (8th Cir. 2009) the Court noted more categorically and emphatically that "[a] district court abuses its discretion when it … 'gives significant weight to an improper or irrelevant factor'", citing to *United States v. Kane,* 552 F.3d 748, 752 (8th Cir. 2009) *United States v. Feemster,* 572 F.3d 455 (8th Cir. 2009), *"(internal quotation and citations omitted)".*

Thus, even applying a higher standard of review, if a District Court gives "significant weight "to an "irrelevant" sentencing "factor" it is possible that this sentencing error will meet the more stringent test of being an "abuse of discretion". Fetner has demonstrated that the consideration of this irrelevant sentencing consideration that Fetner allegedly worked in a daycare center while under the influence and speculation that parents would remove their children from any daycare center that employed Fetner was a

sentencing error so serious that it is an "abuse of discretion", with all due respect to the District Court.

With all due respect to the District Court, for the reasons set forth above, the Court's consideration of an irrelevant factor (namely Fetner's alleged working at a daycare center under the influence of a controlled substance) in sentencing Fetner violated Mr. Fetner's rights to due process of law pursuant to the Fifth Amendment to the United States Constitution as made applicable to state criminal prosecutions by the Fourteenth Amendment to the United States Constitution and pursuant to Article I, Section 9 of the Iowa Constitution were violated. In all due respect, Fetner's rights to equal protection of law pursuant to the Fourteenth Amendment to the United States Constitution and pursuant to Article I, Section 1 of the Iowa Constitution were also violated by the Court's consideration of this "irrelevant" factor in sentencing Fetner.

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, Fetner respectfully requests the Court please strike the District Court's sentencing orders and reverse and remand these cases for further proceedings before a different judge.

REQUEST FOR NON-ORAL SUBMISSION

While the undersigned counsel would welcome the opportunity to present oral argument to this Court if the Court so desires, the undersigned counsel believes this Court can appropriately address this appeal by reviewing the briefs, appendix, and record in this matter. Accordingly, the undersigned counsel requests non-oral submission of this case.

By: /s/_____
Richard Hollis
Attorney at Law
AT0003608
P.O. Box 12153
Des Moines, IA 50312
(515) 255-3426 phone no.
e-mail: attorneyhollis@hotmail.com
ATTORNEY FOR
WILLIAM FETNER
APPELLANT

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

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 3,850 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(3) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface

using a version of Microsoft Word that was produced on or before 2003 in Times New Roman, 14 point type.

By: /s/_____

Richard Hollis
Attorney at Law
AT0003608
P.O. Box 12153
Des Moines, IA 50312
(515) 255-3426 phone no.
e-mail: attorneyhollis@hotmail.com
ATTORNEY FOR
WILLIAM FETNER
APPELLANT

Dated: February 13, 2020