
IN THE SUPREME COURT OF IOWA

**Supreme Court No. 16-1544
Scott County No. FECR301769**

**STATE OF IOWA,
Plaintiff-Appellee,**

vs.

**MICHAEL JEFFERSON,
Defendant-Appellant.**

**Appeal from the Iowa District Court for Scott County
The Honorable Marlita A. Greve, Judge**

**APPELLANT'S FINAL BRIEF
AND
REQUEST FOR ORAL ARGUMENT**

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CERTIFICATE OF FILING

I, Les M. Blair III, hereby certify that on the 8th day of May, 2017, I am filing the attached Appellant’s Final Brief by Electronic Filing with the State of Iowa Electronic Filing System.

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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because the issues raised involve substantial issues of first impression in Iowa. Iowa R. App. P. 6.903(2)(d). Specifically, guidance is necessary on the issues of entitlement to counsel, a hearing, and/or a meaningful statement of findings on a Motion for Correction of Illegal Sentence. Additionally, guidance is necessary on the issue of whether a gross proportionality challenge to a 903B.1 lifetime special sentence is valid under the circumstances of this case.

STATEMENT OF THE CASE

Nature of the Case:

In this case, Appellant appeals from the District Court's ruling entered on August 26, 2016, denying his Motion to Correct an Illegal Sentence.

Course of Proceedings:

On May 23, 2007, the State filed the Trial Information in this matter charging the Appellant with the crime of Sexual Abuse in the Second

Degree in violation of Iowa Code section 709.3. (App. 2) The Appellant initially plead not guilty to this charge. (App. 1) On June 20, 2007, the State filed an Amended Trial Information which added Count II, a charge of Sexual Abuse in the Third Degree in violation of Section 709.4 of the Code of Iowa. On or about that same day, the Appellant appeared and plead guilty in open court to counts II of the amended trial information. (App. 9)

The Appellant filed a timely Motion in Arrest of Judgment. Following a hearing, the Motion in Arrest of Judgment was denied and the matter was reset for sentencing. (App. 19) The Appellant then filed another Motion in Arrest of Judgment. Following another hearing, the second Motion in Arrest of Judgment was also denied and the matter was reset for sentencing. The matter then proceeded immediately to sentencing. (App. 20)

The Appellant eventually appeared before the Court on August 19, 2016, for sentencing. The Appellant was sentenced to 10 years in prison on Count II, which sentence was imposed and the Appellant was commended into the custody of the director of the Iowa Department of Corrections. Count I was dismissed. The sentencing order placed the Appellant on the sex offender registry, but made no mention of any special sentence under

Iowa Code section 903B.1. (App. 20) On September 27, 2007, the Court entered an Order directing that the Appellant be brought back from prison for resentencing because the Court failed to notify the Appellant of the lifetime special sentence under Iowa Code section 903B.1 at the time of sentencing. That hearing was scheduled for October 4, 2007. (App. 21) Notice of Appeal was filed on October 1, 2007. (App. 22). On October 4, 2007, despite the pending appeal, the Appellant appeared again before the District Court and was resentenced, adding the lifetime special sentence under Iowa Code section 903B.1. (App. 23)

On appeal, the Court of Appeals affirmed the Appellant's conviction, but vacated the sentence and remanded for resentencing by the District Court. (App. 24) The Appellant appeared before the District Court on November 13, 2008, and was resentenced. The Appellant was again sentenced to 10 years in prison on Count II, which sentence was imposed and the Appellant was commended into the custody of the director of the Iowa Department of Corrections. This time, the District Court placed the Appellant on the sex offender registry and also imposed the lifetime special sentence under Iowa Code section 903B.1. (App. 25)

In late 2011 or early 2012, the Appellant was released from prison

(the exact date is not clear from the record). He continued on parole supervision until January 11, 2014, when he was arrested for an alleged violation of his parole. (App. 27) Ultimately, he was found to have violated his parole and was sent back to prison for violation of the terms of his lifetime special sentence. (App. 30)

On May 19, 2016, the Appellant filed a Motion to Correct Illegal Sentence. He did request oral argument and evidentiary hearing. (App. 33) On May 26, 2016, the Court denied Appellant's Motion to Correct an Illegal Sentence without hearing, stating that the Court has not control over when the Appellant is released from his special sentence. (App. 36)

On August 9, 2016, the Appellant filed a new Motion to Correct an Illegal Sentence claiming new grounds. (App. 38) Simultaneous with the Motion, the Appellant filed an Application for Appointment of Counsel. (App. 54) Without hearing, the Court denied this Motion to Correct Illegal Sentence, stating that it was

denied for all the same reasons a previous Motion for Correction of an Illegal Sentence was denied. That order was filed on May 26, 2016. Defendant's motion to have counsel appointed for this motion is also denied. (App. 56)

Before that Order was entered, the Appellant prepared and mailed in a Motion to Amend Original Filing of Correction of Sentence, which raised

additional new arguments and grounds. That Motion to Amend was dated August 23, 2016, and subsequently filed on August 29, 2016. (App. 58)

The Court subsequently issued an Order on September 7, 2016, stating

Defendant filed a third motion for correction of illegal sentence. This motion is denied for all of the same reasons the previous two motions were denied. (App. 63)

Notice of Appeal in this matter was filed on September 9, 2016, which specifically appealed from the District Court's Order filed on August 26, 2016, "and from all adverse rulings and orders inhering therein.." (App. 71)

It should also be noted that a Petition for Writ of Certiorari was also filed in this matter on September 8, 2016, in Supreme Court Case 16-1505. (App. 65) The Supreme Court denied the Petition for Writ of Certiorari on October 7, 2016, noting that Appellant had another appeal pending (this one) wherein Appellant was represented by appointed counsel. (App. 73)

Procedendo issued on November 10, 2016. (App. 76)

Statement of the Facts:

On November 13, 2008, the Appellant was sentenced to 10 years in prison for Sexual Abuse in the Third Degree in violation of Iowa Code section 907.4, which sentence was imposed and the Appellant was

commended into the custody of the director of the Iowa Department of Corrections. The District Court placed the Appellant on the sex offender registry and imposed the lifetime special sentence under Iowa Code section 903B.1. (App. 25)

In late 2011 or early 2012, the Appellant was released from prison and began serving his lifetime special sentence (the exact dates are not clear from the record). He continued on supervision until January 11, 2014, when he was arrested for an alleged violation of his parole. (App. 27) Ultimately, he was found to have violated his parole and was sent back to prison for violation of the terms of his lifetime special sentence and/or parole. (App. 30)

On May 19, 2016, the Appellant filed a Motion to Correct Illegal Sentence claiming that he had discharged his lifetime special sentence under Iowa Code section 903B.1... no other arguments were made. He did request oral argument and evidentiary hearing. (App. 33) On May 26, 2016, the Court denied Appellant's Motion to Correct an Illegal Sentence without hearing, stating that the Court has no control over when the Appellant is released from his special sentence. (App. 36)

On August 9, 2016, the Appellant filed a new Motion to Correct an

Illegal Sentence claiming that the lifetime special sentence was (1) a Bill of Attainder; (2) violated his rights under the Equal Protection Clause; (3) violated the separation of powers doctrine; (4) was unconstitutionally vague; (5) violated his constitutional rights of freedom of association, right to marry and have children, right to be free from bodily restraint, and right to travel; and (6) violated his right against self-incrimination under the 5th Amendment to the United State's Constitution. (App. 38) Simultaneous with the Motion, the Appellant filed an Application for Appointment of Counsel. (App. 54) Without hearing, the Court denied this Motion for Correction of Illegal Sentence, stating that it was

denied for all the same reasons a previous Motion for Correction of an Illegal Sentence was denied. That order was filed on May 26, 2016. Defendant's motion to have counsel appointed for this motion is also denied. (App. 56)

Before that Order was entered, the Appellant prepared and mailed in a Motion to Amend Original Filing of Correction of Sentence, which raised (1) a double jeopardy argument, (2) a cruel and unusual punishment argument, and various complaints about the validity of the underlying plea of guilty and whether it was knowing and voluntary. That Motion to Amend was dated August 23, 2016, and subsequently filed on August 29, 2016. The Court subsequently issued an Order on September 7, 2016,

stating

Defendant filed a third motion for correction of illegal sentence. This motion is denied for all of the same reasons the previous two motions were denied. (App. 63)

Notice of Appeal in this matter was filed on September 9, 2016, which specifically appealed from the District Court's Order filed on August 26, 2016, "and from all adverse rulings and orders inhering therein.." (App. 71)

ARGUMENT

Division I:

The District Court erred in denying Jefferson's Motion for Correction of an Illegal Sentence without affording Jefferson the assistance of counsel, the opportunity to be heard at a hearing, or an explanation for the basis of the denial.

A. Preservation of Error

Contemporaneously with his Motion for Correction of Illegal Sentence filed on August 9, 2016, Appellant filed an Application for Appointment of Counsel to represent him on the motion. (App. 54) Additionally, Appellant's Motion for Correction of Illegal Sentence explicitly requested an "evidentiary hearing in this matter where all facts can be fully and fairly determined." (App. 38)

The district court summarily denied the motion for correction of illegal sentence without any hearing, merely stating that the Motion was

denied for all the same reasons a previous Motion for Correction of an Illegal Sentence was denied. That order was filed on May 26, 2016. Defendant's motion to have counsel appointed for this motion is also denied. (App. 56)

However, the Motion for Correction of Illegal Sentence filed on August 9, 2016, was based on completely different grounds than the Motion for Correction of Illegal Sentence that was denied in May of 2016. (App. 33)

By stating that the Motion filed in August was denied “for all the same reasons”, the Court was basically admitting that it did not really read the two Motions and provided no real reason for the denial.

Error was thus preserved by Appellant’s request for counsel and hearing, and the district court’s subsequent denial of the motion without affording Appellant meaningful assistance of counsel, a hearing, or any meaningful explanation of the basis for denial.

To the extent that the State challenges the Appellant’s right to a direct appeal from the denial of his Motion for Correction of an Illegal Sentence, the Appellant notes that he did in fact file a Petition for Writ of Certiorari in this matter. (App. 65) That Petition was denied, at least in part, because of the existence of this pending appeal in which Appellant already had

counsel appointed to assist him. (App. 73)

In addition, Defendant respectfully requests that review should nevertheless be accepted by writ of certiorari or by discretionary review. See Iowa R. App. P. 6.108 (“If any case is initiated by a notice of appeal, an application for interlocutory appeal, an application for discretionary review, or a petition for writ of certiorari and the appellate court determines another form of review was the proper one, the case shall not be dismissed, but shall proceed as though the proper form of review had been requested.”); Iowa R. App. P. 6.107(1) (permitting a party to petition for a writ of certiorari on a claim that the “district court judge... exceeded the judge's jurisdiction or otherwise acted illegally.”); Iowa Code section 814.6(2)(e) (2013) (authorizing the defendant to pursue discretionary review from “An order raising a question of law important to the judiciary and the profession.”). See also *Tindell v. Iowa Dist. Court for Scott Co.*, 600 N.W.2d 308, 309 (Iowa 1999) (holding there was no appeal as of right from the denial of a section 902.4 motion for reconsideration of sentence, but electing to treat defendant’s notice of appeal as a petition for writ of certiorari and granting the writ).

Acceptance of review under a writ of certiorari is proper because the

district court judge “acted illegally” in failing to correct the illegal sentence and in failing to afford Appellant the procedural protections to which he was entitled. Iowa R. App. P. 6.107(1). Acceptance of discretionary review is also proper because the instant case “rais[es]... question[s] of law important to the judiciary and the profession.” Iowa Code section 814.6(2)(e) (2013).

The Supreme Court’s guidance is necessary on the questions of whether and under what circumstances a defendant may be entitled to counsel, a hearing, and/or a statement of findings on a motion to correct illegal sentence. See e.g., *State v. Trueblood*, 2014 WL 636167, *2 (Iowa Ct. App. Feb. 19, 2014) (“Whether a defendant has a constitutional right to have counsel appointed to represent him on a motion to correct an illegal sentence is an issue of first impression.”). To some extent, this question was answered by the Court’s holding in *State v. Webber*, 15-0439, Iowa App. 2016, wherein the Court ordered that counsel be appointed for an appellant on remand for his hearing on his Motion for Correction of Illegal Sentence. However, this ruling appears to be situational rather than a bright line rule.

The Supreme Court’s guidance is also necessary on the question of when a gross disproportionality (formerly termed as-applied) Cruel and

Unusual Punishment challenge to a 903B.1 lifetime special sentence may lie, specifically including the question of whether the threshold inquiry is satisfied under the circumstances of the present case. Such guidance would assist district courts who not-infrequently face such questions. See e.g., *State v. Doornink*, 2015 WL 5278925, at *1-2 (Iowa Ct. App. Sept. 10, 2015); *State v. Justice*, 2014 WL 5862041, at *1-2 (Iowa Ct. App. Nov. 13, 2014); *State v. Garza*, 2014 WL 6804531, at *4 (Iowa Ct. App. Aug. 27, 2014); *State v. Hendrickson*, 2014 WL 7343338, at *2 (Iowa Ct. App. Dec. 24, 2014); *Trueblood*, 2014 WL 636167, at *2; *State v. Martin*, 2015 WL 1848564, at *1 (Iowa Ct. App. April 22, 2015); *State v. Poulson*, 2012 WL 1864790, at *1-2 (Iowa Ct. App. May 23, 2012); *State v. Webber*, 15-0439, (Iowa Ct. App. July 27, 2016). Unlike many of those prior cases, Appellant's challenge to his 903B sentence is ripe as he has discharged the underlying sentence and is currently on 903B supervision. Appellant also specifically requested counsel and an evidentiary hearing on his motion, which was summarily denied without either and without any meaningful explanation of the basis for the denial. Thus, to the extent there is no appeal as of right, review should be accepted as a matter of discretionary review or writ of certiorari.

Finally, it must be stated that both the Motion for Correction of Illegal Sentence filed by Appellant on August 9, 2016, and the Motion to Amend (and its supporting documents) filed by Appellant on August 29, 2016, should be included in the subject matter of this appeal. The Motion to Amend (and its supporting documents) were signed by the Appellant on August 23rd and then mailed to the Clerk's office before the District Court's sua sponte dismissal (without prior notice) filed on August 26, 2016. The District Court then treated the Motion to Amend as a separate third Motion for Correction of Illegal Sentence and denied that by written order on September 7, 2016. Notice of Appeal was filed in this matter on September 9, 2016, which was signed by Appellant on September 7th and would have been mailed by Appellant before he even saw the District Court's Order filed on September 7, 2016. The Notice of Appeal in this matter should apply and preserve error for both the Motion for Correction of Illegal Sentence filed on August 9th and the Motion to Amend (and supporting documents) filed on August 29th.

B. Standard of Review

A claimed denial of either a constitutional or statutory right to counsel

is reviewed de novo. *Lado v. State*, 804 N.W.2d 248, 250 (Iowa 2011).

To the extent a discretionary right to counsel is at issue, review of the district court's decision on whether to appoint counsel is reviewed for an abuse of discretion. *Pfister v. Iowa Dist. Ct. for Polk Co.*, 688 N.W.2d 790, 795-96 (Iowa 2004); *Furgison v. State*, 217 N.W.2d 613, 615 (Iowa 1974). A claimed due process violation is reviewed de novo. *State v. Becker*, 818 N.W.2d 135, 141 (Iowa 2012).

C. Argument

1. Denial of Assistance of Counsel.

The District Court erred in denying Appellant's Motion for Correction of Illegal Sentence without first affording him assistance of counsel.

Appellant specifically requested appointment of counsel to represent him. (App. 54)

a) Appellant had a constitutional and/or statutory right to counsel on his Motion for Correction of Illegal Sentence.

A motion to correct illegal sentence is a stage of the criminal proceedings (Iowa Code sec. 815.10, Iowa R. Crim. P. 2.28), and is a 'critical stage' of such proceedings (Sixth Amendment, and Article I, Sec.

10). Iowa Code Section 815.10(1) provides that “[t]he court... shall appoint” counsel “to represent an indigent person at any stage of the criminal... proceedings... in which the indigent person is entitled to legal assistance at public expense.” Iowa Code sec. 815.10(1) (emphasis added). Iowa Rule of Criminal Procedure 2.28(1) in turn provides an expansive view of when a defendant is “entitled” to court-appointed counsel in criminal cases, stating as follows:

Every defendant who is an indigent person as defined in Iowa Code section 815.9, is entitled to have counsel appointed to represent the defendant at every stage of the proceedings from the defendant’s initial appearance before the magistrate or court through appeal, including probation revocation hearings, unless the defendant waives such appointment. Iowa R. Crim. P. 2.28(1).

Thus, whether Appellant had a statutory right to counsel on his Motion for Correction of Illegal Sentence turns on whether such motion constitutes a stage of the criminal proceedings. However, for a constitutional right to counsel to arise under the Sixth Amendment to the United States Constitution and the “criminal prosecutions” clause of Article 1 section 10 of the Iowa Constitution, the proceeding at issue must not only be a criminal proceeding but must also be a ‘critical stage’ the criminal proceeding.

Hannan v. State, 732 N.W.2d 45, 52 (Iowa 2007); *Iowa v. Tovar*, 541 U.S. 77, 80-81, 124 S.Ct. 1379, 1383, 158 L.2d 209 (2004).

Appellant had a statutory right to appointment of counsel on his Motion for Correction of Illegal Sentence because such motion constitutes a stage of criminal proceedings. Iowa's motion to correct illegal sentence procedure is authorized by the Rules of Criminal Procedure and is inherently a criminal proceeding, even though such motion would be filed subsequent to judgment entry. See Iowa R. Crim. P. 2.24(1) & (5). See also *State v. Dudley*, 766 N.W.2d 606, 618 (Iowa 2009) (noting the process for obtaining reimbursement of costs of legal assistance "takes place entirely in the context of the criminal case" and finding it significant that "[t]he legislature chose to make the process... part of the criminal case" in concluding such post-acquittal proceedings were an extension of the criminal proceedings requiring appointment of counsel); *State v. Casiano*, 922 A.2d 1065, 1072 n.15 (Conn. 2007) ("Although a motion to correct an illegal sentence may be brought at any time, the motion is not collateral to or separate from the underlying criminal action because it directly implicates the legality of the sentencing proceeding and is addressed to the sentencing court itself."). Rule 2.24 contemplates and recognizes that, even after judgment entry, the criminal sentencing court retains the inherent authority to correct a sentence that is illegal and void. See e.g., *State v. Ohnmacht*, 342 N.W.2d 838, 843

(Iowa 1983). That procedural rule thus “constitutes a narrow exception to the general rule that, once a defendant’s sentence has begun, the authority of the sentencing court to modify that sentence terminates.” *Casiano*, 922 A.2d at 1071.

A constitutional right to counsel also exists on a Rule 2.24 motion to correct illegal sentence because such motion is an extension of the sentencing proceedings. It is well-established that sentencing proceedings are a “critical stage” of the criminal proceeding to which the constitutional right to counsel extends. *State v. Alspach*, 554 N.W.2d 882, 883 (Iowa 1996); *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1205, 51 L.Ed.2d 393, 402 (1977). The Iowa Supreme Court has also recognized that certain proceedings that are commenced after the entry of judgment may nevertheless constitute “a phase of sentencing” to which the right to counsel extends. *Alspach*, 554 N.W.2d at 883. Specifically, the Court has held that an indigent defendant is entitled to counsel at a restitution hearing that is instituted as part of the criminal case (rather than as a separate civil proceeding) because it is, in effect, part of the sentencing proceeding. *Id.* at 883-84.

In the present case, Appellant’s Motion for Correction of Illegal

Sentence argued that the mandatory imposition of lifetime parole supervision under section 903B.1 amounted to an illegal sentence in that it violated the constitutional protections against (1) a Bill of Attainder, (2) Self-Incrimination under the 5th Amendment, and because it violates (3) the Equal Protection Clause of the 14th Amendment, (4) the Constitutional right to freedom of association, (5) the Constitutional right to marry and rear children, (6) the Constitutional right to interstate travel, (7) the Constitutional right to freedom from bodily restraint, (8) Separation of Powers, and (9) because it is unconstitutionally vague. Appellant's Motion to Amend his Motion for Correction of Illegal Sentence (which was written and mailed before the Court's denial, but filed shortly afterwards) attempted to add that it violated the constitutional protections against (10) double jeopardy, (11) Ex Post Facto laws, and (12) cruel and unusual punishment. (App. 38; App. 58) Because a Chapter 903B special sentence "is a part of [the defendant's] sentence", Appellant's challenge was to his sentence. *State v. Hallock*, 765 N.W.2d 598, 605-606 (Iowa Ct. App. 2009); *State v. Hollingsworth*, No. 09-0456, 2009 WL 5126331, at *2 (Iowa Ct. App. Dec. 30, 2009); *State v. Cortez*, No. 08-0882, 2009 WL 928873, at *2-3 (Iowa Ct. App. April 8, 2009).

A sentence which is unconstitutional as cruel and unusual punishment or as a violation of ex post facto protections, or if a sentence is in excess of that authorized by statute, it is an illegal sentence. *State v. Bruegger*, 773 N.W.2d 862, 871 (Iowa 2009); *State v. Lathrop*, 781 N.W.2d 288, 293 (Iowa 2010); *Tindell v. State*, 629 N.W.2d 357, 359 (Iowa 2001). Similarly, if a sentence is unconstitutional because it violates constitutional protections against Double Jeopardy, it is illegal. See *Hill v. United States*, 368 U.S. 424, 430, 82 S.Ct. 468, 472, 7 L.Ed.2d 417, 422 (1962).

Because Appellant's Motion for Correction of Illegal Sentence was a stage of the criminal proceeding, he was statutorily entitled to the appointment of counsel under Iowa Code section 815.10 and Iowa Rule of Criminal Procedure 2.28(1). Additionally, because Appellant's Motion for Correction of Illegal Sentence was a phase of sentencing, it was a critical stage of the criminal process at which he was constitutionally entitled to counsel under the Sixth Amendment of the United States Constitution and Article I section 10 of the Iowa Constitution.

b) Under the "Cases" clause of Iowa Const. Art. I, section 10, the motion to correct illegal sentence implicates Appellant's life or liberty.

Article I section 10 of the Iowa Constitution is worded more broadly

than the Sixth Amendment, in that it confers a right to the assistance of counsel not only in “all criminal prosecutions” but also “in cases involving the life, or liberty of an individual...” Iowa Const. art. I, section 10; see also *State v. Young*, 863 N.W.2d 249, 256-257 & 279 (Iowa 2015). A motion for correction of illegal sentence clearly implicates the life or liberty of the individual that is restricted by the purportedly illegal and void sentence. *Id.* at 279. A right to counsel should therefore have been afforded under Article I section 10 of the Iowa Constitution, even if it is not afforded under the Sixth Amendment of the Federal Constitution.

c) Due Process: Fundamental fairness required appointment of counsel.

Even if this Court finds that a Motion for Correction of Illegal Sentence is not a criminal proceeding to which a Sixth Amendment/ Article I section 10 right to counsel attaches, the fundamental fairness required by the due process protections of the Federal and Iowa Constitutions would nevertheless require appointment of counsel. Iowa Const. Art. I, sec. 9; U.S. Const. Amends. V, XIV; *Gagnon v. Scarpelli*, 411 U.S. 778, 790-791, 93 S.Ct. 1756, 1764, 36 L.Ed.2d 656 (US 1973); *Pfister*, 688 N.W.2d at 795-96; *Larson v. Bennett*, 160 N.W.2d 303, 304-306 (Iowa 1968).

Although largely left to the court's discretion, there is a presumption that counsel should be provided in cases where "the individual requests counsel and appears to make "a timely and colorable claim." *Gagnon*, 411 U.S. at 790, 93 S.Ct. at 1764, 36 L.Ed.2d at 666. See also *Furgison v. State*, 217 N.W.2d 613, 615 (Iowa 1974). It should also be considered whether the individual is "capable of speaking effectively for himself" on the issue or whether counsel will affect the likelihood of a reliable outcome. *Gagnon*, 411 U.S. at 790, 93 S.Ct. at 1764, 36 L.Ed.2d at 666.

Ultimately, however, harmless error analysis is not applicable to situations where a defendant has been denied the assistance of counsel. *State v. Rater*, 568 N.W.2d 655, 661 (Iowa 1997). The erroneous deprivation of counsel can never be construed as harmless error. *State v. Cooley*, 608 N.W.2d 9, 17-18 (Iowa 2000). When the court denies a defendant the right to counsel, the matter must be reversed and remand with directions that the defendant be appointed counsel prior to the district court's consideration and resolution of the merits of the claim. See *Alspach*, 554 N.W.2d at 884.

Given the complicated legal and factual issues raised by Appellant's Motion for Correction of Illegal Sentence, appointment of counsel was

necessary under due process considerations of fundamental fairness.

Therefore, this matter should be reversed and remanded with directions that Appellant be appointed counsel and be permitted to confer with appointed counsel on the Motion, prior to the district court's consideration and resolution thereof.

2. Denial of right to be heard, and failure to give any explanation of the basis for dismissing the motion.

Due Process of law is guaranteed by both the United States and Iowa Constitutions. See Iowa Const. Art. I, Sec. 9; U.S. Const. Amends. V, XIV. Due process is the notion that fundamental fairness is necessary to ensure reliability of legal proceedings. Procedural Due Process therefore is not a technical conception with fixed content. *State v. Izzolena*, 609 N.W.2d 541, 552 (Iowa 2000). Instead, Procedural Due Process is “flexible and calls for such procedural protections as the particular situation demands.” *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484, 494 (1972). At a minimum, “procedural due process requires notice and opportunity to be heard in a proceeding that is adequate to safeguard the right for which the constitutional protection is invoked.”

State v. Willard, 756 N.W.2d 207, 214 (Iowa 2008) (internal quotation marks omitted).

In *State v. Clayton*, No. 13-1650, 2014 WL 7343315, at *1 (Iowa Ct. App. Dec. 24, 2014), our Court of Appeals held that the defendant was not entitled to a hearing in the district court because his pro se “motion to correct an illegal sentence did not [itself] establish an inference of gross disproportionality between the underlying claim and the sentence” – namely the threshold prong of the three-step *Solem* test for gross proportionality. This approach overlooks the fact that the first prong of the *Solem* test is itself a highly complicated and fact specific inquiry – turning on the particular characteristics and circumstances of this defendant and this crime. Where the determination at issue turns on important questions of fact, due process requires an evidentiary hearing. See *Jackson v. Denno*, 378 U.S.368, 391-92, 84 S.Ct. 1774, 1789 (1964) (where issue to be determined turns on factual questions, a reliable resolution requires a hearing; due process required an evidentiary hearing before ruling on motion to suppress allegedly involuntary confession); *State v. Winfrey*, 221 J.W.2d 269, 271 (Iowa 1974) (“To meet due process requirements the trial court was required to conduct a pretrial evidentiary hearing” considering the totality of the

circumstances to determine admissibility of defendant's statements); *Dykstra v. Iowa Dist. Ct. for Jones Co.*, 783 N.W.2d 473, 482 (Iowa 2010)

("Generally a person has a constitutional due process right to an evidentiary hearing in accordance with contested case procedures if the underlying proceeding involves adjudicative facts, i.e., individualized facts peculiar to the parties....") (quotation marks omitted). See also *Bruegger*, 773 N.W.2d at 886 ("The Solem-type approach for evaluating [a gross disproportionality] cruel-and-unusual-punishment claim cannot be applied without a proper record."); *Oliver*, 812 N.W.2d at 649-50 ("Creating a proper record would require giving the defendant an opportunity to fully explain the facts and circumstances of the prior offense" and "giving the State a chance to present evidence of the impact on the victim and her family, the defendant's lack of remorse, his inability to respond to rehabilitative services, and the need to incapacitate the defendant."); because "both Oliver and the State presented the type of evidence we felt was lacking in Bruegger" to the sentencing court which considered the cruel and unusual challenge, "[r]emand in this case [for a further hearing] is... unnecessary" and it can be decided on existing record).

Absent a hearing on the complex factual and legal questions involved,

the district court was not in a position to rule on the complex legal issues, such as the cruel and unusual punishment (gross proportionality) issue raised. See *State v. Denato*, 173 N.W.2d 576, 579 (Iowa 1970) (“absent any hearing on the factual situation involved, [the district court] was not in a position to fairly” decide the issue, such that matter must be remanded for a proper hearing); *State v. Trudo*, 253 N.W.2d 101, 104 (Iowa 1977). It was therefore error for the district court to deny Appellant’s Motion for Correction of Illegal Sentence without a hearing.

In the alternative, if this Court decides that Appellant was not entitled to a full evidentiary hearing, then the district court should at minimum have afforded Appellant notice and an opportunity to respond to the court’s sua sponte proposal for summary dismissal before such dismissal was ultimately entered. See e.g., *Manning v. State*, 654 N.W.2d 555 (Iowa 2002) (discussing similar procedure statutorily required under PCR statute). Absent at least such notice and opportunity to be heard, he was not afforded due process on his illegal sentence claims.

Due process also requires findings or an explanation of the basis for a court’s decision. See *Morrissey*, 408 U.S. at 489, 92 S.Ct. at 2604, 33 L.Ed.2d at 499; *State v. Hughes*, 200 N.W.2d 559, 562 (Iowa 1972).

Due process required such findings in the present case. While the court need not “file an opinion or make conclusions of law”, there should at least be on-the-record findings sufficient to “indicate what evidence the court relied on...” *State v. Lillibridge*, 519 N.W.2d 82, 83 (Iowa 1994).

In the present case, the district court’s brief order denying Appellant’s motion to correct illegal sentence fails to give any meaningful reason for the denial of his motion. Without hearing, the Court denied his Motion for Correction of Illegal Sentence filed on August 9, 2016, stating that it was

denied for all the same reasons a previous Motion for Correction of an Illegal Sentence was denied. That order was filed on May 26, 2016. Defendant’s motion to have counsel appointed for this motion is also denied. (App. 56)

However, the Motion for Correction of Illegal Sentence filed on August 9, 2016, was based on completely different grounds than the Motion for Correction of Illegal Sentence that was denied in May of 2016. (App. 33; App. 38) By stating that the Motion filed in August was denied “for all the same reasons”, the Court was basically admitting that it did not really read the two Motions and provided no real reason for the denial. And the reasons for the denial of the Motion filed in May of 2016 are not valid reasons for denying the Motion filed in August of 2016... they were based on completely different grounds. The written order does not give us any

assurance that the district court even read or considered his Motion for Correction of Illegal Sentence filed on August 9, 2016.

Further, the District Court did no better in handling the Motion to Amend (and the additional grounds for correction of illegal sentence listed in the supporting documents) which was filed on August 29, 2016... three days after the District Court's sua sponte dismissal of the August 9th Motion. The Court treated that as a 3rd separate Motion for Correction of Illegal Sentence and denied it on September 7, 2016, stating:

Defendant filed a third motion for correction of illegal sentence. This motion is denied for all of the same reasons the previous two motions were denied. (App. 63)

Unfortunately, the Motion to Amend and supporting documents filed with it actually raised additional grounds, including a claim of cruel and unusual punishment. The Court's order stating that this was also denied "for all the same reasons the two previous motions were denied" basically tells us nothing about why it was denied. The first Motion filed back in May of 2016 was denied because the Court has no control over when the Appellant is released from his special sentence. (App. 36) That reason simply does not apply to the grounds raised in the Motion filed on August 9th or the Motion to Amend (and its supporting documents) filed on August 29th. Cf.

Fuhrmann v. State, 433 N.W.2d 720, 722 (Iowa 1988) (the absence of a written ruling may indicate the trial court did not properly exercise its discretion).

D. Conclusion.

Appellant respectfully requests that this Court reverse the district court's ruling on his pro se Motion for Correction of Illegal Sentence (including his Motion to Amend and its supporting documents), and remand this matter for an evidentiary hearing with counsel and on-the-record findings.

Division II:

The existing record is sufficient to establish that the lifetime special sentence imposed on Appellant pursuant to Iowa Code section 903B.1 is grossly disproportionate to the crime that Jefferson committed, thereby violating the cruel and unusual punishment proscriptions contained within the United States Constitution and the Constitution of the State of Iowa. In the alternative, the matter should be remanded for an evidentiary hearing so that a proper evidentiary record can be developed.

A. Preservation of Error.

If a sentence is unconstitutional as cruel and unusual punishment

under the State or Federal Constitutions, it is an illegal sentence. *State v. Bruegger*, 773 N.W.2d 862, 871 (Iowa 2009). A defendant may challenge an illegal sentence at any time.” *Id.* at 869.

The issue of whether Appellant’s 903B.1 lifetime special sentence constitutes cruel and unusual punishment was alluded to in Appellant’s Motion for Correction of Illegal Sentence filed on August 9, 2016, and was specifically raised in the Amended Motion for Correction of Illegal Sentence which was attached to the Motion to Amend filed by Appellant on August 29, 2016. Both the Motion for Correction of Illegal Sentence filed by Appellant on August 9, 2016, and the Motion to Amend (and its supporting documents) filed by Appellant on August 29, 2016, should be included in the subject matter of this appeal. The Motion to Amend (and the attached Amended Motion for Correction of Illegal Sentence) was signed by the Appellant on August 23rd and then mailed to the Clerk’s office before the District Court’s sua sponte dismissal (without prior notice) filed on August 26, 2016. The District Court then treated the Motion to Amend as a separate third Motion for Correction of Illegal Sentence and denied that by written order on September 7, 2016. Notice of Appeal was filed in this matter on September 9, 2016, which was signed by Appellant on September 7th and

would have been mailed by Appellant before he even saw the District Court's Order filed on September 7, 2016. It should also be pointed out that if counsel had been appointed to represent Appellant in this matter, the Appellant's various Motions would have been cleaned up and the cruel and unusual punishment argument would have been a focal point at the subsequent evidentiary hearing. It would be patently unjust to disregard Appellant's cruel and unusual punishment challenge just because the Court sua sponte denied his August 9th Motion without notice or hearing while the Motion to Amend was in transit in the mail. The Notice of Appeal in this matter should apply and preserve error for both the Motion for Correction of Illegal Sentence filed on August 9th and the Motion to Amend (and supporting documents) filed on August 29th.

Error was thus preserved by Appellant's filing his Motion for Correction of Illegal Sentence on August 9, 2016, the district court's subsequent denial of the motion without affording Appellant a hearing, or any meaningful explanation of the basis for denial, and the timely filing of the notice of appeal in this matter.

To the extent that the State challenges the Appellant's right to a direct appeal from the denial of his Motion for Correction of an Illegal Sentence,

the Appellant notes that he did in fact file a Petition for Writ of Certiorari in this matter. (App. 65) That Petition was denied, at least in part, because of the existence of this pending appeal in which Appellant already had counsel appointed to assist him. (App. 73)

In addition, Defendant respectfully requests that review should be accepted by writ of certiorari or by discretionary review. See Iowa R. App. P. 6.108 (“If any case is initiated by a notice of appeal, an application for interlocutory appeal, an application for discretionary review, or a petition for writ of certiorari and the appellate court determines another form of review was the proper one, the case shall not be dismissed, but shall proceed as though the proper form of review had been requested.”); Iowa R. App. P. 6.107(1) (permitting a party to petition for a writ of certiorari on a claim that the “district court judge... exceeded the judge's jurisdiction or otherwise acted illegally.”); Iowa Code section 814.6(2)(e) (2013) (authorizing the defendant to pursue discretionary review from “An order raising a question of law important to the judiciary and the profession.”). See also *Tindell v. Iowa Dist. Court for Scott Co.*, 600 N.W.2d 308, 309 (Iowa 1999) (holding there was no appeal as of right from the denial of a section 902.4 motion for reconsideration of sentence, but electing to treat defendant’s notice of appeal

as a petition for writ of certiorari and granting the writ).

Acceptance of review under a writ of certiorari is proper because the district court judge “acted illegally” in failing to correct the illegal sentence and in failing to afford Appellant the procedural protections to which he was entitled. Iowa R. App. P. 6.107(1). Acceptance of discretionary review is also proper because the instant case “rais[es]... question[s] of law important to the judiciary and the profession.” Iowa Code section 814.6(2)(e) (2013).

The Supreme Court’s guidance is necessary on the question of when a gross disproportionality (formerly termed as-applied) Cruel and Unusual Punishment challenge to a 903B.1 lifetime special sentence may lie, specifically including the question of whether the threshold inquiry is satisfied under the circumstances of the present case. Such guidance would assist district courts who not-infrequently face such questions. Appellant’s challenge to his 903B sentence is ripe as he has discharged the underlying sentence and is currently on 903B supervision. Appellant also specifically requested counsel and an evidentiary hearing on his motion, which was summarily denied without either and without any meaningful explanation of the basis for the denial. Thus, to the extent there is no appeal as of right, review should be accepted as a matter of discretionary

review or writ of certiorari.

B. Standard of Review.

A denial of a Motion for Correction of Illegal sentence is reviewed for correction of errors at law. *State v. Davis*, 544 N.W.2d 453, 455 (Iowa 1996). To the extent that the issue also involves interpretation and application of constitutional provisions, review is de novo. *State v. Brooks*, 760 N.W.2d 197, 204 (Iowa 2009); *State v. Iowa Dist. Ct.*, 801 N.W.2d 513, 517 (Iowa 2011).

C. Argument.

Appellant was convicted of Sexual Abuse in the Third Degree in violation of Iowa Code section 709.4 which is a class C felony. Pursuant to Iowa Code section 903B.1, Appellant was therefore also sentenced to a “special sentence” for the rest of his life. Iowa Code section 903B.1 (2013). For the duration of the lifetime special sentence, the department of corrections will have the power to “transfer [Appellant] between [corrections] continuum levels two through four....” *Kolzow v. State*, 813 N.W.2d 731, 737-738 (Iowa 2012). Such levels range from supervised

release on parole, to placement in a residential facility, placement on twenty-four hour electronic monitoring, house arrest, or even “[s]hort-term” incarceration. Iowa Code section 901B.1(1)(b)-(d) (2013). The department of corrections has discretion to determine whether a defendant begins his special sentence at a work release facility or whether he is instead be released to parole. Iowa Code sec. 903B.1; See *Kolzow*, 813 N.W.2d at 735, n.6. A defendant who violates violates the terms of his supervision and/or the conditions of his special sentence faces revocation of his release and an indeterminate prison sentence of two years for a first revocation, and five years for a second or subsequent revocation. Iowa Code § 903B.1 (2013).

The 8th Amendment to the United States Constitution and Article I, section 17 of the Iowa Constitution prohibit the infliction of cruel and unusual punishment. Iowa Const. art. I, § 17; U.S. Const. amend. VIII. “[I]t is a precept of justice that punishment for crime should be graduated and proportioned to the offense.” *Weems v. United States*, 217 U.S. 349, 367, 30 S.Ct. 544, 549, 54 L.Ed.2d 793 (1910).

A defendant is therefore permitted to raise a ‘gross disproportionality’ challenge to his sentence based upon an individualized “comparison between

a defendant's sentence and his particular crime.” *State v. Oliver*, 812 N.W.2d at 648. The relevant comparison is between a defendant's sentence and his particular crime, meaning there is an emphasis on the specific facts and circumstances of the particular defendant's case. *State v. Oliver* at 648; *State v. Bruegger*, 773 N.W.2d 862, 884 (Iowa 2009); *Graham v. Florida*, 560 U.S. 48, 59, 130 S.Ct. 2011, 2022, 176 L.Ed.2d 825, 837 (2010) (under the United States Constitution, a defendant may challenge the length of a sentence “given all the circumstances in a particular case”).

The three part analysis and particular factors to be considered were set out in *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), applies. The threshold determination is whether the sentence imposed against this particular defendant “leads to an inference of gross disproportionality.” *Oliver*, 812 N.W.2d at 647. Only if this threshold is met will the Court consider prongs two and three: a comparison of the challenged sentence to sentences for other crimes within the jurisdiction and a comparison of the challenged sentence to sentences in other jurisdictions for the same or similar crimes. *Id.*

In addition, the Court in *Oliver* held that “review of criminal sentences for gross disproportionality under the Iowa Constitution should

not be a toothless review and [will entail] a more stringent review than [is] available under the Federal Constitution.” *Id.* at 650 (internal quotation marks omitted).

If the record is sufficient to evaluate the constitutionality of the sentence as applied to the defendant, the appellate court will resolve the issue on appeal. See *Oliver* at 649-50. However, if the record is lacking evidence necessary to make the determination, the case will be remanded for an appropriate hearing. See *Bruegger*, 773 N.W.2d at 886.

In this case, the District Court did not allow the Appellant a hearing to develop a record, and the specific issue of whether the 903B special sentence was cruel and unusual in light of Appellant’s individual circumstances was not addressed by the district court in its decision. Therefore, if this Court concludes that the existing record on appeal does not establish that the lifetime special sentence is cruel and unusual as applied to Appellant, this case should be remanded for an evidentiary hearing where both Appellant and the State would have an opportunity to present evidence bearing on that determination. See *Id.* at 885-86.

1) Ripeness.

The question of whether a special sentence is grossly disproportionate

as applied to a particular defendant is not ripe for review unless the defendant has commenced his 903B parole supervision. *State v. Tripp*, 776 N.W.2d 855, 859 (Iowa 2010). In this case, Appellant’s challenge to his sentence is ripe because he has discharged his underlying sentence and started his 903B supervision. He actually started serving it in December of 2011. (App. 41)

2) Comparison of the gravity of the crime with the sentence imposed.

The first (threshold) hurdle in the analysis is to “balance the gravity of the crime against the severity of the sentence.” *State v. Oliver*, 812 N.W.2d at 650 (quoting *State v. Bruegger*, 773 N.W.2d at 873). This comparison requires a consideration of the unique facts and circumstances of the case, such as the details of the crime and relevant prior criminal history, the impact on the victim and her family, the defendant’s level of remorse, his amenability to rehabilitative services, and the need to incapacitate the defendant. *Bruegger*, 773 N.W.2d at 885; *Oliver*, 812 N.W.2d at 649.

The particular circumstances of this case create an inference of gross disproportionality. Appellant was convicted of a crime of lesser culpability prohibited by broad statutes subject to harsh punishment.

Appellant, like Bruegger and Oliver, was convicted of violating Iowa Code section 709.4, commonly referred to as statutory rape. While the sentencing Order did not specify the actual subsection, the Amended Trial Information described the offense as “Sexual Abuse in the Third Degree (Statutory)”.

(App. 6) It was also reflected in his sentencing in November of 2008 when the court stated that Defendant “entered a plea of guilty to Sexual Abuse in the Third Degree in violation of Iowa Code Section 709.4(2)(c)(4)” and further provided that “the plea was to a class “C” felony, which is not a forcible felony.” (11/13/2008 Sentencing Transcript, p. 1, ln. 22 through p. 2, ln. 1.) Specifically, Appellant had sex with someone who was fourteen years old and at least four years younger than him. Iowa Code § 709.4(2)(c)(4) (2013). Statutory rape has been described as a “broadly framed crime.” *State v. Bruegger*, 773 N.W.2d at 884. The victim was fourteen and Appellant was twenty-one years old. Appellant is not a repeat sex offender and there is no indication that he presents a risk for reoffending. (App. 13). In fact, other than this matter, the Appellant’s PSI does not reflect any other convictions at the time of sentencing. There are two unrelated misdemeanor arrests listed, but they both indicate no disposition. (App. 13) While the complaint that was initially filed in this matter

detailed a more aggravated offense, that is not what the Appellant plead guilty to. It is not what he was convicted of or sentenced for either. (App. 25; 11/13/2008 Sentencing Transcript, p. 1, ln. 22 through p. 2, ln. 1.)

It is also significant that Appellant was himself a young adult at the time of the offense. Though not actually a juvenile, he was only nineteen. There is no indication in the PSI regarding Appellant's cognitive development or maturity, and the section dealing with his education is simply blank. (App. 14) Significantly, empirical research has demonstrated that lessons we've learned about juveniles under eighteen also have applicability to young adults up through their early twenties. See *State v. Null*, 836 N.W.2d 41, 55 (Iowa 2013) (discussing that brain development and psychological maturation, particularly as to reasoning, abstract thinking, planning, anticipation of consequences, and impulse control, continues into the early twenties); *State v. Seats*, No. 13-1960, 2015 WL 3930169, at *10 (Iowa June 26, 2015) ("We recognize that in *Roper [v. Simmons]*, 543 U.S. 551, 125 S.Ct.1183, 161 L.2d 1 (2005)], the line between being a juvenile and an adult was drawn... at eighteen years of age. Yet, as we stated in *Null*, current science demonstrates that the human brain continues to develop into the early twenties....[T]he research clarifies

that substantial psychological maturation takes place in middle and late adolescence and even into early adulthood.”) (internal quotation marks and citations omitted). Though an individual’s status as a young adult does not give rise to a categorical cruel and unusual punishment challenge, that does not mean such status is wholly irrelevant for purposes of a gross-disproportionality (as-applied) challenge. See e.g., *Bruegger*, 773 N.W.2d at 883-84. The psychological realities of the development of adolescents and young adults must be taken into consideration in a gross-disproportionality analysis.

Appellant’s lack of prior criminal history, young age, and relatively lower culpability comparing the offense of statutory rape versus the other possible felonies that would give rise to a 903B.1 lifetime special sentence must be compared with the harshness of his sentence. Pursuant to section 903B.1, Appellant was committed to the custody of the department of corrections for the rest of his life upon his discharge of his underlying sentence. For the duration of his lifetime, the department of corrections will have the power to “transfer [Appellant] between [corrections] continuum levels two through four....” *Kolzow*, 813 N.W.2d 737-38. Such levels range from supervised release on parole, to placement in a

residential facility, placement on twenty-four hour electronic monitoring, house arrest, or even “[s]hort-term” incarceration. Iowa Code section 901B.1(1)(b)-(d) (2013). The department of corrections has the discretion to determine whether a defendant begins his special sentence at a work release facility or whether he should instead be released on parole.

See *Kolzow*, 813 N.W.2d at 735 n.6. While on parole, he will be subject to whatever terms and conditions the department deems appropriate at the time. Thus, the special sentence will subject Appellant to the control of the government with the threat of prison time for the rest of his life.

In this case, the Appellant is currently serving a prison sentence for a revocation from his lifetime special sentence supervision, based upon what are basically technical violations – they are not based upon new criminal conduct. 903B Special sentence supervision routinely requires the offender to engage or refrain from engaging in various behaviors which would not otherwise be unlawful or criminal in the absence of the special supervision sentence. See Iowa Admin. Code r. 201-45.2 (7/22/2015). In this way, an individual on special sentence supervision can violate and be revoked from parole based on what is otherwise non-criminal conduct. For example, the Appellant is not allowed to have any contact with minor

children, including his own biological children. (Whether this is indeed appropriate would have to be determined through an evidentiary hearing, which simply didn't occur in this case.) The Iowa Department of Corrections has reported "an unexpectedly high rate of revocation among those released to the special sentence, particularly given past research that has shown Iowa sex offenders having very low rates of re-arrest and/or return to prison." IOWA DEPARTMENT OF CORRECTIONS, RESEARCH IN BRIEF, SPECIAL SENTENCE REVOCATIONS, p.1 (May 2010) (available at <http://www.doc.state.ia.us/Publications/RIB-May10.pdf>). As of December 31, 2009, about 22% of sex offenders on special sentence supervision had been revoked. Id. Of those revocations, 36.2% were for non-sex-related violations unrelated to illegal behavior. Id. at 4. "Estimates show that special sentence revocations not based upon new offenses will be the largest contributor to increases in the prison population of sex offenders as the number of new commitments for sex offenses has been stable or decreasing." SEX OFFENDER RESEARCH COUNCIL, REPORT TO THE IOWA GENERAL ASSEMBLY, p.16 (Criminal & Juvenile Justice Planning January 2012). See also Legislative Services Agency, Fiscal Serv. Division, Fiscal Update, p.13 (Oct. 13, 2014)

(available at <https://www.legis.iowa.gov/docs/publications/FU/402805.pdf>)
 (“Most of the special sentence revocations were for technical violations, not new crimes.”)

At the time of his arrest, Appellant was just 21 years old. With his 903B lifetime special sentence, he will not experience another day of freedom for the rest of his life. The government can control what he does and where he goes for the next 40, 50, perhaps even 60 or 70 years.

State v. Mossman, 281 P.3d 153, 172 (Kan. 2012) (Johnson, J., dissenting).

The unique circumstances of this case create an inference of gross disproportionality under both the Iowa and the United States Constitutions. Accordingly, the threshold inquiry is met and this Court should proceed to consider the final two prongs of the *Solem* analysis.

3) Comparison of sentences imposed for other crimes within the jurisdiction

The second prong of the *Solem* analysis involves a comparison of the Appellant’s sentence to sentences for other crimes within the jurisdiction.

State v. Oliver, 812 N.W.2d at 647. Such a comparison shows that the sentence in this case is excessive and supports the conclusion that a lifetime

special sentence under 903B.1 is grossly disproportionate to the offense that Appellant committed.

There are only a limited number of crimes in Iowa that are subject to the lifetime special sentence found in section 903B.1. As discussed above in subsection 2, the other offenses covered by section 903B.1 include causing a minor to engage in a sex act or a simulated sex act with knowledge that the act will be filmed or recorded, forcible rape which results in serious injury, forcible rape while displaying a dangerous weapon or threatening to cause serious injury, raping a child under the age of twelve, gang rape, and committing a sex act with someone who is unconscious or suffering from a mental defect such that he or she cannot consent. See Iowa Code sections 728.12, 709.2, 709.3, 709.4(2),(3) and (4) (2013). Appellant plead guilty to and was convicted of statutory rape in violation of Iowa Code section 709.4(2)(c)(4), a non-forcible class “C” felony. (11/13/2008 Sentencing Transcript, p. 1, ln. 22 through p. 2, ln. 1.) In comparison to the offense for which Appellant was convicted, the other crimes which would subject someone to a 903B.1 lifetime special sentence are much more serious, and usually forcible.

Sexual abuse in the third degree in violation of Iowa Code section

709.4(2)(c)(4), as stated above, is a non-forcible class “C” felony. Many other class “C” felonies involving even death or serious injury are not subject to the section 903B.1 mandatory lifetime special sentence, including voluntary manslaughter, feticide, nonconsensual termination of pregnancy, assisting suicide, assault using an object to penetrate the vagina or anus, intimidation with a weapon, stalking, and providing material support to terrorism, just for examples. See Iowa Code sections 707.4, 707.7, 707.8, 707A.2, 708.2(5), 708.6, 708.11(3), and 708A.4 (2013). The maximum ten-year prison sentence imposed for class “C” felonies is deemed sufficient to adequately punish individuals who have been convicted of these offenses.

Normally, Iowa courts give “substantial deference” to the penalties the legislature has established for various crimes because “criminal punishment can have different goals, and choosing among them is within a legislature’s discretion,” *State v. Oliver*, 812 N.W.2d at 650 (quoting *Graham*, 560 U.S. at 71, 130 S.Ct. at 2028, 176 L.Ed.2d at 843). While legislative judgments are important, however, they do not “wholly determine the controversy, for the Constitution contemplates that in the end [the Courts’] judgment will be brought to bear on the question....” *State v. Bruegger*, 773 N.W.2d at 874 (quoting *Atkins v. Virginia*, 536 U.S. 304,

312, 122 S.Ct. 2242, 2247, 153 L.Ed.2d 335, 345 (2002)) (internal quotation marks omitted).

The stated goal of the 903B.1 lifetime special sentence is to prevent repeat offenses by sex offenders and protect the public because sex offenders supposedly have a high risk of reoffending. See e.g., *State v. Wade*, 757 N.W.2d 618, 626 (Iowa 2008) (discussing the high risk of reoffending presented by sex offenders). However, most sex offenders actually have relatively low rates of recidivism. See Richard Tewksbury, Wesley G. Jennings, & Kristen Zgoba, *Sex Offenders: Recidivism and Collateral Consequences*, 56 (National Criminal Justice Reference Service March 2012) (available at <https://www.ncjrs.gov/pdffiles1/nij/grants/238060.pdf>); IOWA DEPARTMENT OF CORRECTIONS, RESEARCH IN BRIEF, SPECIAL SENTENCE REVOCATIONS, p.1 (May 2010). Indeed, the Sex Offender Research Council, after studying the issue of mandatory post-sentence parole as required by section 903B.1, concluded that “[t]he current policy of set terms of post-sentence parole is not supported by research, is not the most effective use of limited resources, and does not contribute to increased public safety.” SEX OFFENDER RESEARCH COUNCIL, REPORT TO THE IOWA GENERAL ASSEMBLY, p.17

(Criminal & Juvenile Justice Planning January 2012) (emphasis added); and p.4 (Criminal & Juvenile Justice Planning January 2013) (emphasis added). Accordingly, the deference normally granted to the legislative determination of appropriate punishment should be tempered.

The gravity of Appellant's offense, while serious, does not merit a life sentence. Other offenses, which necessarily involve violence towards others, are punished by an equal term of imprisonment with no requirement for additional supervision of the defendant following release from incarceration. Therefore, the special life sentence for sexual abuse in the third degree in violation of Iowa Code section 709.4(2)(c)(4) in Appellant's case is grossly disproportionate.

4) Comparison of the sentences for similar crimes in other jurisdictions

The third prong of the *Solem* analysis requires a consideration of sentences in other jurisdictions for the same or similar crimes. *State v. Oliver*, 812 N.W.2d at 647. There are several other states whose laws provide for lifetime supervision for certain sex crimes, including statutory rape. See *State v. Mossman*, 281 P.3d 153, 164-165 (Kan. 2012)

(identifying states which have either mandatory or permissive lifetime post-release supervision for an adult committing a crime of having sex with a minor). As stated in *Mossman*, a comparison of statutes enacted by the various states is difficult because of the wide variety of ways that states categorize a crime committed by an adult having sex with a 14 or 15 year old child, Appellant acknowledges that a number of states impose some form of lifetime supervision on a defendant convicted of statutory rape. However, imposition of lifetime supervision on a defendant convicted of statutory rape is not a majority position. In other words, there does not appear to be a national consensus on the propriety of lifetime supervision for sex offenders. *State v. Mossman*, 281 P.3d at 166 (“It is fair to say that less than half of the states provide for lifetime post-release supervision of some or all sex offenders.”).

Regardless, Appellant respectfully urges that this third prong of the *Solem* analysis should be deemed less significant to an analysis under the Iowa Constitution than an analysis under the Federal Constitution. Because the Federal Constitution is concerned with standards for the nation as a whole, it is relevant to consider how other states address the issue. However, the Iowa Constitution only applies to Iowa, and so how other states punish

similar crimes might be informative or persuasive, but it is ultimately not conclusive on whether the Iowa Constitution permits the challenged sentence. *State v. Lyle*, 854 N.W.2d 378, 387 (Iowa 2014) (“We... would abdicate our duty to interpret the Iowa Constitution if we relied exclusively on the presence or absence of a national consensus regarding a certain punishment.”). Therefore, this third prong should be given less weight in the analysis under the Iowa Constitution.

D. Conclusion.

Under the specific facts and circumstances of this case, the section 903B.1 lifetime special sentence is grossly disproportionate to the crime Appellant committed and therefore violates his state and federal constitutional rights to be free from cruel and unusual punishment. Appellant’s lifetime special sentence should be vacated and the case remanded for an individualized resentencing.

In the alternative, if this Court determines that the record is insufficient to establish Appellant’s individualized gross disproportionality claim, this case should be remanded for further proceedings to allow the parties to present evidence relevant to the issues.

(Counsel for Appellant readily acknowledges that significant portions of this brief were duplicated from a brief written by Assistant Appellate Defender Vidhya K. Reddy in *State v. Webber*, 15-0439, wherein she faced essentially the same issues.)

REQUEST FOR ORAL ARGUMENT

The Appellant hereby requests oral argument in this matter.

ATTORNEY'S COST CERTIFICATE

I hereby certify that the cost of printing Appellant's Final Brief is the sum of \$ 13.60 .

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1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 10,139 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)(e) 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 Microsoft Word 2016 in 14 point Times New Roman.

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