IN THE SUPREME COURT OF IOWA
Supreme Court No. 16-1544

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

APPELLEE'S BRIEF

THOMAS J. MILLER
Attorney General of Iowa

SHARON K. HALL
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
(515) 281-4902 (fax)
sharon.hall@iowa.gov

MICHAEL J. WALTON
Scott County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLEE

FINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Federal Statutes

State Statutes/Codes

State Rules

Other Authorities

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the District Court Erred in Failing to Grant Jefferson's Request for Appointment of Counsel to Assist with His Motion for Correction of an Illegal Sentence (Section 903B.1 Special Sentence).

Authorities

Gagnon v. Scarpelli, 411 U.S. 778 (1973)
Greenholtz v. Inmates of Neb. Penal and Correctional Complex, 442 U.S. 1 (1979)
Pennsylvania v. Finley, 481 U.S. 551 (1987)
Atwood v. Vilsack, 725 N.W.2d 641 (Iowa 2006)
Dep't of Gen. Serv. v. R.M. Boggs Co., 336 N.W.2d 408 (Iowa 1983)
Dunbar v. State, 515 N.W.2d 12 (Iowa 1994)
Fuhrmann v. State, 433 N.W.2d 720 (Iowa 1988)
Furgison v. State, 217 N.W.2d 613 (Iowa 1974)
Glenn v. Farmland Foods, Inc., 344 N.W.2d 240 (Iowa 1984)
Gould v. State, 151 P.3d 261 (Wyo. 2006)
In re Johnson, 257 N.W.2d 47 (Iowa 1977)
Jordan v. State, 530 S.E.2d 42 (Ga. Ct. App. 2000)
Lado v. State, 804 N.W.2d 248 (Iowa 2011)
Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)
Larson v. Bennett, 160 N.W.2d 303 (Iowa 1968)
Leonard v. State, 461 N.W.2d 465 (Iowa 1990)
McNabb v. Osmundson, 315 N.W.2d 9 (Iowa 1982)
Meier v. Senecaut, 641 N.W.2d 532 (Iowa 2002)
Patrick v. State, 108 P.3d 838 (Wyo. 2005)
Pfister v. Iowa Dist. Ct. for Polk County, 688 N.W.2d 790 (Iowa 2004)
Staff Mgmt. v. Jimenez, 839 N.W.2d 640 (Iowa 2013)
State ex rel. Hamilton v. Snodgrass, 325 N.W.2d 740 (Iowa 1982)
State v. Alspach, 554 N.W.2d 882 (Iowa 1996)
State v. Casiano, 922 A.2d 1065 (Conn. 2007)
State v. Dudley, 766 N.W.2d 606 (Iowa 2009)

State v. Hendrickson, 2014 WL 7343338 (Iowa Ct. App. Dec. 24, 2014)
State v. Hernandez-Lopez, 639 N.W.2d 226 (Iowa 2002)
State v. Johnson, 2015 WL 6509543 (Iowa Ct. App. Oct. 28, 2015)
State v. Jones, 817 N.W.2d 11 (Iowa 2012)
State v. Loye, 670 N.W.2d 141 (Iowa 2003)
State v. Majeres, 722 N.W.2d 179 (Iowa 2006)
State v. Neary, 470 N.W.2d 27 (Iowa 1991)
State v. Seering, 701 N.W.2d 655 (Iowa 2005)
State v. Thomas, 547 N.W.2d 223 (Iowa 1996)
State v. Titus, 2016 WL 2745938 (Iowa Ct. App. May 11, 2016)
State v. Wentland, 2013 WL 105340 (Iowa Ct. App. Jan. 9, 2013)
State v. Wright, 456 N.W.2d 661 (Iowa 1990)
State v. Young, 863 N.W.2d 249 (Iowa 2015)
Tindell v. Iowa Dist. Ct., 600 N.W.2d 308 (Iowa 1999)
Wise v. State, 708 N.W.2d 66 (Iowa 2006)
Article IV, Section 2 of the U.S. Constitution
Article I, section 10 of the Iowa Constitution
Iowa Code § 709.4(2)(c)(4)
Iowa Code § 801.4(13) (2005)
Iowa Code § 814.6(1, 2)
Iowa Code § 815.9
Iowa Code § 815.10(1)
Iowa Code § 815.10(1)(a)
Iowa R. Crim. P. 2.28(1)
THE DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF IOWA 736 (W. Blair Lord rep., 1857)

II. Whether the District Court Correctly Rejected Jefferson's Cruel and Unusual Punishment Challenge to His Section 903B.1 Lifetime Special Sentence Without Granting an Evidentiary Hearing.

Authorities

Ewing v. California, 538 U.S. 11 (2003)
Graham v. Florida, 560 U.S. 48 (2010)
Greenholtz v. Inmates of Neb. Penal and Correctional Complex, 442 U.S. 1 (1979)
Smith v. Doe, 538 U.S. 84 (2003)
Solem v. Helm, 463 U.S. 277 (1983)
United States v. Moriarty, 429 F.3d 1012 (11th Cir. 2005)
Kolzow v. State, 813 N.W.2d 731 (Iowa 2012)
People v. Dash, 104 P.3d 286 (Colo. Ct. App. 2004)
State v. Tripp, 776 N.W.2d 855 (Iowa 2010)
State v. August, 589 N.W.2d 740 (Iowa 1999)
State v. Bruegger, 773 N.W.2d 862 (Iowa 2009)
State v. Bryant, 2015 WL 4469136 (Iowa Ct. App. July 22, 2015)
State v. Clayton, 2014 WL 7343315 (Iowa Ct. App. Dec. 24, 2014)
State v. Cohrs, 2016 WL 146526 (Iowa Ct. App. Jan. 13, 2016)
State v. Cronkhite, 613 N.W.2d 664 (Iowa 2000)
State v. Hernandez-Lopez, 639 N.W.2d 226 (Iowa 2002)
State v. Iowa Dist. Ct. for Scott County, 508 N.W.2d 692 (Iowa 1993)
State v. Klemme, 2011 WL 2112463 (Iowa Ct. App. May 25, 2011)
State v. Lyle, 854 N.W.2d 378 (Iowa 2014)
State v. McCurdy, 2014 WL 467916 (Iowa Ct. App. Feb. 5, 2014)
State v. Mossman, 281 P.3d 153 (Kan. 2012)
State v. Musser, 721 N.W.2d 758 (Iowa 2006)
State v. Null, 836 N.W.2d 41 (Iowa 2013)
State v. Oliver, 812 N.W.2d 636 (Iowa 2012)
State v. Poulson, 2012 WL 1864790 (Iowa Ct. App. May 23, 2012)

State v. Ragland, 836 N.W.2d 107 (Iowa 2013)
State v. Reed, 2015 WL 566625 (Iowa Ct. App. Feb. 11, 2015)
State v. Rubino, 602 N.W.2d 558 (Iowa 1999)
State v. Sallis, 786 N.W.2d 508 (Iowa Ct. App. 2009)
State v. Seering, 701 N.W.2d 655 (Iowa 2005)
State v. Vance, 2015 WL 4936328 (Iowa Ct. App. Aug. 19, 2015)
State v. Wade, 757 N.W.2d 618 (Iowa 2008)
U.S. Const. amend. VIII
Colo. Rev. Stat. § 18-1.3-1001 (2015)
Iowa Code § 709.4(2)(c)(4)
Iowa Code § 903B.1
Iowa Code § 906.15
Iowa Const. art. I, § 17
Me. Rev. Stat. tit. 17-A, §§ 1231(2)(C), 1252(4–E) (2015)
N.H. Rev. Stat. Ann. § 632-A:10-a (2015)
N.J. Stat. Ann. § 2C:43-6.4 (2015)
Neb. Rev. Stat. § 83–174.03 (2015)
Nev. Rev. Stat. § 176.0931 (2015)
Tenn. Code Ann. § 39-13-524 (2015)
W. Va. Code § 62-12-26 (2015)
Wis. Stat. § 939.615 (2015)
Iowa R. App. P. 6.903(2)(g)(3)
Iowa R. Crim. P. 2.24(5)(a)
Christopher C. Kendall, *Rape As a Violent Crime in Aid of Racketeering Activity*, 34 LAW & PSYCHOL. REV. 91 (2010)
Iowa Admin. Code r.201-45.2(1) (standard conditions)
Iowa Admin. Code r.201-45.2(2) (special conditions)
Iowa Criminal Justice and Juvenile Planning, *An Analysis of the Sex Offender Special Sentence in Iowa* (2015 Annual Report)

ROUTING STATEMENT

A challenge to the denial of a motion for correction of an illegal sentence without a hearing does not present a substantial issue of first impression. *See, e.g.*, *State v. Hendrickson*, 2014 WL 7343338, at *2 (Iowa Ct. App. Dec. 24, 2014); *State v. Clayton*, 2014 WL 7343315 (Iowa Ct. App. Dec. 24, 2014); *State v. Poulson*, 2012 WL 1864790 (Iowa Ct. App. May 23, 2012).[1]

Likewise, the gross disproportionality challenge to Iowa Code section 903B.1 requires application of established legal principles. *See, e.g.*, *State v. Sallis*, 786 N.W.2d 508, 517 (Iowa Ct. App. 2009) ("We conclude that section 903B.1 . . . is not grossly disproportionate to the gravity of the offenses to which it applies and its imposition does not constitute cruel and unusual punishment."); *State v. Harkins*, 786 N.W.2d 498 (Iowa Ct. App. 2009) (same). Transfer to the Iowa Court of Appeals is appropriate. *See* Iowa R. App. P. 6.1101(3)(a).

[1] This Court denied further review of these cases on July 16, 2015, and August 1, 2012.

STATEMENT OF THE CASE

Nature of the Case

In June of 2007, defendant Jefferson pled guilty to third-degree sexual abuse, a class C felony. Iowa Code § 709.4(2)(c)(4); Court Calendar (6/19/07); Memorandum of Plea Agreement (FECR301769); App. 5, 9-11. The district court thereafter ordered Jefferson to serve up to ten years in prison. Sent. Tr.p.11, line 21-p.12, line 19; Court Calendar (9/20/07); App. 20. After discharging his prison sentence, Jefferson began his section 903B.1 special sentence in late 2011. Iowa Department of Corrections (Time Computation); App. 41-42. Following two revocations of his special sentence status in early 2014, resulting in prison terms, Jefferson now appeals from the district court's denial of his August 2016 motions for correction of illegal sentence.

Course of Proceedings

The State accepts the defendant's summary of the course of proceedings below as essentially correct and adds the following facts. Iowa R. App. P. 6.903(3).

On direct appeal the Court of Appeals rejected voluntariness challenges to Jefferson's guilty plea but ordered resentencing based on the State's unauthorized sentencing recommendation. *State v.*

Jefferson, 2008 WL 4531454 (Iowa Ct. App. Oct. 1, 2008). Jefferson unsuccessfully raised similar claims in a postconviction application. *Jefferson v. State,* 2012 WL 1860782 (Iowa Ct. App. May 23, 2012).

Approximately two years after the discharge of his prison sentence, the Board of Parole filed a notice of parole violation alleging Jefferson made verbal threats against a former girlfriend and provided false information for the sex offender registry. Preliminary Parole Violation Information (1/10/14); Arrest Warrant; App. 26, ---. A parole judge found the alleged violations to be correct, revoked Jefferson's parole, and placed him on the work release list or at the work release center. Parole Revocation Hearing/Findings of Fact and Order (3/24/14); App. 28-29. A few weeks later, another parole judge found Jefferson in violation of four conditions of probation and ordered him to serve up to five years in prison. Revocation Hearing/Findings of Fact and Order (4/04/16); App. 31-32; *see* Iowa Code § 903B.1 (revocation of release shall be no greater than five years for a second or subsequent violation).

On May 19, 2016, Jefferson filed a motion for correction of an illegal sentence challenging his discharge date and asserting an ex post facto violation. Motion for Correction of an Illegal Sentence

(5/19/16); App. 33-35. The district court summarily denied Jefferson's motion noting the court "has no control or authority over when Defendant is to be released or when his parole should end." Order Denying Motion to Correct Illegal Sentence (5/26/16); App. 36-37.

Jefferson filed a second motion for correction of an illegal sentence in early August 2016, asserting section 903B.1 violates several of his constitutional rights and further complaining about certain conditions of parole. Motion for Correction (8/09/16); App. 38-39. Jefferson asked for the appointment of counsel and an evidentiary hearing. *Id.*; Application for Counsel (8/09/16); App. 38-39, 54-55. The court summarily denied Jefferson's second motion without appointing counsel or setting a hearing date, stating the motion "is denied for all the same reasons a previous" motion for correction was denied. Order Denying Motions (8/26/16); App. 56-57.

Before Jefferson received the court's August 26 order, Jefferson had mailed a motion to amend his motion for correction and amended motion asserting additional constitutional violations, including cruel and unusual punishment. Motion to Amend/Motion

for Correction (8/29/16); App. 58-62. The court summarily denied Jefferson's third motion "for all of the same reasons the previous two motions were denied." Order (9/07/16); App. 63-64. The next day Jefferson filed a petition for writ of certiorari, and a day later filed a notice of appeal from the district court's rulings. Petition for Writ of Certiorari (9/08/16); Notice of Appeal (9/09/16); App. 60-70, 71-72. The State resisted and the Court later denied the petition noting Jefferson had "a related appeal still pending before this Court" with counsel. Order, No.16-1505 (10/07/16); App. 73-75. This appeal focuses only on Jefferson's cruel and unusual punishment claim.

Facts

The State initially charged Jefferson with second-degree sexual abuse based on fourteen year-old K.W.'s allegations of a sex act Jefferson performed on her in a Davenport motel room on or about March 26, 2007. Minutes; App.------. On at least one occasion, Jefferson had reportedly joined an acquaintance, Arnold Grice, who had been holding K.W. in the motel room for three days while supplying her with cocaine and alcohol and subjecting her to nonconsensual sexual contact. *Id.*; *see also Jefferson,* 2008 WL 4531454, at *1. K.W. identified Grice from a photographic line-up,

and "Jefferson was implicated by admissions made to Grice's girlfriend and fingerprints lifted from a condom wrapper found in the motel room." Minutes; Additional Minutes; App.------; *Jefferson,* 2008 WL 4531454, at *1.

In exchange for Jefferson's guilty plea to third-degree sexual abuse, the State offered to dismiss the greater charge of second-degree sexual abuse (count I) and refrain from filing additional charges in connection with the charged incident. Memorandum of Plea Agreement; Plea Tr.p.2, lines 11-25; App. 9-11. At the July 2007 guilty plea hearing Jefferson admitted to performing a sex act with K.W., age 14, and that he was more than four years older (age 21). Plea Tr.p.7, lines 3-15, p.8, line 19-p.9,line 14; PSI pp.1-2; App. 12-13. The court conditionally accepted Jefferson's plea as knowing, voluntary, and supported by a factual basis. Plea Tr.p.9, line 18-p.10, line 5.

At the September sentencing hearing, defense counsel noted Jefferson claimed innocence and pointed out that he was a man of limited education and was receiving disability payments related to a learning disability. Sent. Tr.p.4, line 16-p.5, line 3. The defense further noted Jefferson was a young man, he had a small child and

another child on the way with his fiancée, and he was hard working. Sent. Tr.p.9, line 10-p.10, lines 12.

ARGUMENT

I. The District Court Did Not Err in Failing to Grant Jefferson's Request for Appointment of Counsel to Assist with His Motion for Correction of an Illegal Sentence. No Constitutional or Statutory Right to Counsel Attached Upon the Filing of a Motion Challenging a Section 903B.1 Special Sentence.

Preservation of Error

Jefferson first challenges the district court's summary denial of his second and third motions for correction of an illegal sentence without granting his requests for the appointment of counsel and an evidentiary hearing. Motions for Correction (8/09/16 & 8/29/16); Orders (8/26/16 & 9/07/16); App. 38-39, 58-62, 56-57, 63-64. The State urges "the court's ruling indicates that the court *considered* the issue and necessarily ruled on it." *Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012); *see also Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa 2002). This Court previously denied Jefferson's petition for writ of certiorari. Order, No.16-1505 (10/07/16); App. 73-75.

Should the Court find Jefferson has no right to directly appeal the denial of his motions to correct an illegal sentence, Jefferson urges the Court to treat his appeal as either a petition for writ of

certiorari or an application for discretionary review. Appellant's Brief pp.27-28; *see* Iowa Code § 814.6(1, 2); *Tindell v. Iowa Dist. Ct.*, 600 N.W.2d 308, 309 (Iowa 1999). The State did not file any response to Jefferson's motions.

Standards for Review

Alleged violations of a right to counsel "are reviewed de novo, but when there is no factual dispute, review is for correction of errors at law." *State v. Young*, 863 N.W.2d 249, 252 (Iowa 2015) (citing *State v. Majeres*, 722 N.W.2d 179, 181 (Iowa 2006)). This standard of review applies whether the right-to-counsel claim is couched in a constitutional or statutory right. *Lado v. State*, 804 N.W.2d 248, 250 (Iowa 2011) (citing *Dunbar v. State*, 515 N.W.2d 12, 14–15 (Iowa 1994)).

"In interpreting the Iowa Rules of Criminal Procedure, our review is for correction of errors at law." *Young*, 863 N.W.2d at 252 (citing *State v. Jones*, 817 N.W.2d 11, 15 (Iowa 2012)).

When a court is authorized to appoint counsel, but absent a *right* to counsel, the decision whether to do so in any given case "rests in the district court's sound discretion," and is therefore reviewed for abuse of discretion. *See Wise v. State*, 708 N.W.2d 66, 69 (Iowa 2006) (citing *Furgison v. State*, 217 N.W.2d 613, 615 (Iowa 1974)).

Merits

Defendant Jefferson argues that he had a constitutional and/or statutory right to counsel to assist with his motions to correct an illegal sentence, and as a matter of due process (fairness). He further urges "the complicated legal and factual issues" raised in his motions warranted the appointment of counsel and that he was entitled to a statement of specific reasons for the court's dismissal of his constitutional claims.[2] The State disagrees Jefferson had a right to counsel in this context—long after the discharge of his underlying prison sentence and after two revocations of his special sentence parole status.[3]

As noted, Jefferson pled guilty to third-degree sexual abuse and was sentenced to serve up to ten years in prison followed by a lifetime special sentence, "with eligibility for parole as provided in chapter 906." *See* Iowa Code §§ 709.4(2)(c)(4), 903B.1, 906.15. Jefferson began his special sentence late 2011 or early 2012, but later violated several conditions of parole resulting in revocation of his parole

---

[2] The State addresses the claim concerning the lack of findings and stated reasons as part of division II below. Appellant's Brief pp.40-46.

[3] Jefferson had counsel in connection with his probation revocation proceedings.

status and a prison sentence of up to five years. *See* Revocation Hearing/Findings of Fact and Order (4/04/16); App. 31-32. It was after the second revocation that Jefferson began filing motions for correction of an illegal sentence challenging his lifetime special sentence on constitutional grounds. The district court summarily denied each motion. Jefferson urges he had a constitutional right to counsel under both the federal and state constitutions as well as a statutory right, and the court erred in refusing to grant his request.

A. Statutory Right.

"[T]he legislature has provided for court-appointed counsel for indigent defendants 'at any stage' of the criminal proceeding 'in which the indigent defendant is entitled to legal assistance at public expense.'" *State v. Dudley*, 766 N.W.2d 606 (Iowa 2009) (quoting Iowa Code section 815.10(1)(a). Specifically, section 815.10(1) states:

Specifically, section 815.10(1)(a) provides:

> The court, for cause and upon its own motion or upon application by an indigent person or a public defender, shall appoint the state public defender's designee pursuant to section 13B.4 to represent an indigent person at any stage of the criminal, postconviction, contempt, commitment under chapter 229A, termination under chapter 600A, detention under section 811.1A, competency under chapter 812, parole revocation if applicable under section 908.2A,

> or juvenile proceedings or on appeal of any criminal, postconviction, contempt, commitment under chapter 229A, termination under chapter 600A, detention under section 811.1A, competency under chapter 812, parole revocation under chapter 908, or juvenile action in which the indigent person is entitled to legal assistance at public expense. . . . . An appointment shall not be made unless the person is determined to be indigent under section 815.9.

Iowa Code § 815.10(1)(a).

Iowa Rule of Criminal Procedure 2.28(1) expands on that section, stating:

> 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 the court through appeal, including probation revocation hearings, unless the defendant waives such appointment.

Iowa R. Crim. P. 2.28(1); *see, e.g., State v. Johnson*, 2015 WL 6509543, at *2 (Iowa Ct. App. Oct. 28, 2015) (quoting *Majeres*, 722 N.W.2d at 182) (holding that, because the motion to correct an illegal sentence was a "collateral appeal on a conviction that has long since been final," it could not be a critical stage of the criminal prosecution).

In *State v. Dudley*, the Court's holding as to the appointment of counsel hinged upon the fact that "[t]he legislature has defined 'prosecution' for purposes of chapter 815 as a criminal proceeding from commencement by filing a complaint 'to final judgment on behalf of the state.'" *See Dudley*, 766 N.W.2d 606, 618 (Iowa 2009) (quoting Iowa Code section 801.4(13) (2005)). The Court held this meant the acquitted defendant was entitled to appointed counsel in the post-acquittal proceeding for a cost judgment against him for attorney fees relating to his defense, because "the criminal case did not end, by definition, until the cost judgment had been entered against Dudley and in favor of the State." *Id.* at 620. But here, the criminal case *had* ended; final judgment in favor of the state was entered in 2008. *See State v. Loye*, 670 N.W.2d 141, 147 (Iowa 2003) (holding that whether the district court imposed a sentence "is the determinative fact in assessing the finality of a criminal proceeding"). That means, unlike the attempt to litigate attorney's fees before entry of a cost judgment in *Dudley*, the motions in this case cannot trigger the attachment of a statutory right to counsel; it is excluded by the unambiguous constraints imposed by Iowa Code section 801.4(13)'s definition of "prosecution."

Similarly, in *State v. Alspach*, a convicted defendant asserted a statutory right to counsel at a restitution hearing, which was delayed "because the amount of pecuniary damages was unavailable on the day of sentencing." *See Alspach*, 554 N.W.2d 882, 883–84 (Iowa 1996). The Court held that the defendant was entitled to assistance of counsel to litigate restitution "imposed as part of the original criminal proceedings," whether the amount of that restitution is determined at the original sentencing hearing or at a later date. *Id.* at 884. But the *Alspach* holding was expressly "limited to challenges to restitution imposed as part of the original sentencing order, or supplemental orders"—which means that *Alspach* stands for the proposition that a defendant has a right to appointed counsel to litigate sentencing issues when they are before the court, *not* to bring subsequent challenges to sentencing issues that have already been argued and finalized through final judgment. *Id.*

The *Alspach* Court cautioned that it "[did] not mean to suggest by this opinion that a defendant is entitled under all circumstances to court-appointed counsel when challenging restitution orders" in post-conviction attacks that are "not part of the criminal proceedings." *Id.* Unlike in *Alspach*, the sentence here was imposed at the original

sentencing hearing, and no aspect of the case was continued or remained open—Jefferson had also discharged his underlying prison sentence.

In *State v. Hendrickson*, the Iowa Court of Appeals rejected an argument that "a motion to correct a [section 903B.1] sentence is a critical stage of the criminal proceeding and therefore the right to counsel continued until his motion was heard." *See Hendrickson*, 2014 WL 7343338, at *2 (Iowa Ct. App. Dec. 24, 2014). The *Hendrickson* Court distinguished *Alspach* because "[t]he restitution sentencing provision of the order had been left open in *Alspach* until the amount of restitution had been determined." *Id.* This Court should reach the same conclusion and resist the call to extend *Alspach* to apply to this defendant's collateral attack on his sentence, far removed from the imposition of the original sentence.

Fundamental principles of statutory interpretation foreclose Jefferson's claim of a statutory right to court-appointed counsel. Both section 815.10(1) and rule 2.28(1) discuss proceedings in which indigent defendants have a right to court-appointed counsel. Neither mentions motions to correct an illegal sentence. Legislative intent is expressed by omission as well as by inclusion, and the express

mention of one thing implies the exclusion of others not so mentioned. *Staff Mgmt. v. Jimenez,* 839 N.W.2d 640, 649 (Iowa 2013). If the legislature had intended to include motions to correct an illegal sentence, it would have done so. *Id.*

Likewise, "through appeal" as used in Rule 2.28(1) does not include motions to correct to an illegal sentence made after expiration of the appeal period. The Wyoming Supreme Court interpreted a similar statutory provision to not provide a right to counsel for a motion to correct an illegal sentence filed after expiration of the appeal period or after the conclusion of a defendant's direct appeal. *See Gould v. State*, 151 P.3d 261, 268-69 (Wyo. 2006). Wyoming's statute on the appointment of counsel states that an indigent defendant is entitled

> [t]o be represented by counsel at every stage of the proceedings, from the time of the initial appointment by the court until the entry of final judgment, at which time the representation shall end, unless the court appoints counsel for purposes of appeal, correction or modification of sentence.

Wyoming § 7-6-104(c)(vi). The Wyoming Supreme Court determined the above statute did not create an absolute right to counsel. *Gould*, 151 P.3d 261 at 268-69.

Jefferson's reliance on *State v. Casiano*, 922 A.2d 1065 (Conn. 2007) is also misplaced. In that case, the Connecticut Supreme Court interpreted its statutory provision, which provided for the appointment of counsel in "any criminal proceeding," to require the appointment of counsel for a motion to correct an illegal sentence. Unlike Iowa's rule of criminal procedure, however, the Connecticut statute "does not qualify or limit the term [any criminal action] in any way." *Id.* at 1070. While predecessor statutes had explicitly limited the term "any criminal action" to "any criminal action in the court of common pleas" and "any criminal action in the circuit court," *Id.*, the Connecticut legislature amended the statute to remove those limitations. *Id. Casiano* is therefore not instructive when interpreting Iowa's rule on appointment of counsel.

B. Constitutional Rights.

The Sixth Amendment to the federal constitution affords an accused facing incarceration the right to counsel "[a]t all critical stages of the criminal process." *State v. Majeres*, 722 N.W.2d 179, 182 (Iowa 2006). A motion to correct an illegal sentence is not a "critical stage" of a criminal prosecution.

"[T]he United States Supreme Court has clearly announced the right to appointed counsel for a convicted criminal extends only to the first appeal of right, not to a collateral appeal on a conviction that has long since become final upon the exhaustion of the appellate process." *Fuhrmann v. State*, 433 N.W.2d 720, 722 (Iowa 1988) (citing *Pennsylvania v. Finley*, 481 U.S. 551, 552 (1987)) (finding indigent defendants are not entitled to court-appointed counsel during postconviction relief); *see also Finley*, 481 U.S. at 555 ("We think that since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori,* he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process."). Because a motion to correct an illegal sentence is an attempt to reopen a criminal case, potentially long after a criminal judgment is final and direct appeal concluded, a defendant does not have a right to court-appointed counsel.

Other jurisdictions have also determined motions to correct an illegal sentence do not constitute a "critical stage" of proceedings. In *Patrick*, the Wyoming Supreme Court determined that a motion to correct an illegal sentence is not a "critical stage." *Patrick v. State*,

108 P.3d 838, 844 (Wyo. 2005). The Georgia Court of Appeals has also rejected the argument that a motion to correct an illegal sentence is a "critical stage," stating, "[t]he Constitution does not even require states with multi-tiered appellate systems to appoint appellate counsel through the exhaustion of an indigent defendant's discretionary direct appeals." *Jordan v. State*, 530 S.E.2d 42, 45 (Ga. Ct. App. 2000), *disapproved of on other grounds by Shields v. State*, 581 S.Ed.2d 536 (Ga. 2003).

Iowa courts construing the Sixth Amendment have held that it "applies only to criminal prosecutions," and "has no application" outside of that limited context. *See Leonard v. State*, 461 N.W.2d 465, 468 (Iowa 1990) (citing *State v. Wright*, 456 N.W.2d 661, 664-65 (Iowa 1990)). Even though Jefferson's lifetime special sentence was imposed as part of a mandated penalty for his criminal offense—and even though the defendant's motions were docketed in that same criminal action—that does not mean that a motion to correct an illegal sentence is part of a "criminal prosecution" and within the purview of the Sixth Amendment. The parallel provision of the Iowa Constitution is construed identically in this regard. *See Furhmann*, 433 N.W.2d at 722.

The Iowa Court of Appeals has considered the question of whether a constitutional right to counsel attaches with a motion to correct illegal sentence, and consistently rejected such arguments. *State v. Titus,* 2016 WL 2745938, at *3 (Iowa Ct. App. May 11, 2016); *State v. Cohrs,* 2016 WL 146526, at *1-*3 (Iowa Ct. App. Jan. 13, 2016); *State v. Johnson,* 2015 WL 6509543, at *2 (Iowa Ct. App. Oct. 28, 2015); *State v. Hendrickson,* 2014 WL 7343338, at *2 (Iowa Ct. App. Dec. 24, 2014). Because Jefferson's motions were not part of his criminal prosecution nor a critical stage, no federal constitutional right to counsel attached.

C. Iowa Constitution.

Jefferson further argues that under article I, section 10 of the Iowa Constitution a "motion for correction of illegal sentence clearly implicates the life or liberty . . . ." Appellant's Brief pp.37-38. His argument rests solely upon the language in article I, section 10 that extends rights to the accused "in cases involving the life, or liberty of an individual." This argument misapprehends the meaning of that language.

The "life or liberty" language in article I, section 10 was specifically added "for the purpose of providing that instead of the

fugitive slave having the trial by jury where his labor may be done, he shall have his trial here; . . . that any slave in the territory of this state shall have the right to assert his freedom, and cannot be remanded back into slavery." *See* THE DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF IOWA 736 (W. Blair Lord rep., 1857) [hereinafter THE DEBATES]. Accordingly, the debate over this language focused on the rights of a person accused of being a fugitive slave:

> I claim that no State can be sovereign, no people can be independent, without a right reposed in that people, and in that sovereignty, to protect its own people, and to determine within the jurisdiction of that sovereignty the right of the people found there to life or liberty. I hold that unless we have the right to make a constitution which will secure to me the right of jury trial, if I am claimed as a fugitive slave, without that right we are not a sovereign people. Without that right we cannot protect every individual member of society.

Id. at 737; *Young*, 863 N.W.2d at 284 n.2 (Mansfield, J., dissenting) ("[T]he contemporary debates indicate this provision was meant to protect persons claimed to be subject to return as fugitive slaves.").

Similarly, opposition to the inclusion of this language did not touch upon any other issue; instead, it focused on the wisdom and constitutionality of refusing to remit a fugitive slave to the custody of another state:

> The undersigned can, (whether so intended or not) only look on the amendment as it stands as a full and complete nullification of [Article IV, Section 2 of the U.S. Constitution and the Fugitive Slave Act], and a solemn protest against complying with the demands that may be made for persons who may have escaped from other States in either case.

THE DEBATES at 654. This was about slavery, "contradistinguished from criminal law, and disconnected from any proceedings in the enforcement of the criminal law of the State." *Id.* at 653.

The framers of the Iowa Constitution viewed the right to trial by jury—and not the right to counsel—as the component of article I, section 10 that would protect Iowans from overzealous prosecution and from attempts to claim them as fugitive slaves. *Id.* at 738 ("We are a sovereign State that will allow me the right of a jury trial when the value of a sixpence is brought into controversy; and yet when I am put upon trial for my liberty, . . . I am deprived of that right."); *Id.* at 739 ("I say that every man sought to be reclaimed as a fugitive slave has a right to a trial by jury"). And the right to a jury trial was particularly important in the context of the Fugitive Slave Act because of the nature of the recapture proceedings it authorized:

> Under the Fugitive Slave Act a slaveowner from another state could obtain a "certificate of right" in an ex parte proceeding in his home state and present it in a free

> state like Iowa as conclusive proof of his right to the return of an alleged fugitive slave. . . .
>
> [. . .]
>
> No one can doubt from the convention record that the disputed language was added to Art. I s 10 in an effort to nullify the Fugitive Slave Act by giving persons accused as escaped slaves the right to jury trial in Iowa.

In re Johnson, 257 N.W.2d 47, 53–54 (Iowa 1977) (McCormick, J., concurring) (citing THE DEBATES at 102, 651–54, 736–38). This weighs against reading the "cases involving life or liberty" language to create any sort of post-conviction right to counsel in contexts where the accused has already invoked or waived his or her all-important right to trial by jury.

The Iowa Supreme Court has already held article I, section 10 is inapplicable to "an individual facing potential civil commitment pursuant to Iowa's [sexually violent predator] statute" because, in the absence of claims brought under the Fugitive Slave Act that could trigger the cases-involving-life-or-liberty clause, "this provision only applies to criminal proceedings." *See Atwood v. Vilsack*, 725 N.W.2d 641, 650–51 (Iowa 2006). In this case Jefferson, much like the plaintiffs in *Atwood*, faces a deprivation of liberty imposed following conviction and sentencing for a sex offense—and if the involuntary commitment in *Atwood* was outside the scope of article I, section 10,

then supervised release on parole must be outside of its scope as well. *See id.*

Accordingly, the "cases involving life and liberty" language of article I, section 10 does not create an Iowa constitutional right to counsel that attaches upon filing a motion to correct an illegal sentence.

D. Due Process.

The due process provisions of the federal constitution and the Iowa Constitution "are nearly identical in scope, import and purpose." *See State v. Seering*, 701 N.W.2d 655, 662 (Iowa 2005) (quoting *State v. Hernandez-Lopez*, 639 N.W.2d 226, 237 (Iowa 2002)). Due process can extend constitutional rights to counsel to a proceeding outside of the context of a criminal prosecution if that particular proceeding "might directly result in incarceration." *See State ex rel. Hamilton v. Snodgrass*, 325 N.W.2d 740, 742 (Iowa 1982) (citing *McNabb v. Osmundson*, 315 N.W.2d 9, 14 (Iowa 1982)); *see generally Gagnon v. Scarpelli*, 411 U.S. 778 (1973). That principle is inapplicable here because the lifetime special sentence was imposed through the original sentencing proceeding, and no additional loss of liberty was threatened by the proceedings on the

defendant's motion, this proceeding "did not entail the potential for a loss of liberty." *See State v. Wentland*, 2013 WL 105340, at *8 (Iowa Ct. App. Jan. 9, 2013); *cf. Greenholtz v. Inmates of Neb. Penal and Correctional Complex*, 442 U.S. 1, 10 (1979) ("[T]here is a human difference between losing what one has and not getting what one wants.").

Because these proceedings threatened no direct loss of liberty, this was a case where "the trial court has discretion to ascertain whether the claim is substantial before granting a full evidentiary hearing" and before determining whether it would be "useful to appoint counsel." *See Larson v. Bennett*, 160 N.W.2d 303, 305 (Iowa 1968). This standard of review is extremely deferential—an abuse of discretion is found only when a court exercises discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996) (citing *State v. Neary*, 470 N.W.2d 27, 29 (Iowa 1991)). Showing an abuse of discretion requires establishing that the court reached "an erroneous conclusion and judgment, one clearly against logic and effect of facts and circumstances before the court, or the reasonable, probable and actual deductions to be drawn therefrom." *See Glenn v. Farmland*

Foods, Inc., 344 N.W.2d 240, 243 (Iowa 1984) (quoting *Dep't of Gen. Serv. v. R.M. Boggs Co.*, 336 N.W.2d 408, 410 (Iowa 1983)).

Jefferson argues that counsel should have been appointed "[g]iven the complicated legal and factual issues raised" by his gross disproportionality challenge. Appellant's Brief p.39. Any standard for appointment of counsel that incentivizes pro se movants to complicate or confuse legal issues only invites trouble. Moreover, determining whether a defendant was "capable of speaking effectively for himself" would only have been necessary if the district court found the motion presented a "colorable claim." *See Pfister v. Iowa Dist. Ct. for Polk County*, 688 N.W.2d 790, 795–96 (Iowa 2004) (quoting *Gagnon*, 411 U.S. at 790). The court's orders unequivocally indicate that it did not; the State will address why that determination was correct below in division II.

Because Jefferson's motion did not threaten a direct loss of liberty, whether a hearing was necessary was left to the discretion of the trial court. Jefferson has not shown the court had statutory authority to appoint counsel in this context. The Court should therefore find Jefferson did not have a statutory or constitutional right to counsel to assist in his challenge to an allegedly illegal special

sentence. The district court did not err in electing not to appoint counsel prior to ruling on his motions.

II. The District Court Correctly Rejected Jefferson's Cruel and Unusual Punishment Challenge to His Section 903B.1 Lifetime Special Sentence Without Granting an Evidentiary Hearing. Jefferson's Motion for Correction of Illegal Sentence Failed to Raise an Inference of Gross Disproportionality as Applied.

Preservation of Error

Jefferson may challenge a sentence as unconstitutional or illegal at any time. *See State v. Lyle*, 854 N.W.2d 378, 382 (Iowa 2014); *State v. Bruegger*, 773 N.W.2d 862, 871 (Iowa 2009); Iowa R. Crim. P. 2.24(5)(a). Error was preserved on the challenge to the denial of his third motion for correction of an illegal sentence without a hearing by timely filing the notice of appeal from that order. Notice of Appeal (9/09/16); App. 73-75. As to specific constitutional claims asserted in his second and third motions, Jefferson has waived error on all claims other than cruel and unusual punishment by electing not to raise and argue those on appeal.[4] Iowa R. App. P. 6.903(2)(g)(3).

The State agrees Jefferson's challenge to the lifetime special sentence is ripe for review because he is presently serving a prison

[4] The cruel and unusual punishment claim was first asserted in Jefferson's third motion for correction of an illegal sentence. Amended Motion for Correction p.2 (8/29/16); App. 59.

term resulting from the revocation of his parole status. *State v. Tripp*, 776 N.W.2d 855, 858–59 (Iowa 2010).

Standards for Review

A challenge to a sentence on the ground that it is cruel and unusual is reviewed is *de novo*. *State v. Ragland*, 836 N.W.2d 107, 113 (Iowa 2013). "[S]tatutes are cloaked with a presumption of constitutionality"—and to prevail, a challenger "must prove the [statute's] unconstitutionality beyond a reasonable doubt." *State v. State v. Seering*, 701 N.W.2d 655, 661 (Iowa 2005) (quoting *State v. Hernandez-Lopez*, 639 N.W.2d 226, 233 (Iowa 2002)); *see also Tripp*, 776 N.W. 2d at 857.

"The United States Constitution forbids cruel and unusual punishment." *State v. Sallis,* 786 N.W.2d 508, 516 (Iowa 2009); *see* U.S. Const. amend. VIII; Iowa Const. art. I, § 17; *State v. Wade,* 757 N.W.2d 618, 623 (Iowa 2008). "Punishment may be considered cruel and unusual 'because it is so excessively severe that it is disproportionate to the offense charged.'" *Wade,* 757 N.W.2d at 623 (quotations omitted).

This Court has further explained:

> Generally, a sentence that falls within the parameters of a statutorily prescribed penalty

> does not constitute cruel and unusual punishment. Only extreme sentences that are 'grossly disproportionate' to the crime conceivably violate the Eighth Amendment.
>
> Substantial deference is afforded the legislature in setting the penalty for crimes. Notwithstanding, it is within the court's power to determine whether the term of imprisonment imposed is grossly disproportionate to the crime charged. If it is not, no further analysis is necessary.

Wade, 757 N.W.2d at 623 (quoting *State v. Cronkhite,* 613 N.W.2d 664, 669 (Iowa 2000)).

A cruel and unusual punishment analysis involves a three-part test. "The threshold inquiry is whether the severity of the sentence is grossly disproportional to the gravity of the crime." *State v. Cohrs,* 2016 WL 146526, at *3 (Iowa Ct. App. Jan. 13, 2016) (citing *Solem v. Helm,* 463 U.S. 277, 291-92 (1983) *and State v. Oliver,* 812 N.W.2d 636, 649 (Iowa 2012)). The United States Supreme Court has stated that it is a "rare case" in which the threshold comparison leads to an inference of gross disproportionality. It is an exceedingly difficult standard to meet outside the context of a death penalty. *Bruegger*, 773 N.W.2d at 873.

If the threshold inquiry is satisfied, the Court then proceeds "to an intrajurisdictional analysis 'comparing the challenged sentences

for other crimes within the jurisdiction.'" *Cohrs,* 2016 WL 146526, at *3 (quoting *Bruegger,* 773 N.W.2d 862, 873 (Iowa 2009)). The final step involves a comparison of "sentences in other jurisdictions to the same or similar crimes." *Id.* (citation omitted). No further inquiry is necessary if "the challenged sentence does not create an inference that it is grossly disproportionate." *Id.* (citing *Oliver,* 812 N.W.2d at 649). These last two steps introduce objectivity into the determination of gross disproportionality. *Bruegger* 773 N.W.2d at 873.

The same analysis applies under the Iowa Constitution though review is more stringent. *Oliver,* 812 N.W.2d at 640, 649; *Bruegger,* 773 N.W.2d at 883. The Court recognizes that the unique features of a case can "converge to generate a high risk of potential gross disproportionality." *Oliver*, 812 N.W.2d at 651 (*citing Bruegger*, 773 N.W.2d at 884). In *Bruegger*, those features included: (1) "a broadly defined crime;" (2) "the permissible use of preteen juvenile adjudications as prior convictions to enhance the crime;" and, (3) "the dramatic sentence enhancement for repeat offenders." *Bruegger*, 773 N.W.2d at 884. Thus, the Court should examine the unique features of a particular case as part of its threshold

determination regarding the inference of gross disproportionality. *Oliver*, 812 N.W.2d at 651 (*quoting Bruegger*, 773 N .W.2d at 884). Yet, the Court has cautioned that it remains rare that a sentence is so grossly disproportionate to the offense that it satisfies the *Solem* test's threshold inquiry and warrants review under the second and third steps of the Solem test. *See Oliver*, 812 N.W.2d at 650 (citing Iowa cases in which defendants failed to meet this preliminary standard).

Merits

Defendant Jefferson alleges that the district court erred in summarily denying his motions to correct an illegal sentence without an evidentiary hearing and without specifically detailing reasons for denial of his claims. Jefferson contends that his special sentence under Iowa Code section 903B.1 is grossly disproportionate to his crime and, therefore, in violation of the state and federal prohibitions against cruel and unusual punishment. The remedy he appears to seek is not outright vacation of his lifetime special sentence; he seeks a remand to the district court to provide the parties an opportunity to present evidence on whether the special sentence can be constitutionally applied. In this case, however, the Court can deny Jefferson's claim without remand for an evidentiary hearing on the

ground that he cannot meet the threshold test for a claim of gross disproportionality. Alternatively, the Court may remand this case to permit a hearing on the issue of proportionality.

A. No Evidentiary Hearing Required.

In *Bruegger* the Court held that "in some circumstances, defendants who commit acts of lesser culpability within the scope of broad criminal statutes carrying stiff penalties should be able to launch an as-applied cruel and unusual punishment challenge." *See Bruegger*, 773 N.W.2d at 884. But *Bruegger* did not hold that Iowa courts must engage in an individualized assessment of proportionality every time a defendant files a motion to correct an illegal sentence; instead, the Court emphasized that it was dealing with "a relatively rare case where an individualized assessment of the punishment imposed should be *permitted*." *Id.* at 884 (emphasis added). Logically, without some "unusual combination of features that converge to generate a high risk of potential gross disproportionality," an as-applied challenge would *not* be permitted—and a challenge raised without the convergence of such unusual features would not even enable a court to reach the threshold analysis under the first *Solem* factor. *Id.*; *see also State v. Clayton,* 2014 WL

7343315, at *2-*3 (Iowa Ct. App. Dec. 24, 2014) (defendant failed to highlight "unique factors" that might support his claim) (Tabor, J., concurring specially); *State v. Klemme*, 2011 WL 2112463, at *6 (Iowa Ct. App. May 25, 2011) (quoting *Bruegger*, 773 N.W.2d at 884–85) ("Because Klemme's case is not one of the rare cases where there is 'an unusual combination of features that converged to generate a high risk of potential gross disproportionality,' we find he is not entitled to make an 'as applied' cruel-and-unusual-punishment challenge.").

The Court in *Oliver* stated that "it is now clear that such a challenge can be brought, regardless of the presence or absence of [converging unique] factors." *See Oliver*, 812 N.W.2d at 651 n.12. But *Oliver* did not hold that such challenges always require evidentiary hearings; to the contrary, *Oliver* affirmed that "it is rare that a sentence will be so grossly disproportionate to the crime as to satisfy the threshold inquiry and warrant further review." *Id.* at 650 (citing *State v. Musser*, 721 N.W.2d 758, 749 (Iowa 2006)). The Court did not attack *Bruegger*'s recognition that Iowa cases routinely "reject individualized determinations in connection with cruel-and-unusual-punishment challenges in a number of contexts." *See Bruegger*, 773 N.W.2d at 884; *see also Wade*, 757 N.W.2d at 624;

Musser, 712 N.W.2d at 749; *State v. Rubino*, 602 N.W.2d 558, 564 (Iowa 1999); *State v. August*, 589 N.W.2d 740, 743 (Iowa 1999).

The Iowa Court of Appeals has consistently interpreted *Bruegger* and *Oliver* to mean that an as-applied disproportionality challenge in a motion to correct an illegal sentence does not entitle the movant to an evidentiary hearing if it does not allege facts raising a substantial risk of gross disproportionality. In *State v. Poulson*, decided shortly after *Oliver*, the defendant raised a due process challenge to an order denying his motion challenging his sentence as grossly disproportionate without a hearing on the matter. *See State v. Poulson*, 2012 WL 1864790, at *1 (Iowa Ct. App. May 23, 2012). The Court of Appeals held that the defendant had no due process right to a hearing on that motion, and affirmed the denial of the motion on its merits. *Id.* at *1–*4.

Subsequently, in *State v. Clayton*, the defendant argued he "should be afforded an evidentiary hearing in order to develop his cruel and unusual challenge to his sentence." *See Clayton*, 2014 WL 7343315, at *1. The Court of Appeals rejected that argument and held it "cannot find that a mere claim of disproportionality is sufficient to require an expanded hearing on the matter." *Id.* at *1 n.1. In a

concurring opinion, Judge Tabor agreed it was clear that "*Bruegger* cannot be read to require an evidentiary hearing in every case where an inmate moves to correct an illegal sentence—even when the motion properly alleges gross disproportionality under the cruel and unusual punishment clauses of the federal and state constitutions." *Id.* at *2-*3 (Tabor, J., concurring specially).

The Court of Appeals has affirmed denials of motions that brought gross-disproportionality challenges in other cases, evaluating the strength of each challenge in determining whether the district court erred in denying the motion without a hearing. *See, e.g.*, *State v. Reed*, 2015 WL 566625, at *5 (Iowa Ct. App. Feb. 11, 2015) ("[W]e conclude the cruel and unusual punishment clause of the Iowa Constitution did not require the district court to afford Reed an individualized evidentiary sentencing hearing."); *cf. State v. Bryant*, 2015 WL 4469136, at *1 (Iowa Ct. App. July 22, 2015) (holding that "no individualized assessment of the punishment imposed" was necessary because the defendant's prior conviction was for an offense committed as an adult, and that "[t]his fact alone renders *Bruegger* inapplicable").

Jefferson has not alleged facts suggesting that an evidentiary hearing was necessary to develop the record and enable a more specific ruling in this case. Even if he had, *Bruegger* and *Oliver* do not require the district court to grant an evidentiary hearing unless the motion alleges "an unusual combination of features that converge to generate a high risk of potential gross disproportionality." *See Bruegger*, 773 N.W.2d at 884.

B. No Substantial Risk of Gross Disproportionality.

1. Gravity of the Crime.

The first *Solem* factor requires the Court to weigh "the gravity of the crime against the severity of the sentence" and determine if that raises an inference of gross disproportionality. *See Oliver*, 812 N.W.2d at 650 (quoting *Bruegger*, 773 N.W.2d at 873). At that point, "[i]f the sentence does not create an inference of gross disproportionality, then 'no further analysis is necessary.'" *Id.* (quoting *Seering*, 701 N.W.2d at 670). Because the crime, the sentence, and the other circumstances of Jefferson's case establish no substantial risk of gross disproportionality, it was proper to deny Jefferson's motions without an evidentiary hearing.

"The State has a strong interest in protecting its citizens from sex crimes." *Wade*, 757 N.W.2d at 625 (citing *State v. Iowa Dist. Ct. for Scott County*, 508 N.W.2d 692, 694 (Iowa 1993)). Recognizing a "frightening and high" risk of recidivism posed by sex offenders and the harm sexual abuse causes victims and society, the Iowa Legislature enacted Iowa Code section 903B.1 in 2005 to impose a special sentence on persons convicted of chapter 709 sex offenses. *Kolzow v. State*, 813 N.W.2d 731, 737 (Iowa 2012) (citing *Wade*, 757 N.W.2d at 626 *and Smith v. Doe*, 538 U.S. 84, 103 (2003)). Section 903B.1 is designed to protect the public from recidivism by persons convicted of sexual offenses. To achieve that end it mandates, in addition to the ordinary sentence for the offense, a special sentence of extended parole. This extended supervision protects society by providing a mechanism in which treatment may be offered and sex offenders may be monitored for a longer period. *Kolzow*, 813 N.W.2d at 737.

Jefferson argues that the circumstances of his case create an inference of gross disproportionality because he was "convicted of a crime of lesser culpability prohibited by broad statutes subject to harsh punishment," and unlike Bruegger and Oliver, was convicted of

statutory rape; he was twenty-one and the victim was fourteen. Appellant's Brief pp.55-56; Iowa Code § 709.4(2)(c)(4); PSI pp.1-2; App. 12-13. Jefferson's assertion that the court may not consider the fact he was charged with a greater sexual assault because he pled guilty to a lesser offense is not well taken under the circumstances of his case. *See generally* Minutes; App.------. Even overlooking facts establishing that the sexual assault was non-consensual, performed in tandem with another man, and while the victim was under the influence of drugs and/or alcohol, Jefferson does not claim a "Romeo and Juliet" type of relationship with the victim, or any prior relationship with the fourteen year-old girl. *Contrast State v. McCurdy,* 2014 WL 467916, at *2 (Iowa Ct. App. Feb. 5, 2014) (defendant and victim had a short, consensual sexual relationship).

Nor does Jefferson acknowledge the relative youth of the victim. The special sentence is aimed at not only protecting sexual assault victims from physical harm, but also psychological harm. *McCurdy,* 2014 WL 467916, at *3 (citing *State v. Mossman,* 281 P.3d 153, 160-61 (Kan. 2012)); *see also Wade*, 757 N.W.2d at 626. The Iowa Legislature included statutory rape "in light of the risk of disease, pregnancy, and serious psychological harm that can result from even

apparently consensual sexual activity involving adults and adolescents." *Bruegger*, 773 N.W.2d at 886-87; *see also Oliver,* 812 N.W.2d at 654.

As to Jefferson's point that he is a young man, the State points to the Court of Appeals' rejection of attempts to extend *Lyle*'s neuroscience rationales beyond juvenile offenders. *See State v. Vance*, 2015 WL 4936328, at *2 (Iowa Ct. App. Aug. 19, 2015) (collecting other recent opinions rejecting arguments to extend *Lyle* to adult offenders, then rejecting it again). At sentencing, defense counsel and Jefferson advised the court that he was working at Target, and he had a small child and another on the way with his fiancée. Sent. Tr.p.4, line 16-p.5, line 3, p.9, line 10-p.11, line 10. Thus, it is reasonable to believe Jefferson was aware of the wrongful nature of his conduct at the time he acted despite his limited formal education or his youth.

Jefferson also points out that he "is not a repeat offender and there is no indication that he presents a risk for reoffending." Appellant's Brief p.56; PSI p.2; App. 13. Jefferson also has no documented criminal history. PSI p.2; App. 13. To the extent Jefferson asserts the risk of sexual offender recidivism has been

overestimated, the State submits low rates of arrest or incarceration do not necessarily equate to low rates of re-offense. Iowa Criminal Justice and Juvenile Planning, *An Analysis of the Sex Offender Special Sentence in Iowa* pp.5, 16-22 (2015 Annual Report), https://humanrights.iowa.gov/cjjp/council/sex-offender-research-council. Many sexual assaults do not result in arrest, let alone incarceration:

> Only 10% of rapes are reported to the police, and only 20% of those reported perpetrators are convicted of sexual assault. Doing the math, that means that only 2% of all rapists are punished, while 98% go free.

Christopher C. Kendall, *Rape As a Violent Crime in Aid of Racketeering Activity*, 34 LAW & PSYCHOL. REV. 91, 91–92 (2010).

In determining that the imposition of lifetime supervision for the factual equivalent of Iowa's third-degree sexual abuse was not cruel and unusual punishment, a Colorado appellate court found:

> [S]ex offenses are considered particularly heinous crimes, and the General Assembly has determined that sex offenders present a continuing danger to the public and that a program providing for lifetime treatment and supervision of sex offenders is necessary for the safety, health, and welfare of the state.

People v. Dash, 104 P.3d 286, 293 (Colo. Ct. App. 2004) (internal citation omitted).

Likewise, this Court has recognized that sex offenders "present a special problem and danger to society," given the "particularly devastating effects of sexual crimes on victims." *Kolzow*, 813 N.W.2d at 737 (*citing Wade*, 757 N.W.2d at 626); *see also Sallis*, 786 N.W.2d at 517. The gravity of Jefferson's offense, both in the abstract and in this particular case, weighs heavily against any finding of gross disproportionality.

2. Severity of the Sentence.

As to the severity of the challenged special sentence, Jefferson claims "he will not experience another day of freedom for the rest of his life." Appellant's Brief p.61. This is both melodramatic and incorrect; "[t]he imposition of lifetime parole is not tantamount to a sentence of life imprisonment." *Tripp*, 776 N.W.2d at 858 (citation omitted). Nor does the lifetime special sentence foreclose opportunities for Jefferson to graduate to full release by demonstrating rehabilitation and personal growth. Iowa Code §§ 901B.1, 906.15. The Iowa Legislature has directed the parole board to discharge a person from parole supervision if, at any time, that person is "able and willing to fulfill the obligations of a law-abiding

citizen without further supervision." Iowa Code § 906.15; *see also* Iowa Code § 903B.1.

Given that parole usually functions as a relief valve in the context of cruel and unusual punishment challenges by providing defendants with "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," it cannot be said that this lifetime special sentence—which represents a relatively minimal burden on liberty *and* provides a relief valve for obtaining discharge—offends either the Eighth Amendment or article I, section 17 of the Iowa Constitution. *See State v. Null*, 836 N.W.2d 41, 63 (Iowa 2013) (quoting *Graham v. Florida*, 560 U.S. 48, 75 (2010)). The Court has stated that "[p]arole is a lenient form of punishment that monitors a person's activities to ensure the person is complying with the law." *Tripp*, 776 N.W.2d at 858. Parole supervision is at the low end of the corrections continuum. Iowa Code ch.901B.

The supervision imposed under Iowa Code section 903B.1 provides for a minimal level of infringement on defendant's liberty interest while still providing protection to the community through monitoring and treatment. Section 903B.1 embodies the concept of proportionality: the intensity of the parole supervision, and the

rigorousness of the parole conditions, can be customized to address the relative severity of a defendant's crime, the defendant's likelihood of re-offending, and any treatment and rehabilitation needs of a particular defendant.

To the extent Jefferson is also complaining about his specific conditions of parole, such complaints are not properly before this Court.[5] Appellant's Brief p.59 ("Appellant is not allowed to have any contact with minor children, including his own biological children."). In any regard, the parole board findings as to Jefferson's violations do not reflect merely "technical violations" of parole conditions.[6] Parole Revocation Hearing/Findings of Fact and Order (3/24/14); Revocation Hearing/Findings of Fact and Order (4/04/16); App. 28-29, 40.

The Iowa Legislature is not alone in believing the risk of recidivism is high; legislatures in at least nine other states have enacted some form of lifetime special sentence applicable to sex offenders. *See* Colo. Rev. Stat. § 18-1.3-1001 (2015) ("The general

---

[5] *See* Iowa Admin. Code r.201-45.2(1) (standard conditions), r.201-45.2(2) (special conditions).

[6] Iowa Criminal Justice and Juvenile Planning, *An Analysis of the Sex Offender Special Sentence in Iowa* pp.16, 20-22 (2015 Annual Report), https://humanrights.iowa.gov/cjjp/council/sex-offender-research-council.

assembly therefore declares that a program under which sex offenders may receive treatment and supervision for the rest of their lives, if necessary, is necessary for the safety, health, and welfare of the state."); Me. Rev. Stat. tit. 17-A, §§ 1231(2)(C), 1252(4–E) (2015) (requiring lifetime special sentence of supervised release following incarceration for those convicted of sex offenses against children under 12); Neb. Rev. Stat. § 83–174.03 (2015) (requiring that certain sex offenders, upon completion of their term of commitment, be supervised "by the Office of Parole Administration for the remainder of his or her life"); Nev. Rev. Stat. § 176.0931 (2015) ("If a defendant is convicted of a sexual offense, the court shall include in sentencing, in addition to any other penalties provided by law, a special sentence of lifetime supervision."); N.H. Rev. Stat. Ann. § 632-A:10-a (2015) (setting out that lifetime supervision may be ordered in addition to any other sentence for certain sex offenses); N.J. Stat. Ann. § 2C:43-6.4 (2015) (stating sentences for sex offenses "shall include, in addition to any sentence authorized by this Code, a special sentence of parole supervision for life"); Tenn. Code Ann. § 39-13-524 (2015) (specifying sex offenses where, "[i]n addition to the punishment authorized by the specific statute prohibiting the conduct," the

offender "shall receive a sentence of community supervision for life"); W. Va. Code § 62-12-26 (2015) (certain sex offenders "shall be subject, in addition to any other penalty or condition imposed by the court, to supervised release for life"); Wis. Stat. § 939.615 (2015) (providing that serious sex offenders may be sentenced to lifetime supervision in addition to any other sentence); *cf. United States v. Moriarty*, 429 F.3d 1012, 1025 (11th Cir. 2005) ("[W]e conclude that a lifetime term of supervised release is not grossly disproportionate to [the defendant's] child pornography offenses . . . , and his Eighth Amendment claim therefore fails."). Therefore, the absence of any "national consensus against the use of this penalty for this crime" would undermine any attempt to show Iowa's lifetime special sentence is cruel and unusual under the third *Solem* factor as applied to third-degree sexual abuse. *See Oliver*, 812 N.W.2d at 641 (citing *Bruegger*, 773 N.W.2d at 873).

Jefferson has failed to show that the lifetime special parole imposed after his conviction for third-degree sexual abuse, and two revocations for multiple violations, amounts to cruel and unusual punishment under either the United States or the Iowa Constitution. Jefferson's alleged "unique circumstances" are not particularly

unique, and none of them rise to the level of establishing a substantial risk of gross disproportionality that would warrant a hearing—much less an inference of gross disproportionality that would require analysis of the second and third *Solem* factors. *Bruegger*, 773 N.W.2d at 873 (quoting *Ewing v. California*, 538 U.S. 11, 30 (2003)).

Accordingly, the Court should reject Jefferson's as-applied challenge to section 903B.1. Should the Court disagree and find Jefferson has satisfied the threshold test, this case should be remanded to the district court for a full hearing on the issue of whether Jefferson's lifetime special sentence is grossly disproportionate to his crime of third-degree sexual abuse.

CONCLUSION

For all of the reasons stated above, the Court should affirm the district court's denial of defendant Jefferson's motions for correction of an illegal sentence. Alternatively, the Court should remand this case to the district court for an evidentiary hearing on the issue of whether Jefferson's lifetime special sentence under Iowa Code section 903B.1 is constitutional as applied.

REQUEST FOR NONORAL SUBMISSION

Appellant has requested oral argument. This case should be set for nonoral submission because it requires application of established legal principles, and does not present the opportunity for argument on novel points of law. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

Sharon K. Hall

SHARON K. HALL
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
sharon.hall@iowa.gov

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **9,106** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: May 18, 2017

SHARON K. HALL
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
sharon.hall@iowa.gov