IN THE SUPREME COURT OF IOWA

NO. 16-1684

STATE OF IOWA, Plaintiff-Appellee, vs. **BRADLEY ELROY WICKES,** Defendant-Appellant.	CLINTON COUNTY, NO. FECR071368
APPEAL FROM THE SEVENTH JUDICIAL DISTRICT COURT HONORABLE STUART WERLING, DISTRICT COURT JUDGE	

APPELLANT'S BRIEF

Eric D. Puryear, AT0010498
PURYEAR LAW P.C.
3719 Bridge Avenue, Suite 6
Davenport, IA 52807
(p) 563.265.8344
(f) 866.415.5032
eric@puryearlaw.com

Eric S. Mail AT0011435
PURYEAR LAW P.C.
3719 Bridge Avenue, Suite 6
Davenport, IA 52807
(p) 563.265.8344
(f) 866.415.5032
mail@puryearlaw.com

ATTORNEYS FOR THE DEFENDANT-APPELLANT

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy was served on August 4, 2017 on the Attorney General's Office by EDMS as well as provided to the Defendant-Appellant, Bradley Wickes, via MyCase.

/s/ Eric S. Mail

Eric S. Mail AT0011435
PURYEAR LAW P.C.
3719 Bridge Avenue, Suite 6
Davenport, IA 52807
(p) 563.265.8344
(f) 866.415.5032
mail@puryearlaw.com

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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because it presents substantial constitutional questions as to the validity of a statute, substantial issues of first impression, and fundamental and urgent issues of broad public importance requiring prompt or ultimate determination by the Supreme Court. Iowa R. App. P. 6.1101(2)(a), (c), and (d).

STATEMENT OF THE CASE

NATURE OF THE CASE:

The Defendant-Appellant, Bradley Wickes ("Mr. Wickes"), appeals from the district court's ruling, verdict, and sentence in the Scott County District Court for sexual exploitation by a school employee. The Honorable Stuart Werling presided over the bench trial, the motion for new trial hearing, and the sentencing hearing.

COURSE OF PROCEEDING AND DISPOSITION BELOW:

On November 19, 2015, Mr. Wickes was charged by Trial Information with one count—Sexual Exploitation by a School Employee, a Class D felony in violation of Iowa Code §§ 709.15(3)(a)(1) and 709.15(5)(a) (2015). (A3). Mr. Wickes entered a plea of not guilty and waived his right to a jury trial. (A1; A5). The matter proceeded to a bench trial on July 18, 2016. (Bench Trial Tr. p. 1).

On August 11, 2016, the district court issued its findings of fact and conclusions of law. (A15-25). The district court found Mr. Wickes guilty of Sexual Exploitation by a School Employee, a Class D felony. (Verdict Tr. p. 3, lines 21-25 & p. 4, lines 1-2; A24). In relevant part, the district court found as follows:

> The evidence establishes that Wickes was a teacher and A.S. was a student within the meaning of the statute. The issue before the Court is this: "Can hugs be sexual conduct within the meaning of 709.15?" It is arguable that the hugs between this teacher and student started out as mere expressions of support. However, by September 20 and thereafter, the clear expression of Wickes' emotional needs and intent was that the hugs became a tool for his sexual gratification. As in *Romer*, Wickes' sexual gratification was from the emotional intimacy exchanged between him and the student during the hugs and the intense emotional exchange in the messages he shared with the student. As in *Romer*, there was no sex act between the teacher and student as such is defined by the Code. However, in this instance, unlike *Romer*, there was physical contact between the teacher and student. The Court therefore **FINDS** that hugging can satisfy the statutory requirements of sexual gratification as defined in *Romer* and in 709.15(3)(a)(1) and 709.15(5)(a) of the Code of Iowa (2015). If a hug is given or received for the sexual gratification of Wickes or A.S., then such conduct is "sexual conduct" under the Code. The Court **FINDS** Wickes' hugging of A.S. was for his sexual gratification and it was therefore sexual conduct.

(A23) (emphasis in original). *See generally*, Verdict Tr. pp. 1-2. The district court set the matter for sentencing and ordered that a presentence investigation report be prepared. (Verdict Tr. p. 4 lines 3-9; A24).

On August 24, 2016, Mr. Wickes filed a motion for new trial and a motion in arrest of judgment. (A26-A31). The district court denied the motions at sentencing, finding merely "that based on the whole record there is substantial evidence to support the decision and verdict of the Court, that the evidence, when weighed, weighs in favor of the verdict. . . ." (Motions & Sent. Tr. p. 4, lines 5-10; A53).

On October 6, 2016, the district court sentenced Mr. Wickes to an indeterminate term of prison not to exceed five years, a $750 fine, a thirty-five percent surcharge, court costs, submit a DNA sample, a ten-year special sentence, a $250 civil penalty, placement on the Sex Offender Registry, and a no contact order be entered. (Motions & Sent. Tr. p. 15, lines 21-25, p. 16, lines 1-18 & p. 17, lines 11-12; A53).

On October 6, 2016, Mr. Wickes filed his Notice of Appeal (A56).

FACTS:

In the fall of 2015, Mr. Wickes was a social studies teacher at the Camanche High School. (Bench Trial Tr. p. 11, lines 19-25 & p. 12, lines 1-

4). At that time, A.S. was a senior at the high school and was in Mr. Wickes' social studies class. (Bench Trial Tr. p. 51, lines 12-17 & p. 52, lines 5-7).

From August 21, 2015, through October 5, 2015, Mr. Wickes and A.S. engaged in Facebook conversation for six weeks, totaling over 600 messages exchanged between the two. (Bench Trial Tr. p. 52, lines 21-25 & p. 53, lines 1-3). *See generally*, State's Exhibit 1 (A58-A703). The messaging started around the time that A.S. had given Mr. Wickes an English paper to proofread for her. (Bench Trial Tr. p. 19, lines 7-14). Mr. Wickes initiated conversation on Facebook messenger, as it appeared that A.S. was struggling with some issues in her personal life. (Bench Trial Tr. p. 19, lines 23-25 & p. 20, lines 1-2). Initially, the messages were about A.S.'s struggles but then the messages turned flirty in nature. (Bench Trial Tr. p. 22, lines 18-23). However, Mr. Wickes had no romantic intentions toward A.S. (Bench Trial Tr. p. 23, lines 10-14). Regarding A.S.'s intentions, Mr. Wickes believed that A.S. thought there was more involved than Mr. Wickes did. (Bench Trial Tr. p. 23, lines 15-18).

Mr. Wickes and A.S. exchanged hugs on a couple of occasions. (Bench Trial Tr. p. 25, lines 1-6 & p. 64, lines 19-22). The hugs were the “type of hug you would give to someone after they had been crying” and were not sexual in nature. (Bench Trial Tr. p. 25, lines 12-17, p. 27, lines 14-17 & p. 65, lines 5-7). *See generally*, State's Exhibit 9 (DVD of police interview). Both parties were fully clothed, and Mr. Wickes did not grab or touch A.S. in a sexual manner. (Bench Trial Tr. p. 65, lines 2-7). Other than the hugs,

there was no physical contact between Mr. Wickes and A.S., including any sexual conduct or contact. (Bench Trial Tr. p. 27, lines 18-20, p. 30, lines 2-7, p. 64, lines 23-25 & p. 65, line 1). Besides A.S., Mr. Wickes has hugged many other students, including at graduation. (Bench Trial Tr. p. 46, lines 22-24, p. 47, line 25 & p. 48, line 1).

At the time of the sentencing hearing, Mr. Wickes was 37-years-old, had no prior criminal history, had a stable employment history and was currently employed, had several post-secondary degrees, including a bachelor's degree and a master's degree in special education, had family support in the community, including his wife and three minor children, resided in Illinois, and had mental health diagnoses for which he is seeking treatment and counseling. (A32-A35, A38-A39 & A41). In terms of recommendations, the Department of Correctional Services indicated it had assessed the Defendant's risk to re-offend and testing indicated that the Defendant scored in the low category for future violence and the low-minimum category for future victimization. (A43). Testing further indicated that the Defendant would be supervised initially at a low level of supervision should he be supervised in the community. (A43).

In terms of sentencing, the prosecution believed that the district court had no choice but to sentence Mr. Wickes to prison under Iowa Code section 907.3; even if the district court had discretion, the prosecution requested incarceration. (Motions & Sent. Tr. p. 4, lines 17-25, p. 5, lines 1-25 & p. 6, lines 2-22). On the other hand, Mr. Wickes believed he was eligible for a

deferred judgment or a suspended sentence under the statute; even if he was not eligible for either of these and prison was required under the statute, Mr. Wickes argued that sentencing him to prison for hugs constituted cruel and unusual punishment as applied to him in violation of the federal and Iowa constitutions. (Motions & Sent. Tr. p. 12, lines 14-25 & p. 13, lines 1-15; A44-A52).

Even if Mr. Wickes is eligible under the sentencing statute for a deferred judgment or a suspended sentence, the district court found doing either would be inappropriate in this case "based on the seriousness of this offense and the depth of the betrayal of this position of trust and mentorship that society has given to him." (Motions & Sent. Tr. p. 15, lines 10-15). The district court focused on the hugs and the Facebook messages in concluding that a prison sentence was appropriate. (Motions & Sent. Tr. p. 14, lines 3-25 & p. 15, lines 1-9). The district court also found that incarceration was appropriate, considering "the issues of protection of the public, the opportunity for Mr. Wickes to reflect upon the seriousness of his conduct, and his lack of remorse. . . ." (Motions & Sent. Tr. p. 15, lines 16-20).

Additional facts relevant to this appeal will be discussed below.

ARGUMENT

I. Substantial Evidence Does not Exist to Support a Finding of Sexual Conduct under the Sexual Exploitation by a School Employee Statute when the Conduct Was Merely Nonsexual Hugs.

Preservation of Error: Mr. Wickes preserved error by making a motion for judgment of acquittal, arguing that the hugs at issue do not constitute sexual conduct under the sexual exploitation by a school employee statute. (A9-A14). *See generally* Bench Trial Tr. pp. 90-97. The district court denied the motion for judgment of acquittal. (Bench Tr. Tr. p. 104, lines 19-25 & p. 105, lines 1-23). Therefore, error has been preserved.

When a trial is conducted to the bench, the defendant-appellant may challenge the sufficiency of the evidence on appeal regardless of whether a motion for judgment of acquittal was made. *State v. Abbas*, 561 N.W.2d 72, 74 (Iowa 1997).

Standard of Review: Appellate court review of a sufficiency of the evidence claim is for correction of errors at law. Iowa R. App. P. 6.4; *State v. Kemp*, 688 N.W.2d 785, 788 (Iowa 2004).

Discussion: The appellate court reviews the district court's findings in a bench trial as it would a jury verdict. *Kemp*, 688 N.W.2d at 788-89. A verdict must be upheld if supported by substantial evidence. *Id.* at 789. Evidence is substantial if it would convince a fact finder that the defendant is guilty of the crime beyond a reasonable doubt. *Abbas*, 561 N.W.2d at 74.

In considering whether there is substantial evidence, the evidence is viewed in the light most favorable to the State, along with legitimate inferences that may reasonably be deduced from the evidence in the record. *Id.* The appellate court must also consider all of the evidence in the record and not just that which supports a finding of guilt. *Id.* The State must prove every element necessary to constitute the crime charged. *Kemp*, 688 N.W.2d at 789. The evidence must raise a "fair inference of guilt" and not create "speculation, suspicion, or conjecture." *Id.*

Under Iowa Code section 709.15(3), sexual exploitation by a school employee occurs when any of the following is found:

> (1) A pattern or practice or scheme of conduct to engage in any of the conduct described in subparagraph 2.
> (2) Any sexual conduct with a student for the purpose of arousing or satisfying the sexual desires of the school employee or the student. Sexual conduct includes but is not limited to the following:
> (a) Kissing.
> (b) Touching of the clothed or unclothed inner thigh, breast, groin, buttock, anus, pubes, or genitals.
> (c) A sex act as defined in section 702.17.

Iowa Code § 709.15(3). Furthermore, under section 702.17, a "sex act" is defined as any sexual contact between two or more persons by any of the following:

> 1. Penetration of the penis into the vagina or anus.
> 2. Contact between the mouth and genitalia or by contact between the genitalia of one person and the genitalia or anus of another person.
> 3. Contact between the finger or hand of one person and the

> genitalia or anus of another person, except in the course of examination or treatment by a person licensed. . . .
> 4. Ejaculation onto the person of another.
> 5. By use of artificial sexual organs or substitutes therefor in contact with the genitalia or anus.

Id. § 702.17.

Recently, the Iowa Supreme Court has interpreted the sexual exploitation by a school employee statute. *State v. Romer*, 832 N.W.2d 169 (Iowa 2013). In *State v. Romer*, a teacher had an ongoing sexual relationship with one student and on two occasions photographed nude students in various sexual poses that he had suggested. *Id.* at 173. The photographs depict students kissing, touching another's breasts, and touching another's genital area. *Id.* The issue before the Iowa Supreme Court was whether section 709.15(3) requires some physical contact. *Id.* at 178. By engaging in statutory construction, the Iowa Supreme Court found that the statute does not require physical contact. *Id.* at 181. Specifically, "engage in" means to "employ or involve oneself." *Id.* at 179. In addition, the statute is not limited to the actions specifically listed in the statute. *Id.* at 180. The defendant in *Romer* persuaded and induced students to engage in prohibited sexual conduct and photographed the conduct. *Id.* at 181. Specifically, he engaged in interactive conduct with the students, who in

turn engaged in sexual conduct based on his instructions. *Id.*

Although *Romer* did not involve physical contact between himself and the students when he orchestrated a sexually suggestive photo session, there was physical contact between Mr. Wickes and A.S., namely hugs that were exchanged. The question is whether under section 709.15(3) hugs can constitute "sexual conduct." Mr. Wickes argues that the hugs at issue in this case do not constitute "sexual conduct" under the statute.

Specifically, hugs are not listed as "sexual" conduct under the statute. Nonetheless, a similar statute dealing with sexual exploitation of a dependent adult by a caretaker is instructive on this issue. Under section 235B.2(5)(3)(b), sexual exploitation is defined as follows:

> [A]ny consensual or nonconsensual sexual conduct with a dependent adult which includes but is not limited to kissing; touching of the clothed or unclothed inner thigh, breast, groin, buttock, anus, pubes, or genitals; or a sex act, as defined in section 702.17. "Sexual exploitation" includes the transmission, display, taking of electronic images of the unclothed breast, groin, buttock, anus, pubes, or genitals of a dependent adult by a caretaker for a purpose not related to treatment or diagnosis or as part of an ongoing assessment, evaluation, or investigation. Sexual exploitation does not include touching which is part of a necessary examination, treatment, or care by a caretaker acting within the scope of the practice or employment of the caretaker; *the exchange of a brief touch or hug between the dependent adult and caretaker for the purpose of reassurance, comfort, or casual friendship*; or touching between spouses.

Iowa Code § 235B.2(5)(3)(b) (emphasis added). Therefore, hugs that are given for "reassurance, comfort, or casual friendship" do not constitute

"sexual conduct." Hugs that are not given for reassurance, comfort, or casual friendship and are sexual in nature would presumably constitute "sexual conduct."

This conclusion is also supported by case law. In *State v. Ohrtman*, the Minnesota Court of Appeals was presented with the issue of whether a hug constitutes "sexual contact" under that state's law prohibiting a psychotherapist from engaging in sexual contact with a patient during a psychotherapy session. *State v. Ohrtman*, 466 N.W.2d 1, 2-3 (Minn. Ct. App. 1991). The court cited to the dictionary definition of a "hug," which means "to put the arms around and hold closely and fondly; to embrace tightly and affectionately" and "a close, affectionate embrace." *Id.* at 4 (citing Webster's New Twentieth Century Dictionary 883 (2nd ed. 1983)). The court found that "the legislative intention would be to exclude hugs from the term 'touching' under the statute when no additional sexual act is involved." *Id.* The act of hugging "is used as an expression of fondness and affection" and "ought not be threatened with sanction." *Id.* According to the court, "[t]he law can hold off on criminal sanctions unless some additional touch, some more menacing act occurs." *Id.* Hugging a child is usually a loving, supporting, and comforting act. *Id.* "To put the hugger at risk of charges of criminal sexual exploitation is a high price to pay to punish the small percentage of bad hugs, especially when the bad hug is not followed by more explicitly sexual conduct." *Id.* Even if a hug is inappropriate but not sexual in nature, the court did not believe that the

legislature intended to put "a cloud of potential criminality over affectionate hugging." *Id.* at 5. "On balance, society does not suffer an excess of hugs." *Id.*

As applied, Mr. Wickes argues that insufficient evidence exists that the hugs at issue constitute "sexual conduct" under section 709.15(3). Mr. Wickes and A.S. exchanged hugs on a couple of occasions. (Bench Trial Tr. p. 25, lines 1-6 & p. 64, lines 19-22). The hugs were the "type of hug you would give to someone after they had been crying" and were not sexual in nature. (Bench Trial Tr. p. 25, lines 12-17, p. 27, lines 14-17 & p. 65, lines 5-7). *See generally*, State's Exhibit 9 (DVD of police interview). Both parties were fully clothed, and Mr. Wickes did not grab or touch A.S. in a sexual manner. (Bench Trial Tr. p. 65, lines 2-7). Other than the hugs, there was no physical contact between Mr. Wickes and A.S., including any sexual conduct or contact. (Bench Trial Tr. p. 27, lines 18-20, p. 30, lines 2-7, p. 64, lines 23-25 & p. 65, line 1). Besides A.S., Mr. Wickes has hugged many other students, including at graduation. (Bench Trial Tr. p. 46, lines 22-24, p. 47, line 25 & p. 48, line 1).

Mr. Wickes and A.S.'s exchange of hugs, when taken into proper context, show they were not sexual in nature nor did Mr. Wickes or A.S. become sexually gratified by the hugs. The hugs were clearly intended and given for comfort and emotional support. The Facebook messages between Mr. Wickes and A.S. discussing the hugs and pictures depicting the hugs clearly show that they were just that—hugs. *See generally* State's Exhibit 1

(A58-A703); State's Exhibits 2, 3, & 4 (A704, A705, A706). There is nothing in the messages or pictures to suggest that they were either intended for sexual pleasure or actually depict sexual overtones. Based on the foregoing, insufficient evidence exists that the hugs exchanged constitute sexual contact under the statute.

II. Substantial Evidence Does not Exist to Show a Pattern, Practice, or Scheme of Conduct to Engage in Sexual Exploitation by a School Employee when There Was only One Alleged Victim and the Conduct Merely Involved a Few Hugs.

Preservation of Error: Mr. Wickes preserved error by making a motion for judgment of acquittal, arguing that sufficient evidence does not exist that there was a pattern, practice, or scheme of conduct under the sexual exploitation by a school employee statute. (A9-A14). *See generally* Bench Trial Tr. pp. 90-97. The district court denied the motion for judgment of acquittal. (Bench Tr. Tr. p. 104, lines 19-25 & p. 105, lines 1-23). Therefore, error has been preserved.

When a trial is conducted to the bench, a defendant-appellant may challenge the sufficiency of the evidence on appeal regardless of whether a motion for judgment of acquittal was made. *Abbas*, 561 N.W.2d at 74.

Standard of Review: Appellate court review of a sufficiency of the evidence claim is for correction of errors at law. Iowa R. App. P. 6.4; *Kemp*, 688 N.W.2d at 788.

Discussion: The appellate court reviews the district court's findings in a bench trial as it would a jury verdict. *Kemp*, 688 N.W.2d at 788-89. A verdict must be upheld if supported by substantial evidence. *Id.* at 789. Evidence is substantial if it would convince a fact finder that the defendant is guilty of the crime beyond a reasonable doubt. *Abbas*, 561 N.W.2d at 74. In considering whether there is substantial evidence, the evidence is

viewed in the light most favorable to the State, along with legitimate inferences that may reasonably be deduced from the evidence in the record. *Id.* The appellate court must also consider all of the evidence in the record and not just that which supports a finding of guilt. *Id.* The State must prove every element necessary to constitute the crime charged. *Kemp*, 688 N.W.2d at 789. The evidence must raise a "fair inference of guilt" and not create "speculation, suspicion, or conjecture." *Id.*

Under Iowa Code section 709.15(3), sexual exploitation by a school employee is enhanced from an aggravated misdemeanor to a class D felony if the school employee engages in a "pattern or practice or scheme of conduct to engage in any of the conduct described in subparagraph (2)." Iowa Code §§ 709.15(3)(a)(1) and 709.15(5)(a) and (b). As discussed above in Argument I, subparagraph (2) prohibits "[a]ny sexual conduct with a student for the purpose of arousing or satisfying the sexual desires of the school employee or the student." *Id.* § 709.15(3)(a)(2). Stated another way, subparagraph two conduct is an aggravated misdemeanor while subparagraph one conduct is enhanced to a class D felony for a pattern, practice, or scheme of conduct.

When interpreting a statute, one must start with the words that were used by the legislature. *State v. Nicoletto*, 845 N.W.2d 421, 426 (Iowa 2014). Section 709.15(3) does not contain a definition for pattern, practice, or scheme. When there is no legislative definition, then the court gives words their ordinary meaning. *Nicoletto*, 845 N.W.2d at 426. It is

instructive to look to the dictionary definition of these terms. "Pattern" is defined as a "frequent or widespread incidence." Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary (last visited February 28, 2017). "Practice" is defined as "to do or perform often, customarily, or habitually." *Id.* Also, "scheme" means "a plan or program of action." *Id.*

In interpreting a "common scheme or plan" as used in Iowa Rule of Criminal Procedure 2.6(1), this term "presupposes that it involves a series of separate transactions or acts." *Romer*, 832 N.W.2d at 181. In determining whether a common scheme or plan exists under Rule 2.6(1), all charged offenses must be products of a single, continuing motive. *Id.* In *Romer*, the jury found the defendant guilty of a common scheme or plan and his "intent in that common scheme was to victimize *children* to fulfill his sexual desires." *Id.* at 182 (emphasis added).

> Two of the three events (and seven of the offenses charged) occurred at Romer's home. The other event—the long-term sexual relationship with R.A.--occurred occasionally at her home, at the rock quarry, or at numerous other locations in Iowa. This also establishes geographic proximity. Finally, Romer displayed a similar modus operandi with all of the minors involved. Romer maintained contact with victims in each of the three events through cell phone communication and texting. Romer requested the victims taken nude or seminude photographs of themselves or allow him to take seminude photographs of them. Romer would choreograph or pose the minors in sexually explicit poses, and would encourage others to participate as well. Romer offered or provided alcohol to each of them, often resulting in intoxication. All of these factors

> support Romer having engaged in a common scheme or plan and that joinder of the counts was appropriate.

Id. at 182-83. In other words, *Romer* involved many different student victims and conduct that occurred at various locations over the course of years.

In contrast, there was insufficient evidence that Mr. Wickes engaged in a pattern, practice, or scheme of conduct under section 709.15(3)(a)(1). Even if the Court finds that Mr. Wickes engaged in "sexual conduct" with A.S., insufficient evidence was presented regarding a pattern, practice, or scheme of conduct. The only alleged victim was A.S. There were no other alleged victims. Mr. Wickes was only charged with one count of sexual exploitation by a school employee and did not have multiple counts. (A3). There were only a few hugs, which spanned over the course of approximately six weeks. (Bench Trial Tr. p. 25, lines 1-6 & p. 64, lines 19-22). This can hardly be said to constitute a pattern, practice, or scheme of conduct. Based on the foregoing, there is insufficient evidence of a pattern, practice, or scheme of conduct.

III. The Trial Court Erred in Ruling on the Motion for New Trial by Using the Incorrect Standard and Failing to Independently Weigh Witness Credibility.

Preservation of Error: Mr. Wickes filed a motion for new trial. (A26-A31 Furthermore, the district court denied the motion for a new trial. (Motions & Sent. Tr. p. 4, lines 5-10; A53). Therefore, error has been preserved.

Standard of Review: Appellate court review of a district court's ruling on a motion for new trial is for an abuse of discretion. *State v. Shanahan*, 712 N.W.2d 121, 135 (Iowa 2006). However, when the district court fails to properly apply the correct standard in ruling on a motion for new trial, appellate review is for correction of errors at law. *State v. Ary*, 877 N.W.2d 686, 706 (Iowa 2016).

Discussion: The district court has discretion to grant a new trial when "the verdict is contrary to law or evidence." Iowa R. Crim. P. 2.24(2)(b)(6). This term has been interpreted by the Iowa Supreme Court to mean that the verdict is "contrary to the weight of the evidence." *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998).

The district court in ruling on a motion for a new trial must apply the weight-of-the-evidence standard, not the sufficiency-of-the-evidence-standard that is used in ruling on a motion for judgment of acquittal. *State v. Fister*, No. 15-1542, Google Scholar ¶ 18 (Iowa Ct. App. Nov. 9, 2016). The reasoning for this is that "the weight-of-the-evidence analysis is much broader in that it involves questions of credibility and refers to a

determination that more credible evidence supports one side than the other." *State v. Nitcher*, 720 N.W.2d 547, 559 (Iowa 2006).

Not only must the district court apply the correct standard but also the court must make an independent evaluation of the evidence; in doing so, the court becomes an independent trier of fact. *State v. Scalise*, 660 N.W.2d 58, 65 (Iowa 2003). The district court in ruling on a motion for new trial does not view the evidence in the light most favorable to the verdict; instead, the court "must independently consider whether the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted." *Id.* at 65-66. The district court commits error when it fails to "engage in any independent evaluation of the evidence or make any credibility determinations of the witnesses." *Id.* at 66.

As applied, the district court in Mr. Wickes' case used the wrong standard in ruling on the motion for new trial. While the district court uses some language in its ruling on the motion for new trial differentiating between the standards, it focuses on whether there was sufficient evidence to support the verdict. *See* Motions & Sent. Tr. p. 4, lines 5-10 (finding "that based on the whole record there is substantial evidence to support the decision and verdict of the Court, that the evidence, when weighed, weighs in favor of the verdict. . . ."). *See also State v. Fister*, No. 15-1542, Google Scholar ¶ 20. In addition, the district court referred back to its reasoning for denying the motion for judgment of acquittal in ruling on the motion for a new trial, which Iowa courts have repeatedly held is improper. *See*

Motions & Sent. Tr. p. 4, lines 5-10 (finding "that based on the whole record there is substantial evidence to support the decision and verdict of the Court, that the evidence, when weighed, weighs in favor of the verdict. . . ."). *See e.g.*, *State v. Fister*, No. 15-1542, Google Scholar ¶ 20; *State v. DeMichelis*, No. 05-0962, 2006 WL 2267831, at *2 (Iowa Ct. App. 2006); *State v. Curtis*, No. 04-1878, 2005 WL 1398337, at *2 (Iowa Ct. App. June 15, 2005).

Moreover, the district court failed to analyze the evidence and independently weigh the witnesses' credibility. *See* Motions & Sent. Tr. p. 4, lines 5-10 (finding "that based on the whole record there is substantial evidence to support the decision and verdict of the Court, that the evidence, when weighed, weighs in favor of the verdict. . . ."). The district court is required to independently consider the witnesses' credibility. The district court's failure to do so in denying a motion for new trial constitutes error. *Scalise*, 660 N.W.2d at 66; *Ellis*, 578 N.W.2d at 659. The appellate court should conditionally affirm the verdict on this issue but vacate the district court's ruling and remand for the district court to properly apply the correct weight-of-the-evidence standard. *See Nitcher*, 720 N.W.2d at 560.

IV. The Trial Court Had Discretion under the Sentencing Statute to Defer Judgment or Suspend the Sentence but Abused Its Discretion in Sentencing the Appellant to Prison for Hugs.

Preservation of Error: Mr. Wickes need not object to the district court's refusal to grant him a deferred judgment or suspended sentence because a challenge to the legality of a sentence can be addressed for the first time on appeal. *State v. Dann*, 591 N.W.2d 635, 637 (Iowa 1999).

Standard of Review: Appellate court review of a sentence imposed by the district court is for correction of errors at law. Iowa R. App. P. 6.907; *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996).

Discussion: A district court's sentencing decision is generally cloaked with a strong presumption in its favor. *State v. Grandberry*, 619 N.W.2d 399, 401 (Iowa 2000). An appellate court will not disturb a sentence unless the defendant-appellant proves an abuse of discretion. *Id.* An abuse of discretion occurs when the district court exercises its discretion on grounds or for reasons that are clearly untenable or to an extent that is clearly unreasonable. *Thomas*, 547 N.W.2d at 225. Before suspending a sentence, the court must decide which available option would provide the maximum opportunity for rehabilitation and protect the community. Iowa Code § 907.5. In exercising its discretion, the court must weight all pertinent factors, including the nature of the offense, the circumstances of the offense, the defendant's age, the defendant's character, the chances for reform, prior record of convictions, the defendant's employment, the

defendant's family circumstances, and other appropriate factors. *Id.*; *State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995).

Before discussing whether the district court in Mr. Wickes' case abused its discretion in sentencing him to prison and declining to either defer judgment or suspend the sentence, it is necessary to discuss whether the district court had the authority under the sentencing statute to defer judgment or suspend the sentence. Iowa Code section 907.3 provides in relevant part that "[p]ursuant to section 901.5, the trial court may, upon . . . a verdict of guilty . . . exercise any of the options contained in this section," including deferring judgment, deferring sentence, and suspending a sentence and placing a defendant on probation. Iowa Code § 907.3. It further provides that "this section does not apply to a forcible felony or to a violation of chapter 709 committed by a person who is a mandatory reporter of child abuse under section 232.69 in which the victim is a person who is under the age of eighteen." *Id.* At first blush, section 907.3 appears to prevent the district court from deferring judgment or suspending the sentence for Mr. Wickes, who was convicted of a violation of Chapter 709, who is a mandatory reporter of child abuse, and when A.S. was under eighteen at the time. However, further statutory interpretation leads to a different result.

The purpose of statutory interpretation is to discern the legislature's intent. *Romer*, 832 N.W.2d at 176. A statute's terms are given their ordinary and common meaning, considering the context in which they are used,

unless there is a statutory definition or an established meaning in law. *Id.* Consideration is also given to the legislative history, including prior enactments, in determining legislative intent. *Id.* In addition, in interpreting a statute, a court must examine the statute in its entirety, not just isolated words or phrases. *Id.* The court is prohibited from extending, enlarging, or otherwise changing the meaning of a statute under the guise of statutory construction. *Id.*

On the other hand, if reasonable people could disagree as to its meaning, a statute is ambiguous. *Id.* at 185 (Hecht, J., concurring in part and dissenting in part). "Even . . . a statute appear[ing] unambiguous on its . . . face can be rendered ambiguous by its interaction with and its relation to other statutes." *Id.* (citations omitted). Ambiguity results from either the meaning of specific words or when the statutory provision is read in context with the entire statute or related statutes. *Id.* Finally, whenever ambiguity exists in a criminal statute, any ambiguity is to be strictly construed with all doubts resolved in favor of the defendant. *Id.*

Section 907.3 provides that deferred judgments and suspended sentences are unavailable in Mr. Wickes' situation as well as for those defendants convicted of a forcible felony. Section 702.11 defines what a forcible felony is, which includes "any felonious child endangerment, assault, murder, sexual abuse, kidnapping, robbery, human trafficking, arson in the first degree, or burglary in the first degree." Iowa Code § 702.11. What is important is that notwithstanding this definition certain offenses are

exceptions to the forcible felony rule and, notably, sexual exploitation by a counselor, therapist, or school employee in violation of section 709.15 is exempted. *Id.* § 702.11(2)(d).

Section 907.3 was amended in 1997. *See* Iowa H.F. 661. Prior to that point, the language of section 907.3 only prohibited deferring judgment or sentence or suspending a sentence for forcible felony offenses. After 1997, the section was amended to include language also prohibiting deferring judgment or sentence or suspending a sentence for mandatory reporters of child abuse who are convicted under Chapter 709 and the alleged victim was under eighteen-years-old. *See id*. At the time of this amendment, the crime of sexual exploitation by a school employee did not exist, only sexual exploitation by a mental health provider. *Romer*, 832 N.W.2d at 185 (Hecht, J., concurring in part and dissenting in part). Section 709.15 was amended in 2003 to add the crime of sexual exploitation by a school employee. *See* Iowa H.F. 549.

> In reviewing the statute as a whole and in conjunction with related statutes and in examining the legislative history, section 907.3 is ambiguous, even though on its face it may appear to be unambiguous. Why would the legislature specifically exempt sexual exploitation by a school employee from the definition of a forcible felony but at the same time seemingly include conduct for violations of Chapter 709 committed by mandatory reporters when the alleged victim is under the age of eighteen? This is internally inconsistent. As a result, reasonable minds

would disagree as to the statute's meaning and ambiguity results. Statutes that are ambiguous must be strictly construed in Mr. Wickes' favor. Therefore, Mr. Wickes argues that his conduct is not exempted from consideration for a deferred judgment or a suspended sentence, and the district court was correct that it had the discretion to defer judgment, suspend sentence, or impose a prison sentence.

This analysis is supported by case law. In *State v. Lipovac*, the defendant, a third grade teacher, was charged with one felony and two aggravated misdemeanor counts of sexual exploitation by a school employee for two incidents involving high school students. *State v. Lipovac*, No. 3-713/12-1625, Google Scholar ¶ 1 (Iowa Ct. App. Oct. 2, 2013). In exchange for his plea of guilty to one aggravated misdemeanor count of sexual exploitation, the State agreed to dismiss the other charges and recommend a suspended sentence; the defendant was free to request a deferred judgment. *Id.* The sentencing court suspended the sentence but refused to defer judgment. *Id.* ¶ 3. On appeal, the defendant argued that the court abused its discretion in sentencing him and considered an improper sentencing factor. *Id.* ¶ 7. The Iowa Court of Appeals held that the sentencing court did not consider an improper sentencing factor and did not abuse its discretion in refusing to grant a deferred judgment and instead suspending the sentence. *Id.* ¶ 10.

The district court's decision to reject deferring judgment or suspending sentence and to impose a prison sentence constitutes an abuse

of discretion. In ordering a prison sentence, the district court focused only on the "seriousness of the offense," the hugs and Facebook messages, the betrayal of trust, "protection of the public," an opportunity for Mr. Wickes to "reflect upon the seriousness of his conduct," and lack of alleged remorse. (Motions & Sent. Tr. p. 14, lines 3-25 & p. 15, lines 1-15 and 16-20). In doing so, the district court did not consider that no "sex act" occurred in this case and the only physical contact was nonsexual hugs. (Bench Trial Tr. p. 27, lines 18-20, p. 30, lines 2-7, p. 64, lines 23-25 & p. 65, line 1). Moreover, the district court failed to consider Mr. Wickes' age, lack of criminal history, stable employment history, multiple postsecondary degrees, family circumstances (including raising minor children), and mental health diagnoses. (A32-A35, A39, and A41). Also, the district court failed to consider Mr. Wickes' low level assessment to reoffend and the low-minimum category for future victimization and the recommendation that his probation would be at a low level of supervision. (A43). Nowhere in the Presentence Investigation Report nor any statements made at sentencing indicated that Mr. Wickes lacked remorse for his conduct. (*See generally* A32-A43 and Motions & Sent. Tr. pp. 1-19). Based on the foregoing, the district court abused its discretion in imposing a prison sentence and in failing to defer judgment or suspend sentence.

V. Even if the Trial Court Had no Discretion but to Sentence the Appellant to Prison, the Sentencing Statute Constitutes Cruel and Unusual Punishment under the Federal and Iowa Constitutions as Applied to the Facts of This Case.

Preservation of Error: Mr. Wickes argued even if the district court had no discretion but to impose a prison sentence that the sentencing statute constitutes cruel and unusual punishment under both the federal and Iowa constitutions as applied to the facts of this case. (Motions & Sent. Tr. p. 12, line 25 & p. 13, lines 1-15; A47-A51). The district court seemed to believe that it could defer judgment or suspend the sentence but did not believe it was appropriate under the facts of this case. (Motions & Sent. Tr. p. 15, lines 10-15). Therefore, the district court did not reach this issue.

Regardless, the Iowa Supreme Court has held that a claim that a sentence was illegal because it violated the constitution, specifically the cruel and unusual clause, can be brought at any time, including on direct appeal and even when the issue was not raised below. *State v. Bruegger*, 773 N.W.2d 862, 872 (Iowa 2009). Therefore, error has been preserved.

Standard of Review: A defendant-appellant may challenge an illegal sentence at any time. *State v. Parker*, 747 N.W.2d 196, 212 (Iowa 2008). The appellate court reviews constitutional issues de novo. *State v. Brooks*, 760 N.W.2d 197, 204 (Iowa 2009).

Discussion: If the district court had no discretion to defer judgment or suspend sentence, then the district court had no choice but to impose a

prison term not to exceed five years under Iowa section 902.9(5). Mr. Wickes argues that a mandatory prison sentence violates the cruel and unusual provisions of both the United States Constitution and the Iowa Constitution as applied to him. *See* U.S. Const., amend VIII (stating that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"); Iowa Const., Art. 1, § 17 (stating substantially the same thing). The Eighth Amendment prohibits disproportionate sentences—that is, punishment for a crime should be graduated and proportioned to the offense. *Graham v. Florida*, 130 S.Ct. 2011, 2021 (2010).

In *Graham v. Florida*, the United States Supreme Court held that a state statute that imposes a term of years sentence on a juvenile violated the cruel and unusual clause of the United States Constitution as applied—that is, the sentence was grossly disproportionate the offense that the defendant committed under the individual facts and circumstances of his case. *See id.* at 2034. In determining whether a sentence is grossly disproportionate, the court must engage in a three-part analysis: (1) The court must determine as a threshold matter whether the defendant's sentence leads to an inference of gross disproportionality, which involves balancing the gravity of the crime against the severity of the sentence; (2) the court must then compare the challenged sentence to sentences for other crimes in the jurisdiction; and (3) the court must finally compare sentences in other jurisdictions for the same or similar crimes. *Id.* at 2022.

Regarding interpretation of Iowa's comparable constitutional provision, the Iowa Supreme Court has adopted the *Graham* framework for evaluating a cruel and unusual punishment argument as applied but has held that "review of criminal sentences for 'gross disproportionality' under the Iowa Constitution should not be a 'toothless' review and adopt[ed] a more stringent review than would be available under the Federal Constitution." *Bruegger*, 773 N.W.2d at 883. Based on the unique facts present in *State v. Bruegger*, the Iowa Supreme Court held that the defendant was allowed to make an individualized showing that his sentence amounted to cruel and unusual punishment under the Iowa Constitution. *Id.* at 884. The specific facts in that case included that the criminal statute was broad and covered a wide variety of circumstances, the defendant's young age at the time the offense was committed, and the dramatic increase in punishment. *Id.* at 884-85. The case was remanded for a proper record to be made. *Id.* at 886.

In *State v. Oliver*, the Iowa Supreme Court stated that in considering the first factor the sentencing court is governed by certain principles. *State v. Oliver*, 812 N.W.2d 636, 650 (Iowa 2012). First, the sentencing court is to give deference to the penalties the legislature has created. *Id.* Second, it is rare that a sentence is grossly disproportionate to the crime to satisfy the threshold inquiry. *Id.* Third, a recidivist offender is more culpable and, therefore, more deserving of a longer sentence than a first-time offender. *Id.* Finally, the unique facts of the case can converge and create a high risk of gross disproportionality. *Id.* at 651.

As applied to Mr. Wickes' case, regarding the first factor, a mandatory five-year prison sentence leads to an inference of gross disproportionality. In balancing the gravity of the crime against the severity of the sentence, it is plain that the sentence is grossly disproportionate. Mr. Wickes' conduct, which consisted of inappropriate hugs, is inadvertently caught by a broadly written statute. *See id.* at 651. In fact, the Iowa Supreme Court in *State v. Romer* held that section 709.15 is to be broadly construed in interpreting what constitutes "sexual conduct" under the statute. *Romer*, 832 N.W.2d at 178-81. The Court specifically found that physical contact between the teacher and the student is not required, interpreting that sexual conduct includes, but is not limited to, kissing, touching of the clothed or unclothed inner thigh, breast, groin, buttock, anus, pubes, or genitals, or a sex act. *Id.* at 179-81. Mr. Wickes did not engage in kissing, touching of the student's private parts, or any "sex acts." (Bench Trial Tr. p. 27, lines 18-20, p. 30, lines 2-7, p. 64, lines 23-25 & p. 65, line 1). His mere hugging of the student is swept up in a very broadly worded statute. Furthermore, the Defendant is a first-time offender and is not a repeat or recidivist offender. (A33). Finally, the only punishment available is a prison sentence, and probation is not even an option, despite the lesser culpability of Mr. Wickes' actions as compared with other more concerning acts covered under the statute, i.e., inappropriate touching of private parts and "sex acts."

Regarding the second factor, besides this offense the only other

similar offenses whereby a deferred judgment or a suspended sentence are unavailable in Iowa are for forcible felonies. *See* Iowa Code § 702.11. Forcible felonies include with some exceptions felony child endangerment, assault, murder, sex abuse, kidnapping, robbery, human trafficking, arson in the first degree, and burglary in the first degree. *Id.* These crimes are typically high-level felonies and are violent crimes. There are reasons why deferring judgment or suspending sentence are not appropriate, given the nature of these offenses, the need to punish the defendant, and the need to protect the community. Sexual exploitation of by a school employee is in fact specifically exempted from the definition of a forcible felony. *See id.* § 702.11(2)(d). It does not make sense that this crime would be exempt from being a forcible felony but punished in similar fashion to a crime that constitutes a forcible felony.

Regarding the third factor, many other states besides Iowa have specific statutes that make it a crime for a teacher or other person in a position of authority to commit sexual abuse or sexual conduct against a student. *See, e.g.*, Ark. Code § 5-14-125(a)(6) (prohibiting "a teacher, principal, athletic coach, or counselor in a public or private school in grade kindergarten through twelve (K-12), in a position of trust or authority, and uses his or her position of trust or authority over the victim to engage in sexual contact with a victim who is [a] student enrolled in the public or private school and less than twenty-one (21) years of age"); Colo. Rev. Stat. § 18-3-405.3(1) ("Any actor who knowingly subjects another not his or her

spouse to any sexual contact commits sexual assault on a child by one in a position of trust if the victim is a child less than eighteen years of age and the actor committing the offense is one in a position of trust with respect to the victim"; however, penalties are enhanced for a "pattern of sexual abuse."); Conn. Gen. Stat. § 53a-71(a)(8) (making it a crime for a school employee to engage in "sexual intercourse" with "a student enrolled in a school in which the actor works or a school under the jurisdiction of the local or regional board of education which employs the actor"); Georgia Code § 16-6-5.1(b)(1) ("A person who has supervisory or disciplinary authority over another individual commits sexual assault when that person [i]s a teacher, principal, assistant principal, or other administrator of any school and engages in sexual contact with such other individual who the actor knew or should have known is enrolled at the same school."); Kan. Stat. § 21-3520(a)(8) ("Unlawful sexual relations is engaging in consensual sexual intercourse, lewd fondling or touching, or sodomy with a person who is not married to the offender if: . . . the offender is a teacher or a person in a position of authority and the [other] person . . . is a student enrolled at the school where the offender is employed."); Maine Rev. Stat. §§ 254(1)(C) ("A person is guilty of sexual abuse of a minor if: . . . The person is at least 21 years of age and engages in a sexual act with another person, not the actor's spouse, who is either 16 or 17 years of age and is a student enrolled in a private or public elementary, secondary or special education school, facility or institution and the actor is a teacher, employee or other official in

the school district, school union, educational unit, school, facility or institution in which the student is enrolled."), 255-A(1)(K) and (L) ("A person is guilty of unlawful sexual contact if the actor intentionally subjects another person to any sexual contact and: . . . The other person, not the actor's spouse, is a student enrolled in a private or public elementary, secondary or special education school, facility or institution and the actor is a teacher, employee or other official having instructional, supervisory or disciplinary authority over the student"; however, the penalty is enhanced for sexual penetration), and 260(1)(F) ("A person is guilty of unlawful sexual touching if the actor intentionally subjects another person to any sexual touching and: . . . The other person, not the actor's spouse, is a student enrolled in a private or public elementary, secondary or special education school, facility or institution and the actor is a teacher, employee or other official having instructional, supervisory or disciplinary authority over the student."); Md. Code § 3-308(c) (prohibiting "a person in a position of authority" from engaging "in a sexual act or sexual contact with a minor who, at the time of the sexual act or sexual contact, is a student enrolled at a school where the person in a position of authority is employed"); Mich. Code § 750.520d(1)(e) ("A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist: . . . That other person is at least 16 years of age but less than 18 years of age and a student at a public school or nonpublic school, and . . . [t]he actor is a teacher, substitute

teacher, or administrator of that public school, nonpublic school, school district, or intermediate school district" or an employee or service provider, volunteer, state or local governmental employee assigned to provide service, at the school or district and "uses his or her . . . status to gain access to, or to establish a relationship with, that other person."); N.C. Gen. Stat. § 14-27.7(b) (prohibiting "a defendant, who is a teacher, school administrator, student teacher, school safety officer, or coach, at any age, or who is other school personnel, and who is at least four years older than the victim engages in vaginal intercourse or a sexual act with a victim who is a student, at any time during or after the time the defendant and victim were present together in the same school, but before the victim ceases to be a student"); Nev. Code § 201.540(1) (prohibiting a person 21-years-old or older who "[i]s or was employed by a public school or private school or is or was volunteering at a public or private school" from engaging in "sexual conduct with a pupil who is 16 years of age or older, who has not received a high school diploma" or GED and who "is or was enrolled in or attending a public school or private school at which the person is or was employed or volunteering or [w]ith whom the person has had contact in the course of performing his or her duties as an employee or volunteer"); New Jersey Rev. Stat. § 2C 14-2 (criminalizing "sexual penetration" with a victim at least 13-years-old but less than 18-years-old when the actor has "supervisory or disciplinary power over the victim"); Ohio Rev. Code § 2907.03(A)(7) ("No personal shall engage in sexual conduct with another, not the spouse of the

offender, when any of the following apply: . . . The offender is a teacher, administrator, coach, or other person in authority employed by or serving in a school . . . and the other person is enrolled or attends that school."); S.C. Code § 16-3-755(B-D) (criminalizing "a person affiliated with a public or private secondary school [from] engag[ing] in sexual battery with a student enrolled in the school who is sixteen or seventeen years of age" as well as "a student enrolled in the school who is eighteen years of age or older"); and Wash. Rev. Code §§ 9A.44.093 (prohibiting "sexual misconduct with a minor" when "the person is a school employee who has, or unknowingly causes another person under the age of eighteen to have, sexual intercourse with an enrolled student of the school who is at least sixteen years old and not more than twenty-one years old and not married to the employee, if the employee is at least sixty months older than the student") and 9A.44.096 (prohibiting "sexual contact" under similar circumstances).

Each of these statutes have different statutory language, definitions, and penalties. It appears from a cursory review that Iowa's statute is the broadest statute in terms of what type of sexual act or conduct is covered as well as who is covered under the statute. In other words, Iowa's definition of sexual conduct seems to be the most encompassing as well as Iowa's definition of school employee as interpreted by the *Romer* case, which held that a direct student-teacher relationship is not required. *Romer*, 832 N.W.2d at 178.

Considering all of these factors, imposing a mandatory prison sentence for Mr. Wickes under the facts and circumstances of his case is grossly disproportionate to the crime that was actually committed. Therefore, a mandatory prison sentence is cruel and unusual and violates Mr. Wickes' rights under the Eighth Amendment to the United States Constitution as well as the companion provision of the Iowa Constitution.

CONCLUSION

Regarding Argument I, the Appellant requests that his conviction for sexual exploitation by a school employee, a class D felony, be reversed and remanded for entry of judgment of acquittal.

In the alternative, regarding Argument II, the Appellant requests that the class D felony conviction be reversed and remanded for entry of conviction of the lesser-included offense, an aggravated misdemeanor.

Regarding Argument III, the Appellant requests that the appellate court conditionally affirm the verdict but vacate the district court's ruling and remand for the district court to properly apply the correct weight-of-the-evidence standard.

Regarding Arguments IV and V, the Appellant requests that his sentence be vacated and remanded for resentencing in front of a different judge.

REQUEST FOR ORAL ARGUMENT

The Appellant requests that the matter be submitted for oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned certifies that the true costs of duplicating this document was **$0.**

/s/ Eric S. Mail

Eric S. Mail AT0011435
PURYEAR LAW P.C.
3719 Bridge Avenue, Suite 6
Davenport, IA 52807
(p) 563.265.8344
(f) 866.415.5032
mail@puryearlaw.com

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. 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 Times New Roman in 14-point font size and contains 9018 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Eric S. Mail

Eric S. Mail AT0011435
PURYEAR LAW P.C.
3719 Bridge Avenue, Suite 6
Davenport, IA 52807
(p) 563.265.8344
(f) 866.415.5032
mail@puryearlaw.com