IN THE SUPREME COURT OF IOWA
Supreme Court No. 16–1684

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRADLEY ELROY WICKES,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR CLINTON COUNTY
THE HON. STUART P. WERLING, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

Wickes asks for retention, but does not identify which issues require guidance from the Iowa Supreme Court. *See* Def's Br. at 6. The State submits that each claim related to sufficiency can be resolved by applying principles recently explored/clarified in *State v. Romer*, 832 N.W.2d 169 (Iowa 2013). The other claims are commonplace. As such, transfer to the Iowa Court of Appeals is appropriate. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

After a bench trial, Bradley Elroy Wickes was convicted of sexual exploitation by a school employee as part of a pattern, practice, or scheme of conduct, a Class D felony, in violation of Iowa Code section 709.15(3)(a)(1) (2015). The evidence showed that, through interactions in person and chats on Facebook over about five weeks, Wickes formed an emotionally intimate and romantic bond with A.S., who was a senior at Camanche High School, in a class that he taught. Their conversation spanned 636 pages, containing sexualized banter and heavy flirting. Hugging was a focal point of their daily interactions. Wickes ultimately told A.S. he planned to leave his wife to be with her. Wickes was sentenced to a five-year term of incarceration.

In this direct appeal, Wickes argues: (1) the evidence was not sufficient to prove any sexual conduct occurred between him and A.S.; (2) the evidence was not sufficient to show any pattern, practice, or scheme of conduct to engage in sexual conduct with A.S.; (3) the court did not apply the correct standard in ruling on the post-trial challenge to the weight of the evidence; (4) the court abused its discretion when it imposed a sentence of incarceration, instead of suspending it; and (5) the five-year prison sentence is cruel and unusual punishment because it is grossly disproportionate to the offense Wickes committed.

Facts

A.S. was a student at Camanche High School in Camanche, Iowa. When she was a sophomore, A.S. was in a World Cultures class that Wickes taught; then, as a senior, she was in his Government class. *See* TrialTr. p.42,ln.9–p.43,ln.23; State's Ex. 4; App. 706.

Wickes and A.S. began talking on Facebook on September 11, 2016, when A.S. asked Wickes to proofread a paper for her. *See* State's Ex. 1 at 6–9; App. 63–66. Their conversations continued after that, and they discussed a wide variety of topics and concerns.[1]

[1] Some messages are blank. The State believes they were images (like GIFs) that did not transfer when Officer Nixon copy-pasted this message thread into Microsoft Word. *See* TrialTr. p.70,ln.23–p.72,ln.9.

When A.S. voiced concerns about her weight, Wickes told her: "You look amazing. . . . I'm going to cross over to the creeper side a moment and tell you. You are hot. And pretty kind of a rare combo. Now I'm walking back behind the creeper line." *Id.* at 54; App. 111.

After they ran into each other at Wal-Mart on September 20, Wickes said: "I'm glad I just got to touch you / Omg / Touch hug you lmfao." *See id.* at 64; App. 121.

After saying "I wanna make you happy" and sending an emoji that does not appear in the transcript, Wickes followed up with "I think that's border line sexual assault now. . . . Me saying I wanna make happy then that emoji. " *See id.* at 112–14; App. 169–71. When A.S. says she laughed at the emoji, Wickes said "So many women have laughed at it but I don't think it was helpful"—and he clarified that he "was referring to [his] male parts." *See id.* at 114–15; App. 171–72.

When A.S. said "I know personally I tend to shut down after I open up to someone," Wickes responded with "So can I expect you to shutdown and pull away now? Better not." *Id.* at 120–21; App. 177–78.

Wickes was having marital problems; he complained that his wife was not physically/emotionally affectionate enough. He told A.S. "I NEED AFFECTION , I'm not saying the booty kind ….well that too."

See id. at 135; App. 192. A.S. responded with reassurance that included "[Y]ou're not crazy for wanting those things. It's part of a relationship. It's a big part." Then Wickes said "Could you turn 30 tomorrow lol." *See id.* at 136; App. 193.

Wickes pressed A.S. for details about her last relationship, and then encouraged her to tell her ex-boyfriend how she felt. When A.S. messaged her ex-boyfriend and he did not reciprocate her feelings, Wickes said "If I was his age and had you tell me that. I be breaking down walls to get to you." *Id.* at 165–72; App. 222–29. Then, he said:

> I've been talking to you for a few weeks and I'm infatuated with your character and heart. The only reason I feel good these days is I see in you what I want in a women. I found out there's a girl that gets me and I have hope some day I find another age appropriate girl. I mean 2 weeks. … I figured he'd have to want to back / I'm trying to say that in a way that doesn't scare you and make me feel like more of a creep. / Will you find me another you / He really has no idea what he gave up.

Id. at 173–74; App. 230–31. Soon after that, Wickes said "I just want to hold you. Hug choke the shit out of you." *See id.* at 176; App. 233. And later: "Love ya, [A.S.]. I'm here to help." *See id.* at 181–82; App. 238–39. Later that evening, he said: "I'd sneak over a hug but think that's criminal charges." *See id.* at 187; App. 244. Their banter became slightly sexualized as it continued:

A.S.: You're tired.

WICKES: That's you

WICKES: I can go all night

A.S.: You know I can too lol

WICKES: Your going to call my bluff aren't you

A.S.: Lmao

A.S.: what bluff

WICKES: Going all night

A.S.: Idk if we're thinking the same thing

A.S.: My minds in the gutter currently

WICKES: Yeah I worked to it. Then played it off innocent

A.S.: Lol I got it then. Wasn't sure if I was just being me or what.

WICKES: I mean I worked you into it

Id. at 224–26; App. 281–83.

The next day, Wickes took his son to the doctor. Later, he said "Now that I know [Z]'s okay I'm back to handing with my BFF lol / Omg that sounds horrible / Hanging there will be no hand jobs." *See id.* at 232–39; App. 289–96. That afternoon, Wickes told A.S. "You're hugs and saying just think booty made me keep it together today." *See id.* at 243; App. 300. That night, Wickes said: "How is it that you are the one that gets me . . . You're 17 and I'm a pedophile." *See id.* at 245–47; App. 302–04. Wickes apparently climbed into his car after having some drinks; he told A.S. "Lol just woke up in the garage / Pathetic / Uuuggghhhh just rather hug." *Id.* at 249–50; App. 306–07.

> **A.S.**: I'll just sit outside and drink my coffee like a loner lol
> **WICKES**: Your never alone
> **A.S.**: You're right. You're always here for me
> **WICKES**: Yes

Id. at 256; App. 307.

They talked about the upcoming homecoming dance, and Wickes told A.S. that his mother used to be a stripper; he also told her stories about how he was "a skilled pole dancer." *See id.* at 265–75; App. 322–32.

When that ex-boyfriend had a change of heart and tried to reach out to A.S., Wickes praised her for ignoring him. *See id.* at 281–83; App. 338–40. Right after that, when A.S. was upset that her parents had called her "worthless," Wickes said:

> Permission to be a pervy old man? / Your eyes are amazing, freaking soulful and draws me in. Every face make is freaking adorable. I told you along time ago you look just like an actress from tv. Still do. And then the pervy stuff..... girl you know you've got a great booty! Below that is some smoking legs are beautiful and not the scrawny chicken legs like so many others. You've got a pin up girl build. An hour glass of curves. Read this then delete and I'll go turn my self in

Id. at 284–87; App. 341–44. When A.S. said she was not allowed to wear yoga pants to school, Wickes said "Lol. Yeah I'm probably going to be that dad.... I know what them pervy teachers are doing lmfao."

See id. at 288; App. 345. Then, when A.S. mentioned she had been "felt up in a couple stores," Wickes replied "I had my chance when your arms were full of watermelon" (referring to their September 20 interaction at Wal-Mart). *See id.* at 288–90; App. 345–47. He also said "So like I swear I'm not going to do that stuff / Well not tomorrow." *See id.* at 290–91; App. 347–48. After A.S. related more experiences with unwanted sexual contact, Wickes said "See [A.S.] you're hot. Don't listen to your parents." *Id.* at 288–95; App. 345–52.

A.S. got back together with her ex-boyfriend. *See id.* at 306–16, 348; App. 363–73, 405. Wickes' marriage did not improve. *See id.* at 303–04, 328–33; App. 360–61, 385–90. Wickes asked A.S. if her now-boyfriend knew that he "owes [Wickes] for giving you sweet ass advice"—and then, when A.S. said she would mention it, Wickes told her to "leave out the pervy stuff." *See id.* at 360–61; App. 417–18.

A.S. asked Wickes if he had "[e]ver seen the 'boobas' toy or however you spell it." Wickes said "I saw boob and got lost." *See id.* at 371; App. 428.

There was a school bonfire on September 30. *See id.* at 384–90; App. 441–47. Pictures were taken; Wickes told A.S. "I'm keeping my self portrait for my personal spank bank. I'm hot." *See id.* at 391–92;

App. 448–49. The next day was scheduled to be "Gender Bender Day," where male students/teachers would dress like women and vice-versa. A.S. offered to let Wickes borrow a dress to use, and Wickes said "I'm just glad you're willing to give me your booty at a moment's notice / Yeah delete that." *Id.* at 392–94; App. 449–51. After that, A.S. said "I like have the gitters or shakes wtf"—they both said their hearts were beating fast, and Wickes said it was because of how he felt about her:

> I don't exactly know how to say it with out violating my morale compass [A.S.] / In a different world ... if time could be changed and I younger or you older. You'd be completely perfect for me. And I don't mean to freak you out, but it's true

See id. at 394–400; App. 451–57. Wickes said he was trying to watch TV while talking with A.S. but was having trouble following plotlines while doing so, but then said "This one had some soft core porn in it so it was alight . . . but they Asian no booty." *See id.* at 403–04; App. 460–61. Later, when they were talking about treadmill pratfalls, A.S. mentioned that she got down to 112 pounds—and Wickes said "yuck." A.S. said "When I lose weight my legs and ass stay" and Wickes said "Thank god they stay." *See id.* at 407–10; App. 464–67. Wickes also said "Shorts are excellent on you" and "Your chest fits you perfectly." *See id.* at 411; App. 468.

Later that night, when Wickes was about to go to bed:

WICKES: I'm leaving you unsatisfied or wanting more. …
WICKES: That was dirty sorry
A.S.: Lmao
A.S.: I could come back with dirty lol
WICKES: Better or I'm feel creepy
A.S.: Usually that's exactly where my mind goes.. Straight to the gutter.
A.S.: Left me wanting more. Could go all nigbt

See id. at 429–30; App. 486–87.

When A.S. talked about problems with her family and said she wanted to move out, Wickes said: "I'd buy you an apartment and be your sugar daddy lol if I could afford it." *Id.* at 441–46; App. 498–503. Later, when they were reminiscing about pranks, Wickes brought up "the time you and [other girl student] got under my desk lmfao. Every teachers nightmare and fantasy lol." *See id.* at 463–64; App. 520–21. A.S. sent Wickes some pictures of her and another female student on Gender Bender Day, where they were worried about somebody seeing them (although the actual pictures are not reproduced in the logs). *See id.* at 466–69; App. 523–526. Their banter became more sexualized, and both A.S. and Wickes implied that they wanted each other to end their sexual "dry spell." *See id.* at 470–85; App. 527–542.

Wickes and his wife were moving forward with separation. *See id.* at 501–05; App. 558–63. Wickes told A.S. that his wife "said if I find someone to make me happy she won't be upset. … / Lol found her she's just 17." *See id.* at 508–09; App. 565–66. He also said "Why ohhh why would I meet someone like you! I'll be honesty you match me to tee except I'm a pedophile for thinking so. And I'm not thinking sexual just emotional and personal." *See id.* at 510; App. 567. He was drinking, and he apparently passed out; when he woke up, he said "I'm not leaving you [A.S.]. EVER." *See id.* at 511; App. 568.

October 3 was the homecoming dance. Wickes was the DJ. While he was setting up the sound equipment, A.S. mentioned that she was coming to the dance in heels—and Wickes said "Heels / Omg / I better get my blind fold," which was a reference to their banter from two nights before. *See id.* at 518–22; App. 575–79. Wickes also said "You know what heels do to your assets lol." *See id.* at 523; App. 580.

They messaged each other throughout the dance. *Id.* at 528–33; App. 583–90. Afterwards, Wickes told A.S. "Your gorgeous" and "You're smoking." *See id.* at 534; App. 590. Wickes mentioned that A.S. came up to take a picture with him "during the perfect song." *Id.* at 535–37; App. 592–94. A.S. said "In between messaging you at the

dance and then you'd play a song that caught my attention and maybe I'm dumb but I was like, he's sending me signals"—and Wickes said she was "on point." *See id.* at 537–38; App. 594–95. Specifically, Wickes played the song "Hold Each Other" thinking about A.S.; Wickes said that song made him think of their hugs. *Id.* at 539–41; App. 596–98.

> **A.S.**: I would have done anything for a dance tonight. Like someone just act like they give a shit and let me dance with my arms around you.
>
> **WICKES**: I think I would get completely lost if that happened, like everything would shutdown around me and I would disappear into those eyes.
>
> **WICKES**: If I was that someone

Id. at 542; App. 599. He also told her "Your hot obviously. But your soulful. I don't know how to explain it your just captivating." *See id.* at 543; App. 600.

The next day, Wickes separated from his wife and kids, and he moved in with his father and his father's girlfriend. *See id.* at 550–59; App. 607–16. That night, Wickes and A.S. met up at Wal-Mart to give each other a hug. *See id.* at 569–574; TrialTr. p.60,ln.2–p.62,ln.18; State's Ex. 8; App. 626–31. Their conversations continued to become more emotionally intimate and included more sexualized banter. *See* State's Ex. 1 at 556–74; App. 613–31. Wickes told A.S. he was jealous of her boyfriend because "[h]e's got a shot with my perfect person."

Id. at 575–76; App. 632–33. Wickes also mentioned that, because he hugged A.S., he had "this wonderful perfume smell on [him]." *See id.* at 577; App. 634. Their conversation escalated and they both disclosed romantic feelings for each other; Wickes asked A.S. if she would be together with him after she graduated, and she told him that she would. *See id.* at 578–86; App. 635–43. Wickes said "I'll just say it. I love you. I never meant for this happen it just did. / I've only hugged you and chatted with you and I feel completely tied to you. When my phone light blinks green I know it's a message from you and I get so excited." *See id.* at 587; App. 644. A.S. said she liked to cuddle and "get as close as possible"; Wickes said "Booty touches me and it be marvin gaye.... for all of 5 seconds at this point." *See id.* at 597–99; App. 654–56. Wickes also mentioned his wife had complained that "she wasn't enjoying [sex] because it was too quick and she didn't get what she needed"—so Wickes "literally read all the stuff about how to last longer," and now his wife complained that he lasted too long. *See id.* at 600–01; App. 657–58. Then, Wickes started describing how he would give A.S. a sensual back rub, and they discussed things that turned them on. *See id.* at 603–08; App. 660–65. A.S. said "I start to Work the booty n I'll have you at my mercy." *Id.* at 608; App. 665.

The next day, Wickes said "So I totally freaked out today. … saw one of the cops in the building then you called to the office. … thought ut ohhh think I'm dead lol." *See id.* at 624; App. 681. They briefly discussed meeting up that afternoon, but they both agreed it would be "crossing a line." *Id.* at 630–32; App. 687–89. Wickes told A.S. their budding romance was "freaking exhilarating." *Id.* at 635; App. 692.

The trial court did not consider any of the Facebook messages beyond page 636 of the transcript, because the messages sent by A.S. after that point were actually sent by A.S.'s father and step-father. Order (7/18/16); App. 7. At that point, A.S.'s family had discovered the relationship; they promptly reported it the police. *See* TrialTr. p.66,ln.20–p.69,ln.25.

The matter was brought to the attention of the principal and the superintendent, who called Wickes in for a meeting. Wickes admitted that his conversations with A.S. had turned "flirty," which meant "they were conversations like boyfriend and girlfriend would have." *See* TrialTr. p.22,ln.14–p.23,ln.9. Wickes said they had hugged, and admitted he had met with A.S. outside of school-related functions. *See* TrialTr. p.24,ln.5–p.25,ln.17.

Additional facts will be discussed when relevant.

ARGUMENT

I. Substantial Evidence Supports the Conclusion That Sexual Conduct Under Section 709.15(3) Occurred.

Preservation of Error

"[W]hen a criminal case is tried to the court, a defendant may challenge the sufficiency of the evidence on appeal irrespective of whether a motion for judgment of acquittal was previously made." *See State v. Abbas*, 561 N.W.2d 72, 73–74 (Iowa 1997).

Standard of Review

"Sufficiency of evidence claims are reviewed for a correction of errors at law." *State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012).

Merits

A verdict withstands a sufficiency challenge if it is supported by substantial evidence. "Evidence is substantial if it would convince a rational trier of fact the defendant is guilty beyond a reasonable doubt." *See State v. Hennings*, 791 N.W.2d 828, 823 (Iowa 2010) (quoting *State v. Jorgensen*, 758 N.W.2d 830, 834 (Iowa 2008)). "We view the evidence in the light most favorable to the verdict and accept as established all reasonable inferences tending to support it." *State v. Gay*, 526 N.W.2d 294, 295 (Iowa 1995) (citing *State v. Taft*, 506 N.W.2d 757, 762 (Iowa 1993)).

Wickes cannot show that, as a matter of law, the hugging between Wickes and A.S. was not sexual conduct. The trial court found these hugs occurred "almost daily at school and perhaps multiple times per day." *See* Order and Ruling (8/11/16) at 5–6; App. 19–20; State's Ex. 1 at 33–34, 39, 56, 64, 71–72, 122, 148, 187–88, 235–36, 243, 313–14, 320, 333, 338, 468, 502, 534–35; App. 90–91, 96, 113, 121, 128–29, 179, 205, 244–45, 292–93, 300, 370–71, 377, 390, 395, 525, 559, 591–592. More importantly, the trial court analyzed whether these hugs qualified as sexual conduct under *State v. Romer*:

> 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 in the intense emotional exchange in the messages he shared with the 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.

Order and Ruling (8/11/16) at 9; App. 23. This analysis correctly applies *Romer*, and the record supports its embedded factual findings.

In *State v. Romer*, the Iowa Supreme Court construed the language in section 709.15(3) and concluded "the statute defining 'sexual conduct' does not require physical contact between the school employee and the student to support a conviction for sexual exploitation by a school employee." *See Romer*, 832 N.W.2d at 178–81. *Romer* adopted the same construction that the Iowa Supreme Court had previously used for parallel language in section 709.15(2):

> "[S]exual conduct" has a much broader meaning under the statute and requires the actions of the [teacher] to be examined in light of all of the circumstances to determine if the conduct at issue was sexual and done for the purpose of arousing or satisfying the sexual desires of the [teacher] or the [student].

Id. at 180 (quoting *Smith v. Iowa Dep't of Human Servs.*, 755 N.W.2d 135, 138 (Iowa 2008)). The language clarifying that sexual conduct was "not limited to" any enumerated list of examples showed that "the legislature's clear intent was to protect students from exploitation by school employees" while simultaneously "acknowledging the limits of its own ability to identify ways in which school employees could potentially exploit students." *Id.* Thus, a fact-intensive, case-by-case, totality-of-the-circumstances approach is the proper framework for assessing whether *this* hugging, in *this* particular relationship, was sexual conduct and was intended for sexual arousal/gratification.

The trial court recognized that the Facebook messages were damning proof that Wickes had gradually and deliberately introduced a sexual element into his relationship with A.S.—its ruling catalogued some (but not all) of the sexually suggestive messages that he sent A.S. *See* Order and Ruling (8/11/16) at 6–8; App. 20–22. It also specifically discussed the character of those hugs, using photos that A.S. took of two hugs that occurred outside of school, that "show Wicks and A.S. in an embrace rather than a mere hug." *See id.* at 5; App. 19; *see also* State's Ex. 2–3; App. 704–05. Note that Wickes expressly discussed hugs in contexts that suggested that he imputed a sexual character to that otherwise ambiguous body-to-body contact. He referred to their hug on Gender Bender Day as a "lesbian hug." State's Ex. 1 at 466–68; App. 523–25. He repeatedly referenced hugs as something he needed and could not get from his wife. *See id.* at 74–75, 160, 260, 458; App. 131–32, 217, 317, 515. And he said he could get "criminal charges" if he were to "sneak over" to give her a hug, and he even told her it would be worth getting shot if he could "get the hug off in time." *Id.* at 187–88; App. 244–45. Something about hugging was sexual to Wickes—most likely, it was the sensation of touching A.S. and feeling her body against his (and smelling her perfume). *Id.* at 577–78; App. 634–35;

cf. Bowman v. Parma Bd. of Educ., 542 N.E.2d 663, 665 n.2 (Ohio Ct. App. 1988) (discussing "'frottage,' a form of sexual conduct in which an individual seeks gratification by rubbing against another").

There is also evidence those hugs served a grooming function, as "a gradual escalation of the intimacy and a process of grooming in which Wickes prepare[d] A.S. to accept ever more intimacy." *See* Order and Ruling (8/11/16) at 4–5; App. 18–19. Wickes fostered that emotional dependence by encouraging A.S. to hug him on a daily basis, which established frequent physical contact between them as normal and built physical rapport. *See* State's Ex. 1 at 7; 12; 33; 122; 139; 236; App. 64, 69, 90, 179, 196, 293. And it worked—A.S. repeatedly expressed her own dependence on those shared hugs as time went on and as their relationship intensified. *See, e.g.*, *id.* at 557; App. 614 ("I'm not letting go of our hug.") Wickes also deliberately played "Hold Each Other" at the homecoming dance to catch her attention because it reminded them of those hugs. State's Ex. 1 at 536–40; App. 593–97. By October 4, A.S. accepted "I want a hug" as a valid reason to meet Wickes in a Wal-Mart parking lot, after dark—and she said "that hug could have gone all night." *See id.* at 577–78; App. 634–35. The trial court astutely noted "such emotional intensity could overwhelm

the will of an inexperienced and needful 17-year-old woman"—and, indeed, those hugs appears to have played a key role in those efforts as Wickes "entice[d] A.S. into an ever more intimate relationship." *See* Order and Ruling (8/11/16) at 4–5; App. 18–19. Without them, there would be no sexual banter or discussion of turn-ons/fantasies, which Wickes clearly instigated, pursued, and enjoyed. *See* State's Ex. 1 at 284–88, 393–95; 518–23, 597–611; App. 341, 440, 575, 654.

In sum, the record makes it abundantly clear that those hugs became sexual conduct as Wickes and A.S. grew more intimate—Wickes pushed those hugs as a cornerstone of their relationship to arouse/ignite sexual desires within A.S. and to gratify his own. *See* Order and Ruling (8/11/16) at 9; App. 23 ("[B]y September 20 and thereafter, the clear expression of Wickes' emotional needs and intent was that the hugs became a tool for his sexual gratification."). Even *State v. Ohrtman*, the Minnesota Court of Appeals case on which Wickes relies, noted that "it is thinkable to include hugging within criminality where coercion is not an element of the crime"—like when the charge is exploitation by a school employee—because "there is offensive conduct when an adult exploits a child with a sexual hug" and "[t]he legislature likely wanted to stop such hugs to the extent it could."

See State v. Ohrtman, 466 N.W.2d 1, 4 (Minn. Ct. App. 1991); *cf. State v. Murray*, No. C7-92-468, 1992 WL 333617, at *3 (Minn. Ct. App. Nov. 17, 1992) (distinguishing *Ohrtman* where "[t]he record indicates that the hugs did go beyond ordinary social contact and into the sexual realm"). This Court should decline to close its eyes to the sexual dimensions of these hugs in the context of the intensifying relationship between Wickes/A.S., and it should reject this challenge.

Alternatively, note that Wickes was convicted under section 709.15(3)(a)(1) because the trial court found "the existence of a 'pattern, practice, or scheme of conduct' by Wickes to engage in sexual conduct with A.S." *See* Order and Ruling (8/11/16) at 3–10; App. 17–24. As such, even if no sexual conduct actually occurred, this conviction could stand upon the trial court's finding that Wickes used Facebook chats and other interactions to entice A.S. into an intense emotional bond, intending for sexual contact to follow. *See id.* at 4–9; App. 18–23; *see also* TrialTr. p.100,ln.1–p.101,ln.19.

Section 709.15(3)(a)(1) enables this conviction to stand without any actual sexual conduct—the phrase "scheme of conduct to engage in any [sexual] conduct" does not require that scheme be successful. *See* Iowa Code § 709.15(3)(a)(1). Like a criminal conspiracy, the crime

is the deliberate attempt to accomplish a prohibited result, even when acts done to further that "scheme of conduct" are otherwise lawful:

> Unlawful acts frequently if not usually include as a part of the *scheme of conduct* acts which, standing alone, would be lawful. This joining of the lawful with the unlawful does not forbid the consideration of such lawful acts as a part of the greater whole. The carrying out of an unlawful conspiracy usually involves the doing of many acts which of themselves would be lawful and harmless. As parts of a conspiracy, even lawful acts become unlawful.

Rader v. Elliot, 163 N.W. 406, 407–08 (Iowa 1917) (emphasis added).

A violation of section 709.15(3)(1)(a) is a Class D felony, while a violation of section 709.15(3)(1)(b) is an aggravated misdemeanor. This indicates that sexual conduct that occurs just once *and* occurs through circumstances that come about by chance or happenstance—like a "crime of opportunity"—is ultimately viewed by the Legislature as less serious than sexual exploitation of students that occurs on an ongoing basis ("pattern or practice") and less serious than deliberate attempts by school employees to orchestrate situations where those opportunities for sexual contact may arise or to maneuver themselves into inappropriately intimate relationships with students with the aim of subsequently engaging in sexual contact ("scheme of conduct"). This is quite rational, "[g]iven the important goals of providing a safe school environment for children and preventing sexual exploitation"

especially when school employees "have unique access to children, often in an unsupervised context, and can use that access to groom or coerce children or young adults into exploitive or abusive conduct." *State v. Hirschfelder*, 242 P.3d 876, 883–84 (Wash. 2010) (quoting *State v. Clinkenbeard*, 123 P.3d 872, 880 (Wash. Ct. App. 2005)).

To illustrate, consider the difference between attempted murder and voluntary manslaughter. *See* Iowa Code §§ 707.4, 707.11. While voluntary manslaughter involves a completed homicidal act, it is still viewed with comparative leniency because that homicide is impulsive, rather than deliberately and painstakingly undertaken. *See* Iowa Code § 707.4 (murder becomes voluntary manslaughter when "the person causing the death acts solely as the result of sudden, violent, and irresistible passion resulting from serious provocation" and when the killing happens before a reasonable person could "regain control"). Attempted murder involves *no* completed homicide—but those who deliberately act "with the intent to cause the death of another person and not under circumstances which would justify the person's actions" are more culpable than those who kill when provoked—even when the failed murder schemes had no chance of succeeding. *See* Iowa Code § 707.11(1), (3). The legislature has chosen to punish a failed attempt as

a Class B felony, while actual killings precipitated by passion/impulse are punished with leniency and designated Class C felonies. *Compare* Iowa Code § 707.4(2), *with* Iowa Code § 707.11(2); *see also* Iowa Code § 902.9(1)(b) & (d). And the legislature made a similar choice here, in determining that school employees who devise a "scheme of conduct" to engage in sexual conduct with students merit more punishment than those acting impulsively—even if those schemes ultimately fail.

The impact is that *actual* sexual conduct is not an indispensably necessary element of the offense that Wickes was convicted of—and if this Court disagrees with the trial court and determines that no actual sexual conduct occurred as a matter of law, it should remand for the trial court to make new findings under the correct interpretation of the law (instead of remanding for dismissal with prejudice). *See, e.g.*, *State v. Robinson*, 506 N.W.2d 769, 770–71 (Iowa 1993) ("If we find an incorrect legal standard was applied, we remand for new findings and application of the correct standard."); *State v. Irvin*, 334 N.W.2d 312, 316 (Iowa Ct. App. 1983) ("We believe that the making of new conclusions of law is the appropriate vehicle to correct the error of law involved here, not the granting of a new trial."). Of course, since this hugging *was* actual sexual conduct, this Court need not remand.

II. Substantial Evidence Supports the Conclusion That Wickes Implemented "a Pattern or Practice or Scheme" to Engage in Sexual Conduct with A.S. at a Later Point.

Preservation of Error

"[W]hen a criminal case is tried to the court, a defendant may challenge the sufficiency of the evidence on appeal irrespective of whether a motion for judgment of acquittal was previously made." *See Abbas*, 561 N.W.2d at 73–74.

Standard of Review

"Sufficiency of evidence claims are reviewed for a correction of errors at law." *Sanford*, 814 N.W.2d at 615.

Merits

The State proved Wickes implemented a "scheme of conduct to engage in . . . sexual conduct with a student for the purpose of arousing or satisfying the sexual desires of the school employee or the student." *See* Iowa Code § 709.15(3)(a)(1)–(2). This language encompasses both ongoing patterns of sexual conduct and any/all preparatory grooming. Even if this Court agrees that sexual conduct occurred, the State still needed to demonstrate a "pattern or practice or scheme of conduct" to elevate this from an aggravated misdemeanor to a Class D felony. *See* Iowa Code § 709.15(5)(a).

Wickes argues that *Romer* implies that phrase may require "many different student victims and conduct that occurred at various locations over the course of years." *See* Def's Br. at 21–22. But *Romer* only analyzed the "common scheme or plan" requirement for joinder of multiple charges in a single trial, under Rule 2.6(1)—that analysis did not construe the operative language of section 709.15(3)(a)(1). *See Romer*, 832 N.W.2d at 181–83. To the extent *Romer* offers guidance, it helps illuminate the meaning of the term "scheme"—which can exist where "there was no temporal proximity and the modus operandi was dissimilar" between incidents. *See id.* at 182 (citing *State v. Elston*, 735 N.W.2d 196, 200 (Iowa 2007)).

This case bears some similarities to *Walker v. State*, 47 A.3d 590, 598–604 (Md. Ct. Spec. App. 2012). In that case, the Maryland Court of Special Appeals considered whether a teacher committed sexual abuse of a minor when he sent love notes to a third-grade student and gave her frequent hugs. The trial court's ruling said:

> The notes he sent to her professed his love for her, his desire to spend time with her, share his dreams and fantasies including sleeping with her in his arms. He also told her he thought about kissing her but wouldn't do it if she didn't want him to. But certainly put that invitation out there for a future event.
>
> [. . .]

> Sexual acts are not only limited to physical acts. . . . These letters set the stage for future acts and were extremely suggesting in an inappropriate and sexual manner. Certainly not the types of letters a thirty eight year old man in his position should send to an eight year old girl. As I mentioned, he used these actions in order to gain her trust and then subsequently abused her trust.
>
> . . . I know there's a suggestion that the letters were inappropriate and perhaps passionate but not sexual in nature. It's hard to read these letters, including the totality of these letters, and not find that they were sexual from the standpoint that the passionate comments they contained bordered, almost border on obsession, contained expressions of jealousy and certainly had sexual undertones.

Walker, 47 A.3d at 604–05. The *Walker* court agreed and said that notwithstanding the absence of any completed/attempted sex act, "the sheer volume of letters evidenced a fascination or attachment of a sexual nature" and indicated that the teacher's course of conduct was of an unmistakably sexual character. *See id.* at 607–13.

Similarly, this Court should not limit its "scheme of conduct" analysis to the hugs alone—the entirety of the Facebook conversation is relevant to show the aim/scope of this scheme. "Wickes' sexual gratification was from the emotional intimacy exchanged between him and the student during the hugs *and* in the intense emotional exchanges in the messages he shared with a student." *See* VerdictTr. p.2,ln.13–p.3,ln.11 (emphasis added). The written ruling elaborated:

> Not only is the volume and frequency of the exchanges between teacher and student troubling, so is the emotional intensity within these exchanges. Wickes discloses to A.S. the most intimate details of his marriage, including his sexual frustrations and disappointments and his complaints about his wife and plans to leave her. He also entices A.S. into an ever more intimate relationship through flirtation and compliments. To say such exchanges between a high school teacher and his student are inappropriate is an understatement. Certainly, such emotional intensity could overwhelm the will of an inexperienced and needful 17-year-old woman. *The Court believes such was the plan and intention of Wickes*. In reading the messages as exchanged between Wickes and A.S., one can see a gradual escalation of the intimacy and a process of grooming in which Wickes prepares A.S. to accept ever more intimacy.

Order and Ruling (8/11/16) at 4–5; App. 18–19 (emphasis added). Simply put, even if Wickes did not derive sexual arousal/gratification from the substance of his conversations with A.S. (which is unlikely given the sexualized nature of discussions, especially near the end), the entire "shoulder to cry on late at night" routine can be seen as a ploy to help build the foundation for a romantic relationship—and Wickes offered A.S. more than enough sexualized flattery to support an inference that his efforts were motivated by sexual desire, at least in part. *See* State's Ex. 1 at 284–88, 407–11; 518–23, 597–611; App. 341–45, 464–68, 575–80, 654–68. Wickes cannot undermine the clear evidence of this "scheme of conduct." His sufficiency claim fails.

III. The Trial Court Did Not Err in Ruling on the Weight-of-the-Evidence Challenge. It Did Not Apply a Sufficiency-of-the-Evidence Standard in Its Ruling.

Preservation of Error

This "wrong standard" challenge is governed by the rule that error is preserved when the motion for new trial cites Rule 2.24(2). *See, e.g.*, *State v. Downs*, No. 15–0900, 2016 WL 6652343, at *6 n.8 (Iowa Ct. App. Nov. 9, 2016). The defendant's motion for new trial cited Rule 2.24(2) and attacked witnesses' credibility. *See* Motion for New Trial (8/24/16) at 2–5; App. 27–30. Thus, error was preserved.

Standard of Review

The ruling denying the motion for new trial is reviewed for abuse of discretion. *See State v. Nitcher*, 720 N.W.2d 547, 559 (Iowa 2006). "However, we review a claim that the district court failed to apply the proper standard in ruling on a motion for new trial for errors at law." *Downs*, 2016 WL 6652343, at *6 (quoting *State v. Ary*, 877 N.W.2d 686, 706 (Iowa 2016)).

Merits

"Unlike the sufficiency-of-the-evidence analysis, 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." *See Nitcher*, 720 N.W.2d at 559.

The district court *did* apply that standard. When it ruled on the motion for new trial, it said this:

> Having reviewed the motions, the motion in arrest and motion for new trial, the Court finds 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*, and accordingly will deny both motions.

Sent.Tr. p.5,ln.5–10 (emphasis added). There is no reversible error here.

Wickes argues that this case is like *State v. Fister*, No. 15-1542, 2016 WL 6636688, at *5–7 (Iowa Ct. App. Nov. 9, 2016) because "the district court failed to analyze the evidence and independently weigh the witnesses' credibility." *See* Def's Br. at 25. But in *Fister*, the court improperly *delegated* the credibility-assessment function to the jury, "deferred to the jury's credibility determination," and did not engage in any of the credibility-weighing it was required to do. *See Fister*, 2016 WL 6636688 at *6. Here, because this was a bench trial, there was no opportunity for *Fister* error—even if the court deferred to its prior assessment of the evidence, it would be relying on *its own* view of the credibility/weight of the evidence at issue. Moreover, unlike in *Fister*, the court expressly stated that it was weighing the evidence in ruling on Wickes' motion for new trial. *See* Sent.Tr. p.5,ln.5–10. The trial court clearly applied the right standard, and this challenge fails.

IV. The Sentencing Court Did Not Abuse Its Discretion When It Imposed a Prison Sentence.

Preservation of Error

Generally applicable rules of error preservation do not apply. Wickes may challenge his sentence as defective for the first time on appeal. *See Lathrop v. State*, 781 N.W.2d 288, 292–93 (Iowa 2010).

Standard of Review

"Appellate review of the district court's sentencing decision is for an abuse of discretion." *State v. Evans*, 672 N.W.2d 328, 331–32 (Iowa 2003) (citing *State v. Laffey*, 600 N.W.2d 57, 62 (Iowa 1999)).

Merits

A sentencing court's decisions "are cloaked with a strong presumption in their favor." *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996) (citing *State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995)). District courts are given authority to exercise discretion in order to "give the necessary latitude to the decision-making process," and that "inherent latitude in the process properly limits [appellate] review." *State v. Formaro*, 638 N.W.2d 720, 724–25 (Iowa 2002) (citing *State v. August*, 589 N.W.2d 740, 744 (Iowa 1999)). An appellate court may disagree with the sentencing decision, but that alone does not provide sufficient reason to remand for resentencing.

> The application of these goals and factors to an individual case, of course, will not always lead to the same sentence. Yet, this does not mean the choice of one particular sentencing option over another constitutes error. Instead, it explains the discretionary nature of judging and the source of the respect afforded by the appellate process.

Id.; *see also State v. Hopkins*, 860 N.W.2d 550, 553 (Iowa 2015) (noting that review for abuse of discretion means that "[o]n our review, we do not decide the sentence we would have imposed").

In this case, the sentencing court took special care to explain its thoughts on the considerations underlying its sentencing decision:

> [T]he Court feels that in this case this is not a situation where a teacher gave a hug to a student. That kind of conduct happens daily in educational environment.
>
> [. . .]
>
> This went well beyond that sort of conduct, and the text messages — or, the Facebook messages between the parties establishes that as a fact. The Defendant's conduct in discussing his intimate personal life with this child — and she was still a child.
>
> And it's clear to the Court that he was, A, grooming her for his own benefits and needs, but, B, also using her as an outlet for his unhappy home life, which is entirely inappropriate for any adult to do with a child, but particularly inappropriate for a teacher to do with a student who is a pupil in his classroom.
>
> [I]t's clear from those text messages that the hugging that was going on was — may have started out innocently, but at some point during the process, it morphed into something that he needed, that she needed, and it was more than mere appropriate emotional support.

> It was prurient. It was for Mr. Wickes' sexual satisfaction, a substitute for the lack of sexual fulfillment that he was receiving in his personal life, and that's what makes it a crime, and that is the reason that he was convicted in this matter.
>
> The Court believes that even if the Defendant were by statute eligible for a suspended or deferred sentence, it would be inappropriate to do so 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.
>
> In this case, the Court is convinced from 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 as shown in the matter that incarceration is the appropriate sentencing outcome.

Sent.Tr. p.14,ln.3–p.15,ln.20.

Wickes argues that the sentencing court had discretion to impose a suspended sentence and place him on probation. *See* Def's Br. at 27–30. If the sentencing court incorrectly concluded that it had no discretion, then Wickes would be correct—but that did not happen. Instead, the sentencing court acknowledged Wickes' briefing on the claim that it *did* have discretion and noted it was "not entirely sure that it's correct legally speaking," before proceeding to explain its reasoning as though it *did* have discretion to impose sentences other than incarceration. *See* Sent.Tr. p.13,ln.19–p.15,ln.20.

Additionally, the State must note that Wickes' argument that he could have been placed on probation is meritless. Section 907.3 gives

the sentencing court discretion to impose a suspended sentence, but it "does not apply to a forcible felony or 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." *See* Iowa Code § 907.3. Wickes was convicted of a violation of chapter 709—specifically, section 709.15—which arose out of acts committed while he was "[a] licensed school employee." *See* Iowa Code § 232.69(1)(b)(4); TrialTr. p.11,ln.19–p.14,ln.8; State's Ex. 6; App. 708; Order and Ruling (8/11/16) at 3; App. 17. By the plain language of the statute authorizing imposition of suspended sentences, Wickes was ineligible for any punishment other than incarceration.

Any statutory interpretation argument to the contrary must fail because the legislature could have omitted this particular offense from the scope of section 907.3's carve-out, just as it excluded this particular offense from the statutory definition of "forcible felony." *See* Iowa Code § 702.11(2)(d). It chose not to do so, and the court was obligated to apply the law as written. *See Staff Mgmt. v. Jimenez*, 839 N.W.2d 640, 649 (Iowa 2013) (quoting *Meinders v. Dunkerton Cmty. Sch. Dist.*, 645 N.W.2d 632, 637 (Iowa 2002)) (discussing principle of *expressio unius est exlusio alterius*—"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"). Moreover, Wickes ignores the fact that excluding this offense from the definition of "forcible felony" means that he was eligible for pre-conviction and post-conviction bail under section 811.1, and he will not be subject to a prior-forcible-felony mandatory minimum under section 902.11 if he is subsequently convicted on another criminal charge. *See* Iowa Code § 811.1(1)–(2); Iowa Code § 902.11. Following the plain language does not reduce the carve-out for sexual abuse by a school employee in section 702.11(2)(d) to mere surplusage; while that carve-out has reverberating effects that extend far beyond the sentencing decision, the legislature specifically intended that all violations of chapter 709 be exempt from section 907.3—whether or not they would also qualify as forcible felonies.

Finally, Wickes points out an array of factors that weighed in favor of suspending the sentence and criticizes the sentencing court for failing to consider those factors. *See* Def's Br. at 30–31. Even if the sentencing court did not discuss the weight assigned to those factors, such an omission does not represent an abuse of discretion. *See, e.g.*, *Thomas*, 547 N.W.2d at 226 (citing *State v. Russian*, 441 N.W.2d 374,

375 (Iowa 1989)) ("The fact the district court did not specifically mention the absence of mitigating circumstances is inconsequential since this court has recognized that the district court is not required to note them."). The omission of statements specifically addressing these factors does not mean that they were not considered, and does not mean the sentencing court abused its discretion—if it indeed had discretion to suspend the sentence, which the State disputes. Wickes cannot demonstrate any abuse of discretion, and his challenge fails.

V. This Five-Year Prison Sentence Does Not Amount to Cruel or Unusual Punishment.

Preservation of Error

The defendant may challenge a sentence as unconstitutional or illegal at any time. *State v. Oliver*, 812 N.W.2d 636, 639 (Iowa 2012); *State v. Bruegger*, 773 N.W.2d 862, 871 (Iowa 2009).

Standard of Review

Challenges to the constitutionality of statutorily prescribed sentences are reviewed de novo. *State v. Tripp*, 776 N.W.2d 855, 857 (Iowa 2010). Statutes are presumptively constitutional; a challenger "must prove the [statute's] unconstitutionality beyond a reasonable doubt." *State v. Seering*, 701 N.W.2d 655, 661 (Iowa 2005) (quoting *State v. Hernandez-Lopez*, 639 N.W.2d 226, 233 (Iowa 2002)).

Merits

Determining whether a sentence is grossly disproportionate to the defendant's crime requires application of the three-step test set out in *Solem v. Helm*, 463 U.S. 277, 290-92 (1983). The first step is to weigh the gravity of the offense and the harshness of the penalty to determine if they raise "an inference of gross disproportionality." *See Oliver*, 812 N.W.2d at 649–50. That step is a "threshold inquiry"—without an inference of gross disproportionality, "we need not proceed to steps two and three of the analysis, the intrajurisdictional and interjurisdictional comparisons." *Id.* at 653 (citing *Bruegger*, 773 N.W.2d at 873). Wickes cannot make this threshold showing.

A. There is no inference of gross disproportionality.

This preliminary threshold analysis "involves a balancing of the gravity of the crime against the severity of the sentence." *Bruegger*, 773 N.W.2d at 873 (citing *Solem*, 463 U.S. at 291). This step of the *Solem* test proves fatal to almost all gross disproportionality claims—"it is rare that a sentence will be so grossly disproportionate to the crime as to satisfy the threshold inquiry and warrant further review." *Oliver*, 812 N.W.2d at 650 (citing *State v. Musser*, 712 N.W.2d 734, 749 (Iowa 2006); *see also Bruegger*, 773 N.W.2d at 873.

In this case, Wickes abused the community's trust by preying on a student's vulnerabilities and grooming her to play sexual/romantic roles that would fill the voids in his own personal life. The particular penalty that the legislature prescribed is not very severe. Finally, even though the legislature used a broad definition for sexual exploitation by a school employee, that is far from enough to show convergence of unique factors that would create a high risk of gross disproportionality.

1. Gravity of the Offense: *This crime represents a profound betrayal of the trust that Iowa communities place in our teachers and other school employees.*

Children, even those who are on the cusp of adulthood, receive special protections under Iowa law—and sex-related crimes against them are viewed as more severe and punished more harshly "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." *See Bruegger*, 773 N.W.2d at 886.

Courts weighing gross-disproportionality challenges generally "give the legislature deference because '[l]egislative judgments are generally regarded as the most reliable objective indicators of community standards for purposes of determining whether a punishment is cruel and unusual.'" *Oliver*, 812 N.W.2d at 647

(quoting *Bruegger*, 773 N.W.2d at 873). The legislature's decision to designate schemes to commit sexual exploitation by a school employee as a felony offense (even when sexual contact that occurs between a teacher/student pair is otherwise consensual) reflects a consensus that taking advantage of students for sexual arousal or gratification "is a serious crime and is not diminished in any way because the offender committed the crime by playing upon the youthful vulnerabilities of the victim instead of physically overpowering the victim." *Bruegger*, 773 N.W.2d at 887 (Cady, J., dissenting); *see also Oliver*, 812 N.W.2d at 654 ("While Oliver claims that his crimes were not physically violent, they are still emotionally, psychologically and physically damaging to the child being exploited.").

A.S. did not give a statement that would help assess the gravity of this particular offense—but her mother did:

> [A.S.] went from a bright, intelligent young lady to a broken one who wondered who she could trust. She had nightmares in which Mr. Wickes was watching her while she slept. She would awaken frightened from these, so I slept in her room with her.
>
> [. . .]
>
> She lost the friendship of the majority of her peers during her senior year of high school because they blamed her for Mr. Wickes' behavior. She lost the joy of graduating with her friends and having a graduation party.

> [. . .]
>
> To this day, she continues to feel scared because of the grooming behavior of this teacher she trusted. She has moved away from her home and friends in Clinton because of the attitudes of the community against her. We don't know when she'll recover from this ordeal fully, if at all.

Sent.Tr. p.9,ln.8–p.11,ln.25. Clearly, the gravity of this offense cannot be minimized by focusing exclusively on the limited physical contact between Wickes and A.S.—the broader ramifications on victims must be considered, and those ramifications illustrate some of the harms that our legislature intended to prevent and/or redress.

Other states have recognized the gravity of similar offenses that abuse the profound trust that communities must place in teachers:

> We note, as other courts have done, that teachers have constant access to students, often in an unsupervised context. Thus, teachers are in a unique position to groom or coerce students into exploitive or abusive conduct. It is uncontestable that the State must provide a safe school environment for students, which includes preventing the sexual exploitation of students. Teachers are vested with a great deal of trust by the school districts, the parents, the public, and the students themselves. Our legislature has sought to preserve that trust by prohibiting teachers from misusing their access to students as a means to obtain sex. A sexually charged learning environment would confuse, disturb, and distract students, thus undermining the quality of education in Kansas.

State v. Edwards, 288 P.3d 494, 502 (Kan. Ct. App. 2012); *see also* *Hirschfelder*, 242 P.3d at 549 ("That the legislature saw fit to

criminalize sex between school employees and high school students—even those who reach the age of majority while registered as students—is a policy choice that recognizes the special position of trust and authority teachers hold over their students."); *cf. Scadden v. State*, 732 P.2d 1036, 1042 (Wyo. 1987) (noting evidence of power dynamic satisfied statutory requirement to prove "position of authority" when the victim was "a very young woman, then in high school, who was in large part controlled by the attention and demands of appellant as her teacher, coach and confidant" who was "vested with power by a grant from society"). Wickes betrayed the community's trust by using A.S. for his own romantic/sexual fulfillment, and the sentencing court was right to highlight "the seriousness of this offense and the depth of the betrayal of this position of trust and mentorship that society has given to him." *See* Sent.Tr. p.14,ln.3–p.15,ln.20. While the physical contact in this case is rather tame on its surface, this offense is quite serious.

2. *Severity of the Sentence:* *The Iowa legislature calibrated this punishment to fit the crime.*

"Article I, section 17 of the Iowa Constitution 'embraces a bedrock rule of law that punishment should fit the crime.'" *State v. Lyle*, 854 N.W.2d 378, 384 (Iowa 2014) (quoting *Bruegger*, 773 N.W.2d at 872). But this bedrock rule must be applied with restraint,

because "legislative determinations of punishment are entitled to great deference"—and thus, "a reviewing court is not authorized to generally blue pencil criminal sentences to advance judicial perceptions of fairness." *Bruegger*, 773 N.W.2d at 872–73; *see also Ewing v. California*, 538 U.S. 11, 28 (2003) (noting a reviewing court does not "sit as a 'superlegislature' to second-guess policy choices"). This means that the severity of the sentence must be evaluated in light of the Iowa legislature's view of the threat posed by teachers who would exploit their students for sexual arousal or gratification.

Wickes was sentenced to a five-year term of incarceration, with no mandatory minimum before parole eligibility. *See* Order (10/6/16); App. 53. The State is unable to locate any case where an Iowa court held a five-year sentence of incarceration was grossly disproportionate to *any* offense; Wickes has not provided any case where a sentence of that length has triggered any heightened constitutional concerns that would allow any court to supplant the legislature's views with its own. *See* Def's Br. at 32–41. Indeed, it would be "exceedingly rare" for any term-of-years sentence to violate constitutional protections against cruel and unusual punishment. *See Bruegger*, 773 N.W.2d at 873 (quoting *Rummel v. Estelle*, 445 U.S. 263, 272 (1980)).

Moreover, it is exceedingly unlikely that Wickes will serve a full five years in prison. His sentence is subject to earned time provisions that make him "eligible for a reduction of sentence equal to one and two-tenths days for each day the inmate demonstrates good conduct and satisfactorily participates in any program or placement status identified by the director to earn the reduction." *See* Iowa Code § 903A.2(1)(a)(1). Even if he does not earn parole, he can be finished with this sentence of incarceration in two years and four months. And if Wickes truly poses no threat to society (as he claims in Division IV), then he can demonstrate that "there is reasonable probability that [he] can be released without detriment" at his very first parole hearing. *See* Iowa Code § 906.4(1); Def's Br. at 30–31. Indeed, during FY 2016, the parole board released an offender from a Class D felony sentence after just 10.3 months of incarceration—Wickes might obtain parole before serving a full year in prison. *See* IOWA BD. OF PAROLE, *Annual Report: FY2016* at 22, http://www.bop.state.ia.us/Document/1088. And even if he does not, parole eligibility is generally sufficient to alleviate any danger of gross disproportionality because it provides "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *See State v. Null*, 836 N.W.2d 41, 63

(Iowa 2013) (quoting *Graham v. Florida*, 560 U.S. 48, 75 (2010)). So the availability of parole for Wickes during his relatively short sentence weighs heavily against any finding of gross disproportionality.

3. Unique/Converging Factors: *The circumstances of this case do not create a high risk of disproportionality.*

This case does not involve unique circumstances that "converge to generate a high risk of potential gross disproportionality." *See Oliver*, 812 N.W.2d at 651 (quoting *Bruegger*, 773 N.W.2d at 884). *Breugger* involved "a broadly framed crime, the permissible use of preteen adjudications as prior convictions to enhance the crime, and a dramatic sentence enhancement for repeat offenders." *Bruegger*, 773 N.W.2d at 884. This crime is broadly framed, to a certain extent, but other *Bruegger* factors are more important—and not present here. This is not a case involving "use of preteen juvenile adjudications as prior convictions to enhance the crime," and Wickes was not subject to "a dramatic sentence enhancement for repeat offenders." *See id.*

Moreover, the State disputes that Wickes was convicted under a statute that "broadly frames" a crime, within the meaning of *Bruegger*. This case is more like *Oliver* because the acts that Wickes committed were prohibited by a law that specifically applied to school employees, specifically protected his students, and only criminalized interactions

of a certain flavor that all school employees (including Wickes) *knew* would be prohibited. *See* State's Ex. 1 at 187, 247, 287, 624, App. 244, 304, 344, 681. Wickes may have been prevented from consummating his inappropriately intimate relationship with anything other than hugs, but the fact still remains that "[t]his is the type of exploitation section [709.15(3)] was designed to prevent, not conduct that was inadvertently caught by a broadly written statute." *See Oliver*, 812 N.W.2d at 651 (citing *Bruegger*, 773 N.W.2d at 884).

Wickes offers no other potentially converging factors that may generate any unique risk of gross disproportionality. "[T]he fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is 'properly within the province of legislatures, not courts.'" *Harmelin v. Michigan*, 501 U.S. 957, 998 (1991) (Kennedy, J., concurring) (quoting *Rummel*, 445 U.S. at 275–76). Under both the Eighth Amendment and Article I, Section 17 of the Iowa Constitution, courts "owe substantial deference to the penalties the legislature has established for various crimes." *See Oliver*, 812 N.W.2d at 650. Wickes has failed to demonstrate any facts that can overcome that deference to legislatively prescribed punishments; as such, he has failed to raise an inference of gross disproportionality.

B. Proceeding any further is unnecessary.

Under *Solem*, *Bruegger*, and *Oliver*, it is unnecessary to engage in any "intrajurisdictional and interjurisdictional comparisons" in this case because, as a matter of law, "the penalty does not lead to an inference of gross disproportionality." *See Oliver*, 812 N.W.2d at 653 (citing *Bruegger*, 773 N.W.2d at 873).

In any event, the intrajurisdictional analysis Wickes provides is inaccurate—he claims that "the only other similar offenses whereby a deferred judgment or a suspended sentence are unavailable in Iowa are for forcible felonies," but he ignores that language in the carve-out in section 907.3 also applies "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." *See* Iowa Code § 907.3. This is a deliberate policy choice reflecting the enhanced culpability of any mandatory reporter who has commited a sex-related offense that victimizes a minor—and it even applies to the aggravated misdemeanor and serious misdemeanor offenses set out in chapter 709, which can *never* be forcible felonies. Moreover, the availability/unavailability of alternatives to incarceration does not control the entire proportionality analysis—and Wickes never claims

that a *five year* sentence would still be grossly disproportionate if he was placed on probation, violated terms, and had probation revoked. *See* Def's Br. at 32–41. His singular focus on the denial of probation handicaps his claim—he never challenges the sentence itself.

As for the interjurisdictional analysis, Wickes provides a list of other states' statutes that use other definitions for sexual exploitation by a school employee, but it is not clear that they would not prohibit this exact scheme of conduct—most of them use similarly flexible terms like "sexual contact" or "sexual touching," which may still encompass romantically/sexually charged hugging under those states' interpretations of those laws. *See* Def's Br. at 36–40. Indeed, Wickes cites statutes from Ohio and Nevada that apply to "sexual conduct"—just like Iowa Code section 709.15(3)(a). *See* Nev. Code § 201.540(1); Ohio Rev. Code Ann. § 2907.03(A)(7). Michigan would criminalize a sexual relationship that ensued after A.S. graduated, because Wickes used his status as a teacher "to establish a relationship" with her. *See* Mich. Code § 750.520(d)(1)(e). In any event, this analysis matters the least of all—the relationship between Wickes and A.S. was clearly inappropriate in obvious ways, and other states' failure to prohibit it does not invalidate Iowa's decision to criminalize that breach of trust.

Wickes has failed to establish that this is the exceedingly rare case that raises an inference of gross disproportionality. But even if he had succeeded in doing that, a cursory intrajurisdictional and/or interjurisdictional analysis demonstrates that this punishment is not beyond the pale for the offense that he committed. As such, Wickes cannot prevail on his gross disproportionality challenge, and his constitutional claims must fail.

CONCLUSION

The State respectfully requests that this Court affirm the defendant's conviction.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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