STATE AND DISTRICT JUDICIAL NOMINATION COMMISSION AND OFFICE OF THE GOVERNOR JOINT JUDICIAL APPLICATION

Please complete this application by placing your responses in normal type, immediately beneath each request for information. Requested documents should be attached at the end of the application or in separate PDF files, clearly identifying the numbered request to which each document is responsive. Completed applications are public records. If you cannot fully respond to a question without disclosing information that is confidential under state or federal law, please submit that portion of your answer separately, along with your legal basis for considering the information confidential. Do not submit opinions or other writing samples containing confidential information unless you are able to appropriately redact the document to avoid disclosing the identity of the parties or other confidential information.

PERSONAL INFORMATION

1. **State your full name.**

   Bridget Alice Chambers

2. **State your current occupation or title. (Lawyers: identify name of firm, organization, or government agency; judicial officers: identify title and judicial election district.)**

   Assistant Attorney General, Iowa Attorney General's Office

3. **State your date of birth (to determine statutory eligibility).**

   December 20, 1959

4. **State your current city and county of residence.**

   Webster City, Hamilton County, Iowa

PROFESSIONAL AND EDUCATIONAL HISTORY

5. **List in reverse chronological order each college and law school you attended including the dates of attendance, the degree awarded, and your reason for leaving each school if no degree from that institution was awarded.**

   Doctor of Law, with distinction
   University of Iowa College of Law
   Iowa City, Iowa
   1982-1985

Bachelor of Arts
Majors: Economics, French
University of Iowa
Iowa City, Iowa
1978-1982

6. **Describe in reverse chronological order all of your work experience since graduating from college, including:**
   a. **Your position, dates (beginning and end) of your employment, addresses of law firms or offices, companies, or governmental agencies with which you have been connected, and the name of your supervisor or a knowledgeable colleague if possible.**
   b. **Your periods of military service, if any, including active duty, reserves or other status. Give the date, branch of service, your rank or rating, and present status or discharge status.**

Assistant Attorney General
Iowa Attorney General's Office
Hoover State Office Building
Des Moines, Iowa
1990–present

I have served in various divisions and capacities in the Attorney General's Office.

I served in the office of the Prosecuting Attorneys Training Coordinator from 1990–1992.

I have served in the Criminal Appeals Division from 1992 to the present. I served as division director of the Criminal Appeals Division from May 1995 to October 1999.

I served on an as-needed basis in the Administrative Law Division to prosecute dependent adult abuse cases in 2003 and 2004.

Supervisors/Contacts:
Kevin Cmelik
(563) 940-2502

Darrel Mullins
(515) 281-5976

Hamilton County Attorney
Webster City, Iowa 1986–1990
Contact:Hon. David Danielson
david.danilson@iowacourts.gov
(515) 348-4700 (Clerk of Court)

The Honorable Judge David Danilson, then a District Associate Court judge, was the presiding judge in the majority of my cases in the trial courts and would be able to speak to my effectiveness as a trial prosecutor.

Associate attorney, Bottorff & Van Doren Law Firm
Webster City, Iowa
1985–1986

Supervisor/Contact: Both partners of the law firm are deceased, and the practice has been closed.

7. **List the dates you were admitted to the bar of any state and any lapses or terminations of membership. Please explain the reason for any lapse or termination of membership.**

I was admitted to the Iowa Bar in June 1985. There has been no lapse in, or termination of, my membership.

8. **Describe the general character of your legal experience, dividing it into periods with dates if its character has changed over the years, including:**
   a. **A description of your typical clients and the areas of the law in which you have focused, including the approximate percentage of time spent in each area of practice.**
   b. **The approximate percentage of your practice that has been in areas other than appearance before courts or other tribunals and a description of the nature of that practice.**
   c. **The approximate percentage of your practice that involved litigation in court or other tribunals.**
   d. **The approximate percentage of your litigation that was: Administrative, Civil, and Criminal.**
   e. **The approximate number of cases or contested matters you tried (rather than settled) in the last 10 years, indicating whether you were sole counsel, chief counsel, or associate counsel, and whether the matter was tried to a jury or directly to the court or other tribunal. If desired, you may also provide separate data for experience beyond the last 10 years.**
   f. **The approximate number of appeals in which you participated within the last 10 years, indicating whether you were sole counsel, chief counsel, or associate counsel. If desired, you may also provide separate data for experience beyond the last 10 years.**

Since joining the Iowa Attorney General's Office in 1990, I have exclusively represented the State of Iowa. My practice has been almost entirely in the area of criminal law, with some administrative hearings.

1999-present I currently serve as a staff attorney in the Criminal Appeals division. Approximately 95% of my practice involves appellate litigation. The remaining 5% of my work includes responding to prosecutors' requests for advice on issues arising in their cases and teaching and speaking on criminal law issues.

1995-1999 During this period, I served as director of the Criminal Appeals Division. Approximately 25 % of my practice involved litigation in state and federal appellate courts, including appeals before the 8th Circuit Court of Appeals and an appeal in the United States Supreme Court. Approximately 75 % of my practice was devoted to administrative matters, supervision of attorneys and support staff, motion practice that did not require me to appear in court, responding to requests for advice from county prosecutors, speaking and teaching on criminal law issues, assisting with drafting legislation to be proposed by the

Attorney General, and reviewing bills filed with the Iowa Legislature to assist the Attorney General in determining whether to support or oppose legislation.

1992-1995 From 1992 to 1995, I served as a staff attorney in the Criminal Appeals division. During that period, approximately 95% of my practice involved appellate litigation. The remaining 5% of my work included responding to prosecutors' requests for advice on issues arising in their cases and teaching and speaking on criminal law issues.

1990-1992 In the period from 1990 to 1992, I served in the Prosecuting Attorneys Training Coordinator Division. My work there was 100% non-litigation. I trained prosecutors in trial advocacy skills and instructed prosecutors and law enforcement officers on pertinent issues in criminal law and evidence.

1986-1990 During this period, I served as the Hamilton County Attorney. I represented the State of Iowa in criminal cases and the County of Hamilton County in civil litigation brought by or against the county. I estimate that 85 % of my practice involved litigation. I spent approximately 65 percent of my time on prosecution of criminal cases; 15 % on Child in Need of Assistance cases and juvenile delinquency cases; 5 %on mental health and substance abuse commitment proceedings; and 15 % on providing counsel to county office holders and defending the county in civil litigation.

1985 to 1986 During this period, I was in private practice. My practice was approximately 75 % in the area of general business law. Typical clients would have been small businesses. Approximately 25 percent of my practice was in the area of criminal law, primarily court appointed clients. I estimate that 25 % of my practice involved litigation in court.

In the past ten years, my practice has been exclusively appellate; I have not tried a case during that period. During my time as county attorney, I tried dozens of trials to the bench and approximately 10 jury trials. I would estimate I litigated over 300 suppression hearings. I was sole counsel in those trials and hearings.

In the past ten years, I have served as sole counsel in approximately 350 appeals in the Iowa appellate courts. Over the course of my career, I have represented the State in more than 675 cases in the Iowa appellate courts. I have also represented the State of Iowa in approximately 20 cases in federal district court, 7 cases in the 8th Circuit Court of Appeals, and 1 case in the United States Supreme Court. The Attorney General was named as counsel in those cases but did not perform any part of the legal work.

9. **Describe your pro bono work over at least the past 10 years, including:**
   a. **Approximate number of pro bono cases you've handled.**
   b. **Average number of hours of pro bono service per year.**
   c. **Types of pro bono cases.**

I handled approximately 5 pro bono cases in the five years I was in private

practice. Those cases were dissolutions of marriage and child custody cases.

Since joining the Attorney General's office, I have been prohibited from representing private clients. I honor my duty to provide pro bono services by serving on the boards of non-profit and educational organizations and speaking to students and civic groups about the law and the judicial system.

10. If you have ever held judicial office or served in a quasi-judicial position:

a. Describe the details, including the title of the position, the courts or other tribunals involved, the method of selection, the periods of service, and a description of the jurisdiction of each of court or tribunal.

n/a

b. List any cases in which your decision was reversed by a court or other reviewing entity. For each case, include a citation for your reversed opinion and the reviewing entity's or court's opinion and attach a copy of each opinion.

n/a

c. List any case in which you wrote a significant opinion on federal or state constitutional issues. For each case, include a citation for your opinion and any reviewing entity's or court's opinion and attach a copy of each opinion.

n/a

11. If you have been subject to the reporting requirements of Court Rule 22.10:

a. State the number of times you have failed to file timely rule 22.10 reports.

n/a

b. State the number of matters, along with an explanation of the delay, that you have taken under advisement for longer than:

i. 120 days.

n/a

ii. 180 days.

n/a

iii. 240 days.

n/a

iv. One year.

n/a

12. **Describe at least three of the most significant legal matters in which you have participated as an attorney or presided over as a judge or other impartial decision maker. If they were litigated matters, give the citation if available. For each matter please state the following:**
    - **a. Title of the case and venue,**
    - **b. A brief summary of the substance of each matter,**
    - **c. A succinct statement of what you believe to be the significance of it,**
    - **d. The name of the party you represented, if applicable,**
    - **e. The nature of your participation in the case,**
    - **f. Dates of your involvement,**
    - **g. The outcome of the case,**
    - **h. Name(s) and address(es) [city, state] of co-counsel (if any),**
    - **i. Name(s) of counsel for opposing parties in the case, and**
    - **j. Name of the judge before whom you tried the case, if applicable.**

***State v. Madison*, 785 N.W.2d 706 (Iowa 2010)**

This case challenged the computerized system the Iowa State Patrol had developed to invoke implied consent in Iowa. The case presented an issue of first impression. A decision adverse to the State would have led to widespread reversal of OWI convictions and license revocations and would have forced the Patrol to abandon its new, expensive, computerized system for invoking implied consent. Oral argument was contentious, and the Court appeared hostile to the State's position, but I was able to persuade the Court to uphold the system.

Karen Doland, Assistant Attorney General, wrote the brief in this case; I argued the case before the Iowa Supreme Court. Opposing counsel was Aaron D. Hamrock of West Des Moines.

***Knowles v. Iowa*, 525 U.S. 113 (1998)**

From the standpoint of honing my appellate skills, this is the most significant case in which I have participated. I represented the State of Iowa and was solely responsible for writing the brief and presenting the State's case in oral argument before the United States Supreme Court. The dates of my involvement were January to December 1997.

The issue was whether a law enforcement officer who issued a citation in lieu of arrest pursuant to Iowa Code §805.1(4) could search the driver's vehicle. In this case, the citation was for possession of marijuana. It was important to determine the constitutionality of making a full search when officers issue citations in lieu of arrest. The Supreme Court held that a full search of the car incident to a citation violated the 4th Amendment even though the officer had probable cause to make a custodial arrest.

Attorney General Thomas J. Miller, Des Moines, Iowa, and Solicitor General Elizabeth Osenbaugh, deceased, were listed as co-counsel in the appeal. Opposing Counsel was Paul Rosenberg of Des Moines.

State v. Jackson, No. 21-1319, __ N.W.2d __, (2023 WL 5607145)
(Iowa Ct. App. Aug. 30, 2023)

This very case demonstrates the complex issues I litigate on a regular basis. This case presented a challenge to a search warrant, a claim of medical privilege under the Iowa privilege statute, a claim that the defendant's medical records were inadmissible under the federal HIPPA statute, and a multi-layered hearsay issue. This case has been decided in favor of the State by a panel of the Iowa Court of Appeals. The Iowa Supreme Court has granted the defendant's application for further review; that application is still pending.

I represent the State of Iowa in this case; Gary Dickey of Des Moines is opposing counsel.

13. Describe how your non-litigation legal experience, if any, would enhance your ability to serve as a judge.

I frequently speak and teach on legal issues. My audiences are generally lawyers, but I also present to law enforcement officers, students, and the general public. This requires me to view the law from a non-partisan angle and would enhance by ability to rule objectively on legal issues as a judge. Those experiences also require me to break down complex legal issues into brief, easily understandable pieces. That experience improves my own understanding of the law and would be very useful in discussing legal issues with counsel who would appear in my court and in making clear, understandable rulings.

As county attorney and division director at the Attorney General's office, I hired and supervised support staff and attorneys, and was responsible for case management. Those experiences would enhance my ability to manage an office, control my docket, and meet deadlines.

Both as county attorney and as assistant attorney general, I have created positive working relationships with clerks of court and court reporters around the state and gained a deep understanding of the importance of their work in the smooth operation of the court. Positive working relationships with clerks and court reporters are essential to a judge's work.

Over many years of working in environments where the workload and the stakes are consistently very high, and the subject matter is often legally and emotionally difficult, I have learned how important it is to make the office an enjoyable, even fun, place. Both as supervisor and as a staff attorney, I have developed methods of enabling excellent office morale where everyone can do their best work. This experience would be very useful in helping myself and court staff avoid burnout.

14. If you have ever held public office or have you ever been a candidate for public office, describe the public office held or sought, the location of the public office, and the dates of service.

1986–1990 Hamilton County Attorney; Webster City, Iowa

2003–2006 Freedom Township Trustee; Iowa, elected by write-in votes

2007–2010 Freedom Township Clerk; Iowa, elected by write-in votes

15. If you are currently an officer, director, partner, sole proprietor, or otherwise engaged in the management of any business enterprise or nonprofit organization other than a law practice, provide the following information about your position(s) and title(s):

a. Name of business / organization.
b. Your title.
c. Your duties.
d. Dates of involvement.

Gilbert Flooring & Paint, Inc.

Vice President, Secretary
2000–present

My involvement is limited to attending the annual meeting and approving corporate actions. The day-to-day operation of the business is handled by my husband, Bryan Gilbert, and his staff.

Bluestem Prairie Organic Hemp, LLC, d/b/a Bluestem Prairie Farm

2019–present

Organizer, Member

Bluestem Prairie Farm raises USDA certified organic hemp on our family farm. The hemp is used to produce certified organic CBD products, which are sold at wholesale and at retail. Bluestem Prairie Farm also operates a commercial greenhouse raising flowers, vegetables, and herbs for retail sale.

The day-to-day work is done by family members and a small staff. I handle the administrative and financial aspects of the business.

16. **List all bar associations and legal- or judicial-related committees or groups of which you are or have been a member and give the titles and dates of any offices that you held in those groups.**

Iowa State Bar Association, member, 1985–present.

My membership is active.

United States District Court, Northern and Southern Districts of Iowa, admitted 1997.

My memberships are currently inactive.

United States Court of Appeal for the 8th Circuit, admitted 1997.

My membership is currently inactive.

United States Supreme Court, admitted 1998.

My membership is active.

Iowa State Bar Association Appellate Practice Committee, 1999–2007.

I served on the planning committees for the Appellate Practice Seminars held in October of 2002 and October of 2007.

Iowa State Bar Association, Criminal Law Section Council, 2005–2011.

I served on the planning committee for the Criminal Law Seminar held in April of 2011.

17. **List all other professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed above, to which you have participated, since graduation from law school. Provide dates of membership or participation and indicate any office you held. "Participation" means consistent or repeated involvement in a given organization, membership, or regular attendance at events or meetings.**

2020–present	Member, Webster City Chamber of Commerce Webster City, Iowa

2017–present	Planning & Zoning Commission Board of Adjustment Webster City, Iowa
2002–2008 and 2010–2018	St. Thomas Aquinas Board of Education, Webster City, Iowa; Board President 2007–2008 and 2011–2012
1986–1988	Advisory Board, Assault Care Center Extending Shelter and Support (ACCESS) Ames, Iowa
1987–1988	Advisory Board, Youth and Shelter Services Webster City, Iowa

18. **If you have held judicial office, list at least three opinions that best reflect your approach to writing and deciding cases. For each case, include a brief explanation as to why you selected the opinion and a citation for your opinion and any reviewing entity's or court's opinion. If either opinion is not publicly available (i.e., available on Westlaw or a public website other than the court's electronic filing system), please attach a copy of the opinion.**

n/a

19. **If you have not held judicial office or served in a quasi-judicial position, provide at least three writing samples (brief, article, book, etc.) that reflect your work.**

Please see attached writing samples.

OTHER INFORMATION

20. **If any member of the State Judicial Nominating Commission (for Court of Appeals and Supreme Court applicants) or 2B District Judicial Nominating Commission (for District Judge and District Associate Judge Applicants) is your spouse, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, father, mother, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister, state the Commissioner's name and his or her familial relationship with you.**

n/a

21. **If any member of the State Judicial Nominating Commission (for Court of Appeals and Supreme Court applicants) or 2B District Judicial Nominating Commission (for District Judge and District Associate Judge Applicants) is a current law partner or**

business partner, state the Commissioner's name and describe his or her professional relationship with you.

n/a

22. List the titles, publishers, and dates of books, articles, blog posts, letters to the editor, editorial pieces, or other published material you have written or edited.

2005–2012	Contributed monthly case summaries to the Criminal Law Section Newsletter, Iowa State Bar Association.
1999–2000	Wrote monthly newsletters on criminal law and created accompanying interactive electronic training materials for law enforcement officers; Police Law Institute.
1990–1992	Wrote and edited updates to the OWI Prosecution Manual, Office of the Iowa Prosecuting Attorneys Coordinator, Iowa Department of Justice.
	Wrote and edited the Traffic Safety Newsletter, Office of the Iowa Prosecuting Attorneys Coordinator, Iowa Department of Justice.

23. List all speeches, talks, or other public presentations that you have delivered for at least the last ten years, including the title of the presentation or a brief summary of the subject matter of the presentation, the group to whom the presentation was delivered, and the date of the presentation.

August 6, 2023	Presenter at a farm crawl sponsored by the Iowa Organic Association. Spoke to members of the public about organic agriculture and hemp production.
June 2010	Presenter, Admissibility of Prior Sex Offenses Criminal Law Seminar Public Defenders Association of Iowa
June 2008	Presenter, Criminal Law Update County Attorneys Spring Conference Iowa County Attorneys Association
June 2007	Presenter, Criminal Law Update Iowa Judges Conference

April 2007	Presenter, Criminal Law Update Criminal Law Section Seminar Iowa State Bar Association
February 2005	Presenter, Confessions and Admissions; Search and Seizure; Laws of Arrest Basic Academy Iowa Department of Public Safety
November 2002	Presenter, Criminal Law Update County Attorneys Fall Conference Iowa County Attorneys Association
March 1999	Guest Lecturer, Criminal Law Course Wartburg College
November 1997	Presenter, Criminal Law Update; Search and Seizure Update County Attorneys Fall Conference Iowa County Attorneys Association
June 1997	Presenter, Criminal Law Update Iowa Magistrates Conference
November 1996	Presenter, Criminal Law Update County Attorneys Fall Conference Iowa County Attorneys Association
June 1996	Presenter, Criminal Law Update County Attorneys Spring Conference Iowa County Attorneys Association
November 1995	Presenter, Criminal Law Update; Search and Seizure Update County Attorneys Fall Conference Iowa County Attorneys Association
September 1995	Presenter, Criminal Law Basic Law Enforcement Academy Iowa Department of Public Safety
June 1995	Presenter, Search and Seizure Update

	County Attorneys Spring Conference Iowa County Attorneys Association
December 1994	Presenter, OWI Case Law Update Iowa Judges Conference
November 1994	Faculty Member 29th Annual Northern Iowa Community Conference
September 1994	Presenter, Trial Process for Law Enforcement Iowa County Attorneys Association
August–September Topics 1994	Presenter, Various Criminal Law Law Enforcement Basic Academy Iowa Department of Public Safety
January 1991	Faculty member National Trial Advocacy Program for OWI Prosecutors National Highway Safety Administration

I also speak regularly to student groups and community groups such as the Rotary Club about the judicial system and legal issues of interest.

24. **List all the social media applications (e.g., Facebook, Twitter, Snapchat, Instagram, LinkedIn) that you have used in the past five years and your account name or other identifying information (excluding passwords) for each account.**

Facebook: Bluestem Prairie Farm; Bridget Chambers

Instagram: Bridget Chambers; bluestemprairiefarm

Twitter/X: bridgetalicech1
(inactive)

Snapchat: bgilbert@wmtel.net

LinkedIn: Bridget Chambers

Alignable: Bluestem Prairie Organic Hemp

25. **List any honors, prizes, awards or other forms of recognition which you have received (including any indication of academic distinction in college or law school) other than those mentioned in answers to the foregoing questions.**

J.D. degree with distinction

American Jurisprudence Award in Family Law

26. **Provide the names and telephone numbers of at least five people who would be able to comment on your qualifications to serve in judicial office. Briefly state the nature of your relationship with each person.**

The Honorable David Danilson, Iowa Court of Appeals, senior status
(515) 348-4700 (Clerk of Court)

I practiced before Chief Judge Danilson in the Iowa Court of Appeals and when he was on the District Associate Court in Hamilton County. He can speak to my trial and appellate skills.

The Honorable Mary Tabor, Iowa Court of Appeals

(515) 348-4700 (Clerk of Court)

Judge Tabor can speak to my appellate skills and judicial temperament. I have practiced before Judge Tabor in the Iowa Court of Appeals, and I worked with her for many years in the Criminal Appeals Division of the Iowa Attorney General's Office.

The Honorable Tyler Buller
Iowa Court of Appeals
(515) 348-4700 (Clerk of Court)

Judge Buller and I worked together at the Iowa Attorney General's office for a number of years. He can speak to my knowledge of the law and judicial temperament.

Ellen Willadsen
Chief Innovation Officer, former CFO
Holmes Murphy
(515) 868-6835

Ellen and I have been friends for forty years. She can speak to my judicial temperament and work ethic.

Stephan Japuntich
Assistant Iowa Appellate Defender, retired.
(515) 297-1820

Steve is familiar both my trial practice and my appellate work. He was a defense attorney in Hamilton County when I was a prosecutor there. Steve moved to the Iowa Appellate Defender's Office at about the same time as I moved to the Iowa Attorney General's Office, where we continued to be opposing counsel on a large number of cases.

Kevin Cmelik
Director, Criminal Appeals Division
Iowa Attorney General's Office, retired.
(563) 940-2502

Kevin was my colleague and then my direct supervisor at the Iowa Attorney's Office. Prior to that, he worked in the Appellate Defender's Office. He can discuss my appellate skills.

Darrel Mullins
Director, Criminal Appeals Division
Iowa Attorney General's Office
(515) 281-5976

Darrel is my direct supervisor at the Iowa Attorney General's Office. He can speak to my knowledge of the law, temperament, and work ethic.

27. Explain why you are seeking this judicial position.

I am seeking a new challenge in a position that would have immediate impact on people's lives and would allow me to use my expertise in the law and my life experiences to serve the Iowa judicial system and the people of Iowa.

28. Explain how your appointment would enhance the court.

I would bring to the bench an inmate sense of justice and deep knowledge of the law, the rules of evidence, and the rules of criminal and civil procedure. Perhaps more importantly, I would bring to the court the wisdom, patience, and good judgment that come with age and experience.

29. Provide any additional information that you believe the Commission or the Governor should know in considering your application.

At this point in my life and legal practice, I am seeking to leave a legacy of service to our judicial system and to our state.

My experience would allow me to transition to the bench quickly and smoothly.

I hereby certify all the information in this joint judicial application is true and correct to the best of my knowledge.

Signed: Bridget A. Chambers Date: October 19, 2023

Printed name: Bridget A. Chambers

IN THE SUPREME COURT OF IOWA
Supreme Court No. 21-1319

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID DWIGHT JACKSON,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE SCOTT J. BEATTIE (MOTION TO SUPPRESS)
THE HONORABLE DAVID PORTER (TRIAL), JUDGES

APPELLEE'S BRIEF

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Polk County Attorney

JAKI L. LIVINGSTON
Assistant County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLEE

PROOF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

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Authorities

Franks v. Delaware, 438 U.S. 154 (1978)
Illinois v. Gates, 462 U.S. 213 (1983)
United States v. Ellison, 793 F.2d 942 (8th Cir. 1986)
United States v. Waker, 534 F.3d 168 (2nd Cir. 2008)
Meier v. Senecaut, 641 N.W.2d 532 (Iowa 2002)
State v. Baker, 925 N.W.2d 602 (Iowa 2019)
State v. Bracy, 971 N.W.2d 563 (Iowa 2022)
State v. Case, No. 19-0378, 2020 WL 5651560 (Iowa Ct. App. Sept. 23, 2020)
State v. Gogg, 561 N.W.2d 360 (Iowa 1997)
State v. Green, 540 N.W.2d 649 (Iowa 1995)
State v. Johnson, 312 N.W.2d 144 (Iowa App. 1981)
State v. McNeal, 867 N.W.2d 91 (Iowa 2015)
State v. McPhillips, 580 N.W.2d 748 (Iowa 1998)
State v. Niehaus, 452 N.W.2d 184 (Iowa 1990)
State v. Ripperger, 514 N.W.2d 740 (Iowa App. 1994)
Fourth Amendment, United States Constitution
Iowa Const. art. I, § 8

II. The District Court Did Not Err in Admitting Testimony about Jackson's Medical Records to Rebut Jackson's Testimony That a Medical Condition, and Not Impairment, Caused Him to Cross the Center Line and Hit Another Vehicle Head-On; Even If the Court Had Erred, Any Error Would Be Harmless.

Authorities

Elder—Evins v. Casey, 2012 WL 2577589 (N.D. Cal. July 3, 2012)
Northwestern Memorial Hospital v. Ashcroft, 362 F.3d 923 (7th Cir. 2004)

United States v. Bek, 493 F.3d 790 (7th Cir. 2007)
United States v. Elliott, 676 F.Supp.2d 431 (U.S. Dist. Ct. Md. 2009)
United States v. Streich, 560 F.3d 926 (9th Cir. 2009)
United States v. Yazzie, 998 F. Supp. 2d 1044 (D.N.M. 2014)
United States v. Zamora, 408 F. Supp. 2d 295 (S.D. Tex. 2006)
Chung v. Legacy Corp., 548 N.W.2d 147 (Iowa 1996)
Commonwealth v. Williams, 2017 PA Super 382, 176 A.3d 298 (2017)
In re Est. of Poulos, 229 N.W.2d 721 (Iowa 1975)
People v. Bauer, 402 Ill. App. 3d 1149, 931 N.E.2d 1283 (2010)
Rodriguez v. State, 469 S.W.3d 626 (Tex. App. 2015)
Squealer Feeds v. Pickering, 530 N.W.2d 678 (Iowa 1995)
State v. Adams, No. 21-0916, 2022 WL 5068010 (Iowa Ct. App. Oct. 5, 2022)
State v. Buelow, 951 N.W.2d 879 (Iowa 2020)
State v. Carter, 23 So.3d 798 (Fla. 1st DCA 2009)
State v. Case, No. 19-0378, 2020 WL 5651560 (Iowa Ct. App. Sept. 23, 2020)
State v. Downs, 923 So. 2d 726 (La. App. 1 Cir. 2005)
State v. Eichhorst, 879 N.E.2d 1144 (Ind. Ct. App. 2008)
State v. Fiems, No. 18-2241, 2020 WL 1879700 (Iowa Ct. App. Apr. 15, 2020)
State v. Fontenot, 958 N.W.2d 549 (Iowa 2021)
State v. Lindsey, 881 N.W.2d 411 (Iowa 2016)
State v. Mubita, 145 Idaho 925, 188 P.3d 867 (2008)
State v. Parker, 747 N.W.2d 196 (Iowa 2008)
State v. Reynolds, 746 N.W.2d 837 (Iowa 2008)
State v. Roling, No. 0-710, 2001 WL 98935 (Iowa Ct. App. Feb. 7, 2001)
State v. Smith, 876 N.W.2d 180 (Iowa 2016)
State v. Straehler, 745 N.W.2d 431 (Wis. 2007)
State v. Sullivan, 679 N.W.2d 19 (Iowa 2004)
State v. Tillman, 532 N.W.2d 482 (Iowa Ct. App. 1995)
State v. Yenzer, 40 Kan. App. 2d 710, 195 P.3d 271 (2008)
Verska v. Saint Alphonsus Reg'l Med. Ctr., 151 Idaho 889, 265 P.3d 502 (2011)
Wells Dairy, Inc. v. American Indus. Refrigeration, Inc., 690 N.W.2d 38 (Iowa 2004)
Iowa Code § 622.10 (2021)

45 C.F.R. § 160.103
45 C.F.R. § 160.306
45 C.F.R. § 164.512
45 C.F.R. § 160.102
5 C.F.R. §164.104
5 C.F.R. §164.502(a)
65 Fed. Reg. 82462 (Dec. 28, 2000)
1 *McCormick on Evid.* § 103 (8th ed.)
7 IA PRAC § 5.805:1

ROUTING STATEMENT

This case can be decided based on existing legal principles. Therefore, transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

This is a direct appeal by the defendant David Jackson from his convictions for homicide by vehicle (operating while intoxicated alternative), in violation of Iowa Code section 707.6A(1) (2021); leaving the scene of an accident resulting in death, in violation of Iowa Code section 321.261(4) (2021); and operating a motor vehicle without the owner's consent, in violation of Iowa Code section 714.7 (2021). Sentencing Order; Notice of Appeal; App. ___.

Course of Proceedings

The State accepts the defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

On August 9, 2020, Bounleua Lovan was driving a Polaris Slingshot, a three-wheeled motorcycle, north on MLK when he was

struck by a Prius driven by David Jackson. Tr. II, 35:2 – 36:24; 52:12-23.

Timothy Gilbert was traveling south on MLK on August 9, 2020 when he noticed a "reverse-trike" motorcycle and a black Prius also traveling south on MLK. The Prius was staying right behind Gilbert or trailing right behind hm in his blind spot, so he was paying attention to it. Tr. II, 31:19-25; 33:14 – 34:23; 36:18-22. The Prius stayed alongside him for half to three-quarters of a mile. Other than driving in his blind spot, Mr. Gilbert observed that the Prius driver was driving normally. Tr. II, 40:7-20. MLK is a two-way street with four lanes of traffic. Tr. II, 36:1-4. Mr. Gilbert and the Prius driver were going 35 to 40 miles per hour. "All of a sudden," the Prius accelerated and started to cross the double yellow line into oncoming traffic. The Prius kept accelerating and crossed two or three lanes of traffic. Tr. II, p. 35:2-25; 36:5-9.

Mr. Gilbert observed the motorcyclist and other oncoming motorists trying to get out of the way of the Prius, but the Prius was moving so fast the motorcyclist could not avoid it and it hit the motorcyclist head-on and slammed him up against a telephone pole. The Prius jumped the curb and the driver kept going until he hit a

building. Tr. II, 36:10-24. “Not once” did Gilbert see the Prius’ brake lights illuminate or see the driver try to stop. Tr. II, 36:– 37:1. Gilbert assumed that the Prius driver might have been suffering from a medical problem. Tr. II, 37:2-7; 41:9-12.

Mr. Gilbert stopped and ran over to check on the motorcyclist. He did not see the driver of the Prius because he was focused on the other driver. Tr. II, 37:2-14; 38:10-15.

Another motorist, Ashley Hobbs, observed the aftermath of the collision. Ms. Hobbs did not see the impact, but she saw the three-wheeler hit a light pole and saw the driver slump over. She saw the other driver drive over the curb, cross through a parking lot and into the side of a building. Tr. II, 42:5 – 44:23. Ms. Hobbs pulled into the parking lot and ran over to the car. The car was a four-door vehicle, and the driver was the only occupant. Tr. II, 7:14-21. As she reached out to open the driver’s side car door, the driver “popped out kind of in a daze” and stood up “just looking around as if he was confused a little bit.” Tr. II, 44:9 – 45:8; 45:15-20; 47:17-21. Ms. Hobbs later identified Jackson as the driver. Tr. II, 52:12-23. Ms. Hobbs thought Jackson looked “out of it” either from the car crash or “being off something else.” Tr. II, 46:17-22.

Ms. Hobbs told Jackson that she wanted to make sure he was okay. He told her, "I wasn't in the vehicle," "I wasn't driving that vehicle." Tr. II, 45:9-14; 47:2-9. Jackson turned around and got back into the car; he appeared to be searching for something. Ms. Hobbs got nervous and called over her friend. Jackson then pulled out a bag from the car and started to walk away. Tr. II, 47:22 – 48:14.

Ms. Hobbs tried to stop Jackson, asking if he wanted to wait for the ambulance. He again stated that he was not driving the vehicle. At that point, Ms. Hobbs called 911 and gave the dispatcher a description of Jackson. She was still looking at Jackson as she gave the description. Tr. II, 48:7-19. Jackson walked to the senior citizen home that was next to the building he had hit. She lost sight of Jackson as he walked around the senior center. Tr. II, 48:20 – 49:2.

When the police arrived, Ms. Hobbs pointed out the direction Jackson had gone. She stayed at the scene until police returned and walked with her up the hill by the senior center, where police had Jackson in handcuffs. Ms. Hobbs identified Jackson as the driver of the car. Tr. II, 49:3-22; 52:12-23.

Des Moines Police Officers Brian Cuppy and Christopher Latham were working together and were closed by when the crash

occurred. The officers were the first officers to get to the scene. Tr. II, 56:9-25; 58:5 – 59:14. As Officer Cuppy was still looking for witnesses, Officer Latcham told him he was going to go look for the driver of the car. Officer Cuppy stayed at the scene to make sure witnesses did not leave. Tr. II, 60:1-13.

Officer Latcham testified that he heard the dispatch about the collision and he and Officer Cuppy were at the scene within one to two minutes. Tr. II, 63:13-19; 64:5-7; 67:10 – 68:1. At the scene, he saw a group of people attending to someone by a telephone pole and saw that a car had struck a building. He spoke with Ms. Hobbs at the scene who told him that the drive of the car had run from the vehicle and gave him a description. The officer left to see if he could find the driver, thought he believed he was probably long gone. Tr. II, 68:7-21; 70:13-14.

Officer Latcham walked past the senior center and located Jackson sitting outside the building. Tr. II, 70:15 – 72:4; Exh. 6 (video from body camera); App. --. The officer began to give Jackson commands and, at first, Jackson complied. Tr. II, 72:2-9. But then Jackson ran. He ran into a pillar on the building and that caused him to turn around and the officer was then able to catch him. Tr. II, 73:4

– 22. Jackson asked the officer what was going on. Tr. II, 73:18-22. Two other officers took custody of Jackson and then Officer Latcham collected belongings that Jackson had left behind when he ran. Those items were a bag, a cell phone, a sports drink, and a lighter. Tr. II, 74:2-9.

Des Moines Police Officer Nathan Nemmers also responded to the report of the collision. He assisted Officer Latcham by handcuffing Jackson and securing him in the back of a patrol car. Tr. II, 157:13-15; 158:3-5; 162:21 – 163:21. The officer had completed specialized training in investigation of impaired driving. Tr. II, 158:10-15. He observed signs that Jackson could be under the influence of drugs or alcohol. He observed that Jackson had bloodshot, watery eyes, "seemed a little paranoid," exhibited some erratic behavior, and was sweating profusely. The officer did not smell any odor of alcohol. Tr. II, 163:24 – 164:8. The air conditioning was on in the squad car that he put Jackson into. Tr. II, 177:16-21. Officer Latcham had told Officer Nemmers that he attempted to use pepper spray on Jackson, but Officer Nemmers did not observe any indication that Jackson had been pepper sprayed, though he

acknowledged that pepper spray can cause bloodshot, watery eyes, sweating, and anger. Tr. II, 175:21 – 176:22.

Jackson repetitively stated that he was being shot at or he was going to be shot. Officer Latcham had held Jackson at gunpoint, but he was not being held at gunpoint at the time he was making those statements. Tr. II, 164:13 – 165:6.

Jackson was taken to Broadlawns Medical Center. Officer Nemmers went to Broadlawns to investigate Jackson for suspected operating while intoxicated. Tr. II, 166:2 – 167:2. Officer Nemmers spoke to Jackson at the hospital. Jackson was "generally pretty incoherent." The officer asked Jackson if he knew how the accident occurred and Jackson stated that he does not drive. Jackson did not acknowledge that there had been a collision and was not able to tell the officer where he had been or what had occurred. The officer was not able to get any coherent responses from Jackson. Tr. II, 167:6-18; 168:4 – 169:4.

Officer Nemmers did not attempt to conduct field sobriety testing of Jackson because Jackson was incoherent and unable to follow any commands or instructions and it was clear to the officer

from trying to talk to Jackson that he was not going to be able to perform field tests. Tr. II, p. 169:18 – 170:4.

Officer Nemmers requested a warrant to withdraw a sample of Jackson's blood and stayed at the hospital to facilitate collection of the blood specimen. Tr. II, 170:5-10.

Justin Grodnitzky works in the toxicology section at the Iowa Division of Criminal Investigation Crime Laboratory. He tested Jackson's blood specimen. He found less than 10 nanograms of Lorazepam per milliliter of blood. Tr. III, 15:11-13. Lorazepam, also known as Ativan, is a prescription drug used to treat anxiety and is also used as sedative and for muscle relaxation. Tr. III, 23:13-16.

Mr. Grodnitzky also found 104 nanograms of methamphetamine and 16 nanograms of amphetamine per milliliter of blood. Tr. III, 15:11-13; 21:11 – 22:8. Methamphetamine is broken down in the body to amphetamine at about ten to twenty percent, so he believed it most likely that the amphetamine he found in Jackson's blood was actually from the methamphetamine having been broken down to amphetamine. Tr. III, 22:15-25**.** Methamphetamine is often used to treat obesity, narcolepsy, and ADHD-type disorders. The therapeutic range for methamphetamine is 20 to, at most, 50

milliliters; it really should not exceed 50 milliliters. Tr. p. III, 25:20 – 26:16. He could not say whether Jackson was intoxicated, however, as that would depend on Jackson's tolerance of the drug. Tr. III, 26:17-24.

Bryan Wickett is a Des Moines police officer and an accident reconstructionist. Tr. III, 28:8 – 30:5. He investigated the collision in this case. Tr. III, 30:20 – 31:3. The collision occurred near the intersection of Martin Luther King, Jr. Boulevard (MLK) and Hickman Road. Tr. III, 35:21 – 36:4; Exh. 37 (photograph); App.--. When he arrived at the scene, he found a Polaris Slingshot up against a light pole and a Toyota Prius against the wall of a building on the east side of MLK. Tr. III, 32:11-24.

Mr. Wickett was able to determine that the Prius had been traveling south on MLK and the motorcycle had been traveling north. Tr. III, 36:11 – 37:2; Exh. 36 (photograph/diagram); App. --. He determined that the Prius crossed the centerline and hit the motorcycle in the curb-side lane on the northbound side of the road. The Prius then went up over the curb, across a drive, and ended up resting against a building. Tr. III, 37:3 – 38:22. The Slingshot was moved ten feet from the point of collision. The Prius continued for

another 220 feet from the point of collision before hitting the building. Tr. III, 71:5-16.

Mr. Wickett also obtained a warrant to access the Prius' "black box." Tr. III, 48:9 – 49:5. He was able to determine that Jackson was going 57 miles per hour when he hit the Slingshot. Five seconds earlier, Jackson had been going 49 miles per hour. Jackson never took his foot off the gas pedal; the accelerator pedal was at a constant percentage until the Prius hit the building. Jackson was driving 57 miles per hour when he hit the Slingshot. Jackson never applied the brakes. Tr. III, 52:2 – 54:15; 66:3 – 67:19; 70:6-20; 80:7-25. The speed limit in that area is 30 to 35 miles per hour. Tr. III, 79:9-17.

The path of the Prius and information from the black box showed that indicated that Jackson did turn the steering wheel to attempt to avoid the collision with the Slingshot or with the building. Tr. III, 60:24 – 63:14; 66:7-10; 67:24 – 68:5. The road curves in the area where Jackson crossed the center line, but Jackson did not follow the curve. He continued to drive straight, which put him on a path into oncoming traffic where he struck the Slingshot. Tr. III, 81:15 – 18:18. Only one seat of the Prius was occupied, the driver's seat. The driver's seat belt was latched. Tr. III, 53:16 – 54:3. Mr. Wickett

determined that the Slingshot was traveling at or below the speed limit at the time of the collision. Tr. III, 55:10-24.

Patrick Downey was the owner of the black Prius Jackson was driving on August 9. Carrie Halfpop, one of Mr. Downey's tenants, took off with his keys and stole the car in July of 2020. Tr. III, 7:10 – 8:5; 12:3-17. He reported the car stolen. About a month later, the police called and informed him that they had found his car and that it had been involved in an accident. Tr. III, 8:3-23. Mr. Downey did not know Jackson and did not give him permission to drive his car. Tr. III, 9:14 – 10:21; 13:14-19. Mr. Downey does not ever let anyone use his car. Tr. III, 13:3-12.

Jackson testified at his trial. He testified that he was fifty-two years old. Tr. III, 131:9-15. He testified that he has prior convictions for a drug tax stamp offense, operating a motor vehicle without the owner's consent, two eluding offenses, and two theft offenses. Tr. III, 133:13-23. Mr. Jackson, who played basketball in college and played professionally in the CBA, is six feet six inches tall and weighs 255. He considered himself to be in good condition. Tr. III, 132:14-18; 134:11 – 135:5. However, he testified, he "caught the Corona" and had some

breathing issued afterwards. He "blacked out" at work, the last time at the end of July. Tr. III, 135:6-22.

Jackson testified that he blacked out twice. The last time was when he was working at Hy-Vee Fresh in Ankeny and one of his co-workers saw him stumble. Jackson testified that he was "kind of dizzy" and lost consciousness and, when he came to, he was slumped over his machine. Tr. III, 156:25 – 58:19. The other time was at the home of his daughter. His daughter roused him and told him that she had been talking to him for two or three minutes and he had not responded. Tr. III, 158:7-17.

Jackson's blackout at work took place on July 26. Tr. IV, 26:17 – 27:3; Tr. III, 161:12-23. Because of his blackout at work, Jackson was required to leave work, get a COVID test, and quarantine. Tr. III, 135:6-22; 160:3-16. He got his test the next day, August 27. Tr. III, 161:12-23. Jackson's COVID test was negative, but he was instructed to quarantine for fourteen days. Tr. III, 160:23 – 161:8. He saw a doctor and was diagnosed with rhabdomyolysis, which required him to stay hydrated. Tr. III, 136:1-5.

Jackson's COVID quarantine period ended on August 9. That day, he played with his grandchildren, walked to the corner store,

then watched television and took a nap. He felt "fine." Tr. III, 136:17 – 137:6.

Jackson walked to the home a friend who lived a couple doors down and borrowed a car from Shelley Smith. He did not have a driver's license and knew that he was not supposed to drive. Tr. III, 137:7-25. He borrowed the car to run a few errands. He testified that he did not know the car was stolen. Tr. III, 138:7-15. Jackson intended to go to Broadlawns Medical Center to get a note for work stating that he had taken his COVID test. He needed a note from his doctor to get paid for the time he was in quarantine. Tr. III, 140:14 – 141:1.

Jackson testified that on August 9, he was driving to Broadlawns. He remembered that he drove down Euclid, stopped at the intersection of Euclid and MLK, then turned left and drove south on MLK. Jackson felt fine, was breathing well, and thought he was driving well. Tr. III, 141:5-15. He testified that he started to have tightness in his chest, his breathing became restricted, and he passed out behind the wheel. He did not remember blacking out. His next memory was hearing the loud noises of the airbags deploying and struggling with his seat belt. Tr. III, 141:16 – 142:11.

When he came to, Jackson testified, his ears were ringing, his head was throbbing, his glasses had been knocked off his face, he "couldn't breathe" and he was "in shock." He did not know where he was or what had happened, but he knew he was in trouble. Tr. III, 142:12 -23.

He wiggled out from his seat belt and got out of the car. When he stood up, he felt "dizzy" and was "dazed." He saw a woman standing in front of him and he could see that she was saying something, but he could not hear her and could not comprehend what she was saying. Tr. III, 142:18 – 143:7. He did not recall speaking to the woman. Tr. III, 143:15-20.

Jackson testified that he knew that he had hit the wall but did not know that he had hit anyone. He testified that he did not remember anything after he passed the Hy-Vee store and got to the top of the hill on MLK. When he came to realized that he had hit a concrete wall, wrecked the car, and he could not breathe. He did not see the Slingshot when he got out of the car. Tr. III, 144:8-25.

Jackson recalled that he got back in the car to try to find his glasses. He found them and grabbed them, along with a bag that had Gatorade and juices in it and got back out. Tr. III, 143:8-12. When he

got out, Jackson knew he had to get to the hospital and thought he saw Broadlawns, but it was actually a senior living facility. Tr. III, 143:24 – 144:22. Jackson testified that he "couldn't … catch my breath" and started walking to the "hospital," he was searching for his phone to call his daughter, but he could not find his phone. Tr. III, 145:4-16.

Jackson testified that he did not know what was going on and thought he was at the hospital. He testified that his balance and equilibrium was steady, but he was hearing a steady ringing sound. He walked to the building he thought was Broadlawns and tried to get in. When he got into the lobby, the inside door was locked and there was a code he had to use to get inside. He entered the code and stood there looking for his phone. He did not understand why he could not get in, so he went back outside. He testified that he was sitting there trying to figure things out. At some point, he got up and walked partially around the building. He thought he was looking for his phone, but he did not remember for sure. Tr. III, 145:17 – 147:24. He went back and sat down. Tr. III, 147:24 – 148:3.

While Jackson was sitting outside the senior center, a police officer approached him. Jackson asked the officer what was going on

and initially complied with the officer's commands to get down. Jackson testified that he got on his knees but did not want to lay down on his chest because he "couldn't breathe" and was trying to figure out why the officer was making him lie down, anyway. Tr. III, 148:4 – 149:4.

Jackson testified that he "always [has] a little apprehension when the police are coming at" him because he knows it is not going to be a positive experience. Tr. III, 149:5-14. The officer was screaming at Jackson and had his pepper spray pointed at him and was telling him that he was going to spray him. Tr. III, 149:15 – 151:10. Jackson took off running and the officer sprayed him with pepper spray. Jackson testified that he was sprayed in his face, mouth, nose, and ears and it was burning him up. He testified, "I am m a pretty big guy, but it put me down." Tr. III, 149:19 – 150:15. Jackson ran to a pillar to hide but hit the pillar. He went back the other direction and tried to hide behind a brick wall. He testified that he was worried about being shot. Tr. III, 150:9 – 151:16. Once he stopped behind the brick wall, Jackson complied with the officer's directives, and he was taken into custody and put into a police

cruiser. Tr. III, 151:22 – 152:5. Jackson testified that he lost his glasses when officers took him into custody. Tr. III, 153:6-15.

Inside the squad car, Jackson testified, he was "burning up" and he was having trouble breathing. He testified that he had sweat pouring down his face and tear coming from his eyes. He asked the officer to help him, and the officer allowed a woman to get him a bottle of water. The officer took the bottle from the woman and poured it on Jackson's face. Jackson testified that the water caused pepper spray to pour down his face and onto the front of his stomach and he thought he went into shock again. When he came to, he was at Broadlawns Medical Center. Tr. III, 152:6-21.

Jackson testified that he was admitted to the ICU at Broadlawns. He testified that the reason for the admission was that his heart rate had dropped and "was at 34, …. They said they were waiting to see if my heart was going to stop again." He testified that he received treatment throughout the next day. Tr. III, 153:24 – 154:7.

Jackson attempted to explain the methamphetamine found in his system. He denied that he took any drugs on August 9 or that he was intoxicated on anything that day. He believed the

methamphetamine detected in his blood specimen was from a "X" pill he took three or four days before August 9. Tr. III, 154:8 – 155:9. An "X" pill is ecstasy. Tr. IV, 31:7-12. Jackson testified that the pill must have had methamphetamine in it. Tr. IV, 32:17-21. Jackson denied that he was "in any way impaired, intoxicated, unable to drive when he decided to drive on August 9. Tr. III, 155:2-14. He testified that, "I had an accident. I had a medical emergency …. But I never intended, was not intoxicated, to run and hit a man." Tr. III, 155:22 – 156:2.

On rebuttal, the State called Dale Peterson. Mr. Peterson works for Wellpath, a medical group contracted with the Polk County jail. He serves as the health services administrator for the Polk County jail. In that capacity, he oversees all of the medical and mental health staff for the jail and is responsible for keeping the medical business records for persons incarcerated in the jail. Tr. IV, 58:2 – 59:14.

Jackson was admitted to the Polk County jail on August 10, 2020. He was transferred to the jail from Broadlawns Medical Center. Tr. IV, 59:15-22. As is the normal practice, Jackson's discharge records from Broadlawns accompanied him to the jail and were entered into his medical records at the jail. Tr. IV, 59:23 – 61:2. His

full records from Broadlawns were received later. Tr. IV, 66:13 – 67:4.

Jackson's discharge records reflect that he was admitted to Broadlawns Medical Center for polysubstance abuse, rhabdomyolysis, and because he had been in a motor vehicle crash. Tr. IV, 70:14-22. He explained that rhabdomyolysis typically occurs with damage to the muscular system, typically when the person is dehydrated. The typical treatment is large amounts of fluids. Tr. IV, 70:25 – 71:11.

Mr. Peterson testified that Jackson's records did not reflect that Jackson had any difficulty with breathing. His records show that Jackson's vital signs were taken at the hospital. Hospital records show that his vitals were stable and within normal limits. His blood oxygen level was ninety-eight percent. The records did not show that Jackson had a history of blacking out or losing consciousness and did not indicate that jail staff should keep Jackson under observation for blacking out. Tr. IV, 61:12 – 63:13.

Mr. Peterson testified that Wellpath staff working under contract with the jail conducted an initial screening of Jackson. As a result, he was placed in the alcohol and opioid detoxification program. Tr. IV, 63:23 – 64:2. The detoxification protocols are

started any time a patient states that they have been using opioids, alcohol, or "benzos.' Tr. IV, 64:12-15. Jackson's jail medical records stated that Jackson was placed in the detoxification protocols due to his self-reported use of opioids or alcohol. Tr. IV, 65:11-25.

ARGUMENT

I. The Search Warrant Authorizing Withdrawal of a Sample of Jackson's Blood Is Supported by Probable Cause.

Preservation of Error

The State does not challenge preservation of Jackson's claim that the search warrant contained false information. Jackson raised this claim in the district court and the court ruled on it. *See* Motion to Suppress; Order on Motion to Suppress; App. ____.

The State does challenge preservation of Jackson's claim that the search warrant application omitted material information that would have cast doubt on the magistrate's finding of probable cause. Jackson did not raise that claim in the district court. *See* Motion to Suppress; App. ____. Neither did the district court rule on any such claim. Order on Motion to Suppress; App. ___. That claim is, therefore, waived. *Meier v. Senecaut,* 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues

must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

Scope and Standard of Review

The Court reviews constitutional questions de novo, based on the totality of the circumstances. *State v. McNeal,* 867 N.W.2d 91, 99 (Iowa 2015). "The test for probable cause is 'whether a person of reasonable prudence would believe a crime was committed on the premises to be searched or evidence of a crime could be located there.'" *State v. Baker,* 925 N.W.2d 602, 613 (Iowa 2019) (quoting *State v. Gogg,* 561 N.W.2d 360, 363 (Iowa 1997)).

The standard for review of search warrants is deferential. *State v. Bracy,* 971 N.W.2d 563, 564 (Iowa 2022). The Court does not make an independent determination of probable cause. *McNeal,* 867 N.W.2d at 99 (quoting *Gogg,* 561 N.W.2d at 363). Rather, the Court "consider[s] whether the grant of the warrant had a substantial basis under the totality of the circumstances as disclosed in the warrant application." *Bracy,* 971 N.W.2d at 564.

When reviewing a warrant application, the Court "examine[s] only the information actually presented to the judge." *Bracy,* 971

N.W.2d at 567 (internal quotation and citation omitted). It "do[es] not strictly scrutinize the sufficiency of the underlying affidavit." *Id.* "[T]he affidavit of probable cause is interpreted in a common sense, rather than a hypertechnical, manner." *Id.* The Court "draw[s] all reasonable inferences to support the judge's finding of probable cause and decide[s] close cases in favor of upholding the validity of the warrant." *Id.* at 567-68.

Merits

David Jackson challenges the district court's denial of his motion to suppress the result of a blood test obtained under a search warrant. He alleges that the officer who completed the search warrant affidavit recklessly included incorrect information and omitted material facts. He argues that had the officer not included the incorrect information and included the omitted information, the affidavit would not have supported a finding of probable cause. The Court should reject his claim. Jackson was required to prove that the affiant intentionally or recklessly included false information in the search warrant. The district court found that the false information was included only negligently, and the record supports the court's finding. Further, Jackson waived any challenge to omitted evidence

as he did not raise that claim in the district court. Moreover, even if the false information is excised from the warrant application, and he omitted is considered, the application supplies probable cause for issuance of the warrant. Therefore, the Court must reject Jackson's challenge to the district court's suppression ruling.

A search warrant must be supported by probable cause. Fourth Amendment to the United States Constitution; Iowa Const. art. I, § 8. Our Court uses the totality-of-the-circumstances standard to determine whether officers established probable cause for issuance of a search warrant. *Baker,* 925 N.W.2d at 613–14. The test for probable cause is "whether a person of reasonable prudence would believe a crime was committed on the premises to be searched or evidence of a crime could be located there." *Baker,* 925 N.W.2d at 613 (internal quotation and citations omitted). The judge "'is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information,' probable cause exists." *Baker,* 925 N.W.2d at 613 (quoting *Gogg,* 561 N.W.2d at 363, in turn quoting *Illinois v. Gates,* 462 U.S. 213, 238 (1983)).

In determining whether there was probable cause for a search warrant, the Courts review the information actually presented to the judge and determines whether the issuing judge had a substantial basis for concluding that probable cause existed. *Baker,* 925 N.W.2d at 613-614 (citing *McNeal,* 867 N.W.2d at 99). In reviewing the warrant application, the Court "interprets the affidavit of probable cause in a common sense, rather than in a highly technical manner." *Baker,* 925 N.W.2d at 614. The Court draws all reasonable inferences to support the judge's finding of probable cause and decides close cases in favor of upholding the validity of the warrant. *Id.*

In *Franks,* the Supreme Court developed a means to examine the truthfulness of an affiant in presenting evidence to a magistrate in support of issuance of a search warrant. *State v. Niehaus,* 452 N.W.2d 184, 186–87 (Iowa 1990). A *Franks* inquiry is limited to a determination of whether the affiant was purposely untruthful with regard to a material fact in his or her application for the warrant or acted with reckless disregard for the truth. If the reviewing court finds that the affiant intentionally or recklessly falsified the challenged information, the offensive material must be deleted, and the remainder of the warrant is reviewed to determine whether probable

cause existed. *Bracy,* 971 N.W.2d at 568 (citing *Franks v. Delaware,* 438 U.S. 154, 158, 171-172 (1978)). Our Court has adopted the *Franks* standard for resolving allegations that the officer provided false information in the warrant application. *Bracy,* 971 N.W.2d at 568.

Under *Franks,* intentionally false statements and false statements made with a reckless disregard for the truth are treated the same." The issuing magistrate must have been misled "into believing the existence of certain facts which enter into [her or] his thought process in evaluating probable cause.'" *State v. Case,* No. 19-0378, 2020 WL 5651560, *10 (Iowa Ct. App. Sept. 23, 2020) (internal quotation and citations omitted). Under this standard, an innocent or negligent misstatement is inadequate to challenge the validity of a search warrant. *Niehaus,* 452 N.W.2d at 187; and see *State v. McPhillips,* 580 N.W.2d 748, 751 (Iowa 1998).

Jackson points out that the warrant application contained incorrect information. Attachment A to the search warrant affidavit included information regarding the results of field sobriety testing. *See* Search Warrant Application, Attachment A; App. ___. At Jackson's suppression hearing, the affiant-officer testified that he did not perform field sobriety testing on Jackson. Supp. Tr. 11:10-15. He

testified that he re-used a previous warrant application to prepare his affidavit in this case and inadvertently failed to delete that portion of the prior affidavit. Supp. Tr. 12:10-18.

The district court found that the affiant-officer did not consciously provide the magistrate with false information or act with reckless disregard for the truth. Instead, the court found, the officer "committed a scrivener's error (albeit a significant one) by including information from a previous warrant and failing to note it in proof reading the affidavit." Order on Motion to Suppress at p. 3; App. ___. The court's ruling was correct and should be upheld. *Cf. United States v. Waker,* 534 F.3d 168, 172 (2nd Cir. 2008) (erroneous dates on search warrant application did not invalidate warrant as they were minor scrivener's errors or the product of clerical inadvertence).

Despite its finding that the officer-affiant did not consciously or recklessly provide false information, the district court went on to address whether the warrant would be supported by probable cause if the challenged evidence were not considered. The court concluded that, even without the incorrect evidence regarding field sobriety test results, the warrant application still supported a finding of probable

cause. Order on Motion to Suppress at pp. 3-4; App. ____. The district court's ruling was correct.

Excising the information regarding the field sobriety tests, the remaining evidence is sufficient to establish probable cause. That evidence includes that Jackson crossed the center double yellow line of the road and struck a motorcycle, killing the cyclist. Warrant Application, Attachment A-1; App. ____. Jackson was observed to have bloodshot, watery eyes, his speech was mumbled, he was unsteady on his feet, his emotions were visibly excited, and his judgment was impaired. Jackson displayed behavior that the affiant-officer knew to be consistent with drug use: he was sweating profusely, grinding his teeth, and was unable to remain still. In addition, Jackson was incoherent; he was unaware that he had been involved in an accident and did not know why he was at the hospital. Warrant Application, Attachment A-2; App. ____. That evidence was far more than sufficient to establish probable cause for issuance of a search warrant for withdrawal of a blood specimen from Jackson to test for the presence of a controlled substance. The Court should uphold the district court's denial of Jackson's motion to suppress the result of Jackson's blood test.

Jackson also argues, however, that the warrant is not supported by probable cause because the affiant-officer omitted information that Jackson had been sprayed with pepper spray while at the scene. As argued above, Jackson waived that claim by failing to raise it in the district court. Nonetheless, because the Court may choose to reach the merits of that claim, the State addresses it.

The officer-affiant was not required to advise the magistrate that Jackson was sprayed with pepper spray. "[A]n officer applying for a search warrant 'is not required to present all inculpatory and exculpatory evidence to the magistrate,' only that evidence which would support a finding of probable cause." *State v. Green,* 540 N.W.2d 649, 657 (Iowa 1995) (quoting *State v. Johnson,* 312 N.W.2d 144, 146 (Iowa App.1981)); *accord Baker,* 925 N.W.2d at 615. "Omissions of fact constitute misrepresentations only if the omitted facts 'cast doubt on the existence of probable cause.'" *Green,* 540 N.W.2d at 657 (quoting *State v. Ripperger,* 514 N.W.2d 740, 745 (Iowa App. 1994) (in turn quoting *United States v. Ellison,* 793 F.2d 942, 948 (8th Cir. 1986)). Failure to disclose information in a warrant application can constitute a misrepresentation if the failure to disclose results in a misconception or, in other words, if the omission

produces the same practical effect as an affirmative statement. *Baker,* 925 N.W.2d at 616.

Jackson has not shown that there was a failure to disclose that amounted to a misrepresentation. First, Jackson did not show that Jackson was sprayed with pepper spray. At the suppression hearing, the affiant was asked if he was aware on the scene that Jackson had been pepper sprayed. He responded, "Yeah, I think my initial understanding was … some innocent bystanders had been pepper sprayed, but I assumed he had received –." At trial, Des Moines Police Officer Christopher Latcham testified that he located Jackson and then pursued Jackson as he fled from an area near the collision. The officer testified that twice he attempted to spray Jackson with pepper spray. Tr. II, 68:11 – 69:2; 71:5 – 73:22; 78:10-18. But, when asked whether the pepper spray hit Jackson, the officer responded, "Honestly, I don't know. I was trying to. In certification, you're not really shooting at a moving target with the [pepper spray] cannister, but I would assume at some point, I had made some contact with him." Tr. II, 78:19-24. That evidence did not show that Jackson was sprayed with pepper spray.

The officer-affiant did not have an obligation to disclose to the issuing magistrate that it was possible that Jackson had been sprayed with pepper spray. Jackson has not shown that the information contained in the affidavit regarding Jackson's bloodshot, watery eyes was untruthful. Evidence disputing the cause of Jackson's bloodshot eyes does not establish that the information was false. Therefore, that information should not be excised from the warrant application in reviewing whether the warrant was supported by probable cause. *Ripperger,* 514 N.W.2d at 745.

Ultimately, even stripped of the challenged evidence and considering the omitted evidence, the application still showed that Jackson crossed the center line of the road and struck a motorcycle, that his gait and balance were unsteady, that he was mumbling, that his emotions were visibly excited, that he incoherent and unaware that he had been involved in an accident and unaware why he was at the hospital. It also showed that Jackson displayed signs of drug impairment, including grinding his teeth, sweating, inability to stay still, and visibly excited emotions. Even if Jackson had shown that he had been pepper sprayed, the evidence also showed that pepper spray would not have caused Jackson to mumble, to have an unsteady gait

or unsteady balance, and would not have affected his judgment or his ability to reason, Supp. Tr. 22:8 – 23:18. The affiant-officer's observations of Jackson provided probable cause for issuance of a warrant to obtain a bodily specimen for drug testing. The district court properly denied Jackson's motion to suppress the fruit of that search. This Court should uphold that ruling and affirm Jackson's convictions.

II. The District Court Did Not Err in Admitting Testimony about Jackson's Medical Records to Rebut Jackson's Testimony That a Medical Condition, and Not Impairment, Caused Him to Cross the Center Line and Hit Another Vehicle; Even If the Court Had Erred, Any Error Would Be Harmless.

Preservation of Error

The State agrees that Jackson has preserved his claims that admission of testimony about his medical records was inadmissible hearsay and inadmissible under the Health Insurance Portability and Accountability Act (HIPAA). Those claims were raised and ruled upon in the district court. *See,* Tr. IV, 49:2 – 57:9.

However, Jackson has not preserved his claim that the challenged evidence was inadmissible under the Iowa physician-patient privilege statute, Iowa Code section 622.10 (2021). Jackson specifically based his privilege claim on the federal HIPAA provisions;

he did not raise a claim that the evidence was privileged under the Iowa statute. Neither did the district court consider or rule on any challenge under the Iowa statute. Consequently, Jackson the Court should reject Jackson's claim of privilege under section 622.10 without reaching its merits.

Standard of Review

Generally, the Court reviews the district court's evidentiary rulings for abuse of discretion. *State v. Einfeldt,* 914 N.W.2d 773, 778 (Iowa 2018). However, the Court reviews the admission of hearsay evidence for correction of errors at law. *State v. Buelow,* 951 N.W.2d 879, 884 (Iowa 2020). When hearsay is improperly admitted the error is presumed to be prejudicial unless the State shows the contrary. The State may show improperly admitted evidence was not prejudicial by proving the error was harmless beyond a reasonable doubt. *State v. Huser,* 894 N.W.2d 472, 495 (Iowa 2017); *State v. Paredes,* 775 N.W.2d 554, 560 (Iowa 2009).

Merits

Jackson challenges the district court's admission of testimony from Polk County jail health services administrator Dale Peterson about information contained in Jackson's discharge records from

Broadlawns Medical Center. Information about the treatment Jackson received at the hospital on the date he crossed the centerline and struck and killed a motorcyclist was provided to the jail from the hospital when Jackson was released from the hospital into the custody of the jail. That evidence was admitted to rebut Jackson's testimony that his driving was affected by a medical condition rather than intoxication. Jackson contends Mr. Peterson's testimony violated the federal Health Insurance Portability and Accountability Act (HIPAA) and the physician-patient privilege statute, Iowa Code section 622.10. He also contends that Mr. Peterson's testimony about his records was inadmissible hearsay. The Court should reject Jackson's claims. The district court did not err in admitting the testimony in the face of Jackson's objection that it would violate HIPAA as that act does not apply to the prosecution and suppression or exclusion of evidence is not a remedy for violation of HIPPA. As noted, Jackson has waived any claim under the Iowa privilege statute and, even if he had not, Jackson waived that privilege by testifying that he was suffering from a medical emergency that caused the collision. The district court also did not err in admitting the challenged testimony over Jackson's hearsay objection. Moreover,

even if the court had erred in admitting Mr. Peterson's testimony, any error would be harmless given the very strong evidence of Jackson's guilt, including very strong evidence that drug impairment rather than a medical condition was the cause of the fatal crash.

At his trial, Jackson took the stand and testified that in 2020, he "caught the Corona" and had some breathing issues afterward. He "blacked out" at work "a few times." The last time he blacked out was at the end of July. As a result, he had to leave work, get a COVID test, and quarantine. Tr. III, 135:6-22; 156:25 – 158:19. Jackson also testified that he had been diagnosed with rhabdomyolysis, which required him to stay hydrated. Tr. III, 136:1-5.

Jackson testified that on August 9, his COVID quarantine was up, and he needed to get a doctor's note to get paid for his quarantine time. He was driving down Euclid Avenue towards Broadlawns Medical Center. He was feeling fine, driving well, and was breathing well. Tr. III, 136:14-24; 140:14 – 141:15. But, as turned onto MLK, he "started to have … tightness in my chest, my breathing became restricted, and I passed out, blacked out at the wheel." Tr. III, 141:7 – 142:6. The next thing Jackson remembered, he heard a "pop, a bang,

a loud noise, explosion" and he was surrounded by air bags and their contents and was struggling with his seat belt. Tr. III, 142:7-23.

Jackson testified that after his arrest, police took him to Broadlawns Medical Center. Tr. III, 151:25 – 152:21. Jackson testified that he was admitted to the ICU because his heart rate had dropped to 34 and his health care team was keeping him under observation to see if his heart was going to stop again. Tr. III, 153:24 – 154:4. He testified that he was had not taken any drugs on August 9, and that he was not intoxicated. He, "did not think I was in any way impaired, intoxicated, unable to drive." Tr. III, 155:2-14. He asserted that he had had a "medical emergency" that caused the "accident." Tr. III, 155:22 – 156:2.

On rebuttal, the State offered the testimony of Dale Peterson. Mr. Peterson is employed by Wellpath, which is a medical group contracted to provide care at the Polk County jail. Mr. Peterson works on-site at the jail as the health services administrator, overseeing all of the medical and mental health staff for the Polk County jail. In that capacity, he is responsible for the medical business records that are kept with respect to persons in the jail. Tr. IV, 58:13 – 59:10.

Mr. Peterson testified that Jackson was admitted to the Polk County jail on August 10, 2020; he came to the jail from Broadlawns Medical Center. Tr. IV, 59:15-22. If an arrestee has medical issues or concerns that need to be addressed prior to incarceration, law enforcement officers will take the arrestee to the hospital to be assessed and, if necessary, treated, and cleared for incarceration. When an inmate comes to the jail from a medical facility, the jail will receive the discharge instructions for the patient. Those instructions show what the inmate was treated for at the hospital and will show any follow-up appointments that are necessary and will show any medications prescribed at the hospital. Tr. IV, 59:23 – 60:22.

Mr. Peterson testified that discharge instructions for Jackson were received from Broadlawns Medical Center when Jackson was admitted to jail. Tr. IV, 60:23 – 61:2. Mr. Peterson testified that those records showed that Jackson was admitted to Broadlawns for polysubstance abuse, rhabdomyolysis, and a motor vehicle accident. Tr. IV, 70:9-18. Rhabdomyolysis occurs with damage to the muscular system, typically during a state of dehydration. When the body is really "amped up" and the person is dehydrated, the muscles all start to break down at the same time and release large amounts of waste

products into the bloodstream. Typically, it is treated with large amounts of fluid. Tr. IV, 71:1-8.

Mr. Peterson also testified that Jackson's discharge records did not reflect that Jackson had any difficulty with breathing. Tr. IV, 61:3-11. The records showed that Jackson's heart rate was stable and within normal limits. His oxygen saturation was 98%, also within normal limits, indicating that he was breathing normally. There was no report that Jackson had a history of blacking out or losing consciousness. Tr. IV, 61:21 – 63:13. Based on Jackson's medical records, the jail put him on an alcohol and opioid detoxification protocol. The detoxification protocol is standard protocol for the jail any time a patient reports use of opioids or use of alcohol more frequently than one to five days a week. Tr. IV, 63:18 – 66:2.

Jackson contends that the district court erred in admitting Mr. Peterson's testimony about information contained in Jackson's medical records. He argues that the information was inadmissible hearsay and was also inadmissible as it was privileged under federal HIPAA provisions and the Iowa physician-patient privilege provided for in Iowa Code section 622.10. Jackson has not shown that the

district court abused its discretion in admitting the testimony of Dale Peterson.

A. HIPAA Does Not Bar Testimony about Information Contained in Jackson's Medical Records.

Jackson first argues that the discharge records from Broadlawns Medical Center were confidential under HIPAA and, therefore, the district court erred in admitting testimony about the content of those records. The Court should reject Jackson's claim that the evidence should have been excluded under the federal Health Insurance Portability and Accountability Act. HIPAA does not apply to prosecutors and, even it did, HIPAA does not contain a provision suppressing or excluding evidence obtained in violation of the act.

Jackson asserts that there is "no real question" that Jackson's discharge records are covered by HIPAA. However, the question is not whether the records are covered by HIPAA, but whether those records are subject to exclusion in a criminal trial. The vast weight of authority holds that they are not.

"HIPAA is a massive federal statute that consists of extensive regulations." *State v. Downs,* 2004-2402, 923 So. 2d 726, 728 (La. App. 1 Cir. Sept. 23, 2005). Those regulations identify and limit select

entities' capacity to disclose patients' medical records. *Downs* at 728. "Pursuant to 45 C.F.R. §§ 160.102 and 164.104, HIPAA regulations apply only to a health plan, a health care clearinghouse, and a health care provider who transmits any health information in electronic form in connection with a transaction." *Downs,* at 731; *and see Commonwealth v. Williams,* 2017 PA Super 382, 176 A.3d 298, 317 (2017). The regulations provide limited circumstances when disclosures are permitted for judicial and administrative proceedings. *Downs,* at 728 (citing 45 C.F.R. § 164.512). HIPAA does not create a privilege for patients' medical information; it merely provides the procedures to follow for the disclosure of that information from a "covered entity." *People v. Bauer,* 402 Ill. App. 3d 1149, 1158, 931 N.E.2d 1283, 1291 (2010) (citing *United States v. Bek,* 493 F.3d 790, 802 (7th Cir. 2007) and *Northwestern Memorial Hospital v. Ashcroft,* 362 F.3d 923, 925–26 (7th Cir. 2004)).[1]

Iowa has not considered whether HIPAA applies to prosecutors. Other courts that have considered the issue, however, have found

[1] An individual who believes his rights under HIPAA have been violated may file a complaint with the Office of Civil Rights, Department of Health and Human Services, the federal agency that enforces the regulations. *State v. Eichhorst,* 879 N.E.2d 1144, 1154–55 (Ind. Ct. App. 2008) (citing 45 C.F.R. § 160.306).

that HIPAA does not apply as prosecutors are not "covered entities." *See Downs,* 923 So. 2d at 731; *Williams,* 176 A.3d at 317 (2017); *State v. Carter,* 23 So.3d 798, 801 (Fla. 1st DCA 2009) ("'Covered entities' do not include law enforcement officers or prosecutors, and the conduct of these officials is not governed by HIPAA."); *Bauer,* 931 N.E.2d at 1291–92 ("Although HIPAA provides for penalties against entities that fail to comply with its provisions … law enforcement agencies, including the office of the State's Attorney, are not covered entities under HIPAA."). This Court should find that the county prosecutors was not a covered entity under HIPAA and that Jackson's medical records were not privileged under HIPAA.

Neither has Iowa considered whether evidence obtained in violation of HIPAA must be suppressed or excluded. Again, other courts that have considered the issue has found that the evidence is not subject to suppression or exclusion.

Exclusion of evidence is proper only where the statute violated provides for such exclusion, or where a constitutional violation has occurred. *Carter,* 23 So.3d at 801. "'HIPAA provides for criminal and civil penalties against entities that fail to comply with its provisions.'" *United States v. Yazzie,* 998 F. Supp. 2d 1044, 1116 (D.N.M. 2014)

(internal quotation and citation omitted). However, HIPAA does not create a privilege for patients' medical information; it merely provides the procedures to follow for the disclosure of that information from a "covered entity." *Bauer,* 931 N.E.2d at 1291–92 (HIPAA does not contain a remedy of suppression of evidence obtained in violation of the act). Suppression or exclusion of evidence in a criminal proceeding is not a remedy for violation of HIPAA. *State v. Eichhorst,* 879 N.E.2d 1144, 1154–55 (Ind. App. 2008) (finding that suppression of evidence is not a remedy for violation of HIPAA); *State v. Straehler,* 307 Wis.2d 360, 368, 745 N.W.2d 431, 435 (2007) ("HIPAA does not provide for suppression of the evidence as a remedy for a HIPAA violation"); *State v. Yenzer*, 40 Kan. App. 2d 710, 195 P.3d 271 (2008) ("[E]ven if Yenzer could show a HIPAA violation, the district court did not err in denying Yenzer's motion to suppress."); *Rodriguez v. State,* 469 S.W.3d 626, 635–36 (Tex. App. 2015) ("we cannot read the exclusionary rule into a statute when its remedial provision is silent on suppression."); *State v. Mubita,* 145 Idaho 925, 188 P.3d 867, 878 (2008) (finding that suppression of evidence is not the proper remedy for a HIPAA violation) (*abrogated on other grounds by Verska v. Saint Alphonsus Reg'l Med. Ctr.,* 151

Idaho 889, 265 P.3d 502 (2011)); *United States v. Zamora,* 408 F. Supp. 2d 295, 298 (S.D. Tex. 2006) (HIPAA was not intended to be a means for evading criminal prosecution); *United States v. Yazzie,* 998 F. Supp. 2d at 1116 (stating that "suppressing medical records does not appear to be an appropriate remedy for a HIPAA violation"); *Elder–Evins v. Casey,* 2012 WL 2577589 (N.D. Cal. July 3, 2012) ("As other courts have noted, HIPAA does not have a suppression remedy. And where this is the case, it is inappropriate for the court to exclude evidence on this basis." (citation and footnote omitted)); *United States v. Streich,* 560 F.3d 926, 935 (9th Cir. 2009)(Kleinfeld, J., concurring)("HIPAA does not provide any private right of action, much less a suppression remedy.")).

Indeed, "when the Department of Health and Human Services (DHHS) promulgated the HIPAA regulations, it declared: 'We shape the rule's provisions with respect to law enforcement according to the limited scope of our regulatory authority under HIPAA, which applies only to the covered entities and not to law enforcement officials.'" *Rodriguez,* 469 S.W.3d at 635–36 (quoting 65 Fed. Reg. 82462, 82679 (Dec. 28, 2000) (agency's response to public comments in connection with promulgation of final rule)). "DHHS recognized that,

'under the HIPAA statutory authority, [DHHS] cannot impose sanctions on law enforcement officials or require suppression of evidence.'" *Rodriguez,* 469 S.W.3d at 635 (quoting 65 Fed. Reg. at 82679).

Testimony about information contained in Jackson's hospital records were not privileged under HIPAA as the county attorney is not a "covered entity" within the meaning of HIPAA. Even if Jackson's medical records had been obtained in violation of HIPAA, they would not be subject to exclusion or suppression on HIPAA grounds. The district court did not abuse its discretion in overruling Jackson's objection to the challenged evidence on the ground that it was privileged and inadmissible under HIPAA.

B. Jackson Failed to Preserve His Claim that His Medical Records Were Privileged under Iowa Code Section 622.10 and He Waived Any Privilege by Testifying that a Medical Condition Caused Him to Lose Control and Strike the Victim.

As noted above, Jackson failed to preserve his claim of privilege under Iowa Code section 622.10 as he did not argue in the district court that the testimony of Dale Peterson regarding information contained in Jackson's medical records was inadmissible under that statute. Instead, Jackson argued only that admission of Mr.

Peterson's testimony was barred by the federal HIPAA provisions. Accordingly, the Court should decline to reach Jackson's claim under section 622.10. However, should the Court choose to reach the merits of Jackson's claim, it should reject that claim as Jackson waived any privileged that might have applied under the Iowa statute.

Even if the Court could reach the merits of Jackson's claim that his medical records are privileged under Iowa Code section 622.10, he waived the protection of that privilege by testifying about his medical condition at the time that he was admitted to the hospital and testifying about the course of his treatment at the hospital.

Iowa Code section 622.10 provided in pertinent part as follows.

> 1. A practicing attorney, counselor, physician, surgeon, physician assistant, advanced registered nurse practitioner, mental health professional, or the stenographer or confidential clerk of any such person, who obtains information by reason of the person's employment, or a member of the clergy shall not be allowed, in giving testimony, to disclose any confidential communication properly entrusted to the person in the person's professional capacity, and necessary and proper to enable the person to discharge the functions of the person's office according to the usual course of practice or discipline.
>
> 2. The prohibition does not apply to cases where the person in whose favor the prohibition is made waives the rights conferred; nor does the prohibition apply to physicians or surgeons, physician assistants, advanced registered nurse practitioners, mental health professionals, or to the stenographer or confidential clerk of any physicians or surgeons, physician assistants, advanced registered nurse practitioners, or mental

> health professionals, in a civil action in which the condition of the person in whose favor the prohibition is made is an element or factor of the claim or defense of the person or of any party claiming through or under the person. The evidence is admissible upon trial of the action only as it relates to the condition alleged.
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> * * * *

Iowa Code § 622.10 (2021).

Generally, waiver of the privilege may be express or implied. *Squealer Feeds v. Pickering,* 530 N.W.2d 678, 684 (Iowa 1995) (*abrogated on other grounds by Wells Dairy, Inc. v. American Indus. Refrigeration, Inc.,* 690 N.W.2d 38, 44 (Iowa 2004)). An implied waiver occurs when a litigant asserts an issue that puts a communication in play. *Id.* Here, Jackson waived his physician-patient privilege when he testified that the collision was caused by a medical emergency rather than impairment with a drug and testified that medical staff discovered that he had a low pulse and kept him under observation to make sure his heart would not stop again.

The State recognizes that our Supreme Court has held that the mere denial of an element or factor of an opponent's case does not make that element or factor part of the case of the person making the denial such that the privilege is waived. *See Chung v. Legacy Corp.,* 548 N.W.2d 147, 150 (Iowa 1996). However, *Chung* is distinguishable

from this case. There, the plaintiff in a civil case filed an application for the permission to take the deposition of the physician who treated the driver of the vehicle that struck Chung's vehicle. He also sought production of the driver 's medical records to show his condition and state of intoxication. That driver raised a claim of privilege. *Chung,* 548 N.W.2d at 148. Our Supreme Court held that "the mere act of denying the existence of an element or factor of an adversary's claim does not fall within the statutory [waiver] language" of Iowa Code section 622.10(2). *Chung,* 548 N.W.2d at 150. *Chung*, however, involved a mere general denial of the allegations of a civil petition. The Court did not consider whether a defendant in a criminal case waives the privilege when he takes the stand and makes claims about his medical condition that, if true, would tend to exculpate him. *Chung* does not control this case.

The State also recognizes that in *Roling,* a panel of our Court of Appeal rejected the State's argument that Roling, charged with operating while intoxicated and failure to yield, opened the door to admission of otherwise privileged medical records when he testified he was seeking medical help for sleep apnea, and he was unaware of the condition before the accident. The State argued the privilege

should be waived whenever a defendant puts his medical condition in issue as a defense to a charged crime. The panel rejected that argument.

In rejecting the State's argument, the Court relied upon the intent of section 622.10 to promote uninhibited and full communication between a patient and his doctor so the doctor will obtain the information necessary to competently diagnose and treat the patient. *State v. Roling,* No. 0-710, 2001 WL 98935, at *3 (Iowa Ct. App. Feb. 7, 2001). The purpose underlying our privilege statute is not hindered by recognizing an exception to the privilege where the defendant chooses to testify to his own medical condition. Disclosure of the medical information would remain fully within the control of the defendant; his or her medical records would not be disclosed so long as he or she does not open the door by testifying about them.

The Court should decline to follow *Roling*. First, the panel's decision in that case is not controlling authority. *See,* Iowa R. App. P. 6.904(2)(c); *and see State v. Lindsey,* 881 N.W.2d 411, 414, fn. 1 (Iowa 2016) (Recognizing that "[u]nder Iowa Rule of Appellate Procedure 6.904(2)(c), unpublished decisions of the court of appeals do not constitute binding authority on appeal."). Second, section

622.10 does not directly address the situation where a defendant seeks exclusion of his own medical records and, as noted, the purpose of the privilege statute would not be undermined by finding waiver in cases such as this.

The reasoning of *Roling* is not sound.

As one leading commentator has stated,

> Doubtless, if the patient on direct examination testifies to or adduces other evidence of, the communications exchanged or the information furnished to the doctor consulted this would waive [privilege] in respect to such consultations.

1 McCormick on Evid. § 103 (8th ed.). Further, *McCormick* has noted that when "the patient in his or her direct testimony does not reveal any privileged matter respecting the consultation, but testifies only to physical or mental condition, existing at the time of such consultation," some courts hold that fairness requires a finding that the patient waived privilege by tendering to the jury his physical condition. *McCormick* notes other courts hold that the patient's testimony as to his or her condition without disclosure of privileged matter is not a waiver but points out that the approach finding waiver "has the merit of curtailing the scope of a privilege that some view as obstructive." *Id.*

This Court should hold that Jackson waived any privilege under section 822.10 when he testified that he blacked out just prior to striking the victim's motorcycle and when he testified that he was admitted to the ICU because his heart rate had dropped to 34 and his health care team was keeping him under observation to see if his heart stopped again. Tr. III, 153:24 – 154:4. Once Jackson made those claims, the State was entitled to rebut his testimony by adducing testimony showing that Jackson's medical records did not support his claims.

Should the Court reach the merits of Jackson's claim of privilege under the Iowa statue, the Court should hold that Jackson waived his privilege when he took the stand and testified that a medical condition caused his fatal collision, and that medical staff noted his condition and kept him under observation for it. A defendant should not be permitted to claim that he is not criminally culpable for his act as it was caused by a medical emergency and then use a claim of medical privilege to shield his claim from scrutiny.

C. The District Court Did Not Err in Rejecting Jackson's Hearsay Objection to Testimony About His Medical Records.

Jackson also contends that testimony about his medical treatment was inadmissible hearsay. Hearsay is:

> a statement that:
>
> (1) The declarant does not make while testifying at the current trial or hearing; and
>
> (2) A party offers into evidence to prove the truth of the matter asserted in the statement.

Iowa R. Evid. 5.801(c).

Initially, the State notes that Mr. Peterson's testimony that Jackson's medical records did not report that Jackson had any difficulty with breathing and did not report that Jackson had a history of blacking out or losing consciousness was not hearsay testimony. There was no "statement" by Jackson and, therefore, no hearsay as defined by Rule 5.801(a). Thus, the Court should reject Jackson's challenge to Dale Peterson's testimony that Jackson's discharge records did not reflect that Jackson had any difficulty with breathing, Tr. IV, 61:3-11, and that he did not report a history of blacking out or losing consciousness. Tr. IV, 61:21 – 63:13.

The Court should also reject Jackson's challenge to Mr. Peterson's testimony about information contained in Jackson's medical records. Mr. Peterson testified that Jackson's discharge show that Jackson's heart rate was stable and within normal limits and his oxygen saturation was 98%, within normal limits, indicating that he was breathing normally. Tr. IV, 61:21 – 63:13. His testimony fell within recognized exceptions to the rule against hearsay.

"Hearsay is not admissible unless any of the following provide otherwise: the Constitution of the State of Iowa; a statute; these rules of evidence; or an Iowa Supreme Court rule." Iowa R. Evid. 5.802. Exceptions to the rule against hearsay include exception for "records of a regularly conducted activity," "statements made for medical diagnosis or treatment," and "statement[s] of the declarant's then existing state of mind … or emotional, sensory, or physical condition." *State v. Buelow,* 951 N.W.2d 879, 884 (Iowa 2020) (quoting Iowa R. Evid. 5.803(3), (4), (6)).

In addition, a hearsay statement may, itself, include hearsay. "Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule." Iowa R. Evid. 5.805. As Professor Doré explains,

> A common example of … double or multiple hearsay is a business record admissible under Rule 5.803(6) that includes statements by a declarant under no business duty to report. If the including statement, the business record, is admissible, the included statement will be admissible if it meets the requirements of another hearsay exception, such as present sense impression or excited utterances, statements of then-existing state of mind or statements for medical diagnosis or treatment. When each statement falls within an exception, the rule accepts the reliability of the including and included statements in combination.
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> * * * *
>
> Not infrequently the included statement will be an opposing party's statement. Although a statement of a party-opponent is not hearsay by definition in rule 5.801(d)(2), the admissibility decision will be based on the same analytical framework applied to hearsay within hearsay. The including statement, if offered for the truth of the matter asserted, will require a hearsay exception. If a hearsay exception is found for the including statement, the included statement should be examined to determine if it is also hearsay and requires an exception or, although offered for its truth, is an opposing party's statement or other form of declaration not defined as hearsay.

7 IA PRAC § 5.805:1 (footnotes omitted).

The district court admitted Dale Peterson's challenged testimony on the ground that his testimony was not being admitted for the truth of the matters asserted and that it fell within the hearsay exception for then-existing state of mind or physical condition. Tr. 56:19 – 57:9. This Court may affirm admission of evidence if it was properly admissible on any ground. *State v. Fontenot,* 958 N.W.2d 549, 556 (Iowa 2021).

Jackson's medical records were admissible under the hearsay exception for business records. *See* Iowa R. Evid. 5.803(6). To admit a business record and avoid exclusion as hearsay, a party must establish a foundation for the record, including: (1) That it is a business record; (2) That it was made at or near the time of an act; (3) That it was made by, or from information transmitted by, a person with knowledge; (4) That it was kept in the course of a regularly conducted business activity; and (5) that it was the regular practice of that business activity to make such a business record. *State v. Fiems,* No. 18-2241, 947 N.W.2d 672 (Iowa Ct. App. 2020) (citing *State v. Reynolds,* 746 N.W.2d 837, 841 (Iowa 2008)). The conditions must be "shown by the testimony of the custodian or another qualified witness" or be certified by the custodian. *Fiems*, 947 N.W.2d 672 (quoting Iowa R. Evid. 5.803(6)(D)). The opposing party then has a chance to show the source of information or the preparation of the record indicate a lack of trustworthiness. *Fiems,* 947 N.W.2d 672 (citing Iowa R. Evid. 5.803(6)(E)).

The testimony of Dale Peterson showed that Jackson's medical records were made when Jackson was admitted to the hospital after his arrest, the records were made by medical personnel at Broadlawns

Medical Center and that the records were made and transmitted by persons with knowledge of Jackson's condition. The records were also kept in the course of regularly conducted business activity on the part of Broadlawns and the Polk County jail, and it was the regular practice of the hospital and the jail to make and keep those business records. Mr. Peterson's testimony about those records was therefore admissible under the exception for records of a regularly conducted activity, Iowa Rule of Evidence 5.803(6). *State v. Buelow,* 951 N.W.2d 879, 884–85 (Iowa 2020); *see also In re Est. of Poulos,* 229 N.W.2d 721, 727 (Iowa 1975) ("We have long held that medical and hospital records are admissible, upon proper foundation, as an exception to the hearsay rule.").

Likewise, to the extent that that the medical records, and Mr. Peterson's testimony about them, relied upon the out-of-court statements of Jackson himself, Mr. Peterson's testimony did not run afoul of the rule against hearsay. The statements of a party opponent are not hearsay. *See* Iowa R. Evid. 801(d)(2); *and see State v. Tillman,* 532 N.W.2d 482, 484 (Iowa Ct. App. 1995).

To the extent that Jackson's medical records include information he provided regarding his current health, feelings, and

plans, that evidence was also admissible under the exception allowing for "[a] statement of the declarant's then existing state of mind … or emotional, sensory, or physical condition." Jackson's statements within the medical records regarding his current health, feelings, and plans are admissible under the exception allowing for "[a] statement of the declarant's then existing state of mind … or emotional, sensory, or physical condition." *Buelow*, 951 N.W.2d at 885 (quoting Iowa R. Evid. 5.803(3)).

Those portions of Jackson's records from Broadlawns Medical Center that report or rely on Jackson's own statements also fall within the exception for statements made for the purpose of medical diagnosis or treatment. *Buelow,* 951 N.W.2d at 884–85; *and see* Iowa R. Evid. 5.803(4)). Under this exception, a statement is admissible if it is "made for—and is reasonably pertinent to—medical diagnosis or treatment; and … [d]escribes medical history, past or present symptoms or sensations, or the inception or general cause of symptoms or sensations." Iowa R. Evid. 5.803(4)(A)–(B). Typically, such statements are "likely to be reliable because the patient has a selfish motive to be truthful" given that "the effectiveness of the medical treatment rests on the accuracy of the information imparted

to the doctor." *State v. Adams,* No. 21-0916, 2022 WL 5068010, at *4 (Iowa Ct. App. Oct. 5, 2022) (quoting *State v. Smith,* 876 N.W.2d 180, 185 (Iowa 2016) (citations omitted)).

Jackson has not shown that the district court erred in rejecting his hearsay objection to Dale Peterson's testimony about the contents of his medical records. Mr. Peterson's testimony that the records did not reflect that Jackson had any difficulty with breathing and that Jackson did not report that he had a history of blacking out or losing consciousness is not hearsay. Further, the records themselves fall with the business records exception to the rule against hearsay and information contained in those records that was supplied by Jackson falls within the exceptions for statements of a party opponent, statements of then-existing physical condition, and statements made for the purpose of diagnosis or treatment. The district court properly rejected Jackson's hearsay objection to Dale Peterson's testimony about the contents of Jackson's medical records.

D. Any Error in Admitting Testimony About the Contents of Jackson's Medical Records Was Harmless.

Finally, even if the court had erred in admitting the challenged testimony, any error would be harmless. A reversal is required for the

improper admission of evidence only if the exclusion affected a substantial right of a party. Iowa R. Evid. 5.103(a). "In a case of nonconstitutional error, the Court 'presume[s] prejudice—that is, a substantial right of the defendant is affected—and reverse[s] unless the record affirmatively establishes otherwise.'" *Buelow,* 951 N.W.2d at 890 (quoting *State v. Sullivan,* 679 N.W.2d 19, 30 (Iowa 2004)). This court has "relied on the existence of overwhelming evidence in finding harmless error." *Buelow,* 951 N.W.2d at 890 (quoting *State v. Parker,* 747 N.W.2d 196, 210 (Iowa 2008) (overwhelming guilt was present when multiple eyewitnesses identified the defendant, the defendant admitted to another that he committed the crime, and the defendant's alibi could not be corroborated)).

Here, there was overwhelming evidence that Jackson was driving the car that struck and killed a motorcyclist and overwhelming evidence that drug impairment, and not a medical condition, caused Jackson to cross the center line and strike the victim. That evidence is set out in detail in the statement of the facts, above. Briefly, witness Timothy Gilbert saw a black Prius cross the center line and strike a motorcyclist. Tr. II, 35:2-25; 36:5-9; 36:10-24.

Witness Ashley Hobbs saw Jackson get out of the Prius. Tr. II, p. 47, lines 14-21; p. 44, line 9 – p. 45, line 8; p. 45, lines 15-20; p. 47, lines 17-21. Tr.****. Jackson immediately denied that he had been driving. Tr. II, p. 45, lines 9-14; p. 47, lines 2-9. He then left the scene. Tr. II, p. 48, lines 7-19.

Jackson had more than twice the therapeutic dose of methamphetamine in his system. Tr. III, 15:11-13; 21:11 – 22:8; 25:20 – 26:16. He also exhibited symptoms consistent with methamphetamine intoxication. Tr. II, 163:24 – 164:8. Further, Jackson never told anyone at the scene or officers that he was suffering from a medical emergency. In light of the overwhelming evidence of Jackson's guilt, he would not be prejudiced by any error in admitting testimony about his medical records.

The district court properly admitted testimony about the contents of Jackson's medical records. Those records were not subject to exclusion or suppression under federal HIPAA provisions. Jackson failed to preserve his challenge under the Iowa privilege statute and, even if the Court were to reach Jackson's claim under the Iowa statute, it should hold that Jackson waived his physician-patient privilege when he testified that he was suffering from a medical

emergency at the time of the crash and to the actions of medical staff in reaction to that claimed medical emergency. Jackson has also failed to show that testimony about the contents of his medical records was inadmissible hearsay. Consequently, the Court should reject Jackson's challenge to admission of testimony regarding his medical records and affirm his convictions.

CONCLUSION

The Court should affirm David Dwight Jackson's convictions for homicide by vehicle, operating a motor vehicle while Intoxicated, leaving the scene of an accident resulting in death, and theft in the second degree.

REQUEST FOR NONORAL SUBMISSION

Oral argument is unlikely to assist the Court in deciding the issue raised on appeal. Therefore, the State waives oral argument. However, if appellant is granted oral argument, counsel for appellee desires to be heard in oral argument, as well.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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Dated: October 19, 2023

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IN THE SUPREME COURT OF IOWA
Supreme Court No. 19-0911

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANTHONY ALEXANDER MONG,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE WILLIAM P. KELLY, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

This case can be decided based on existing legal principles. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

This is a direct appeal by the defendant Anthony Alexander Mong from his convictions for attempted murder, intimidation with a dangerous weapon, willfull injury causing bodily injury, and going armed with intent. Sentencing Order; Notice of Appeal; App. ____.

Course of Proceedings

The State accepts the defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

Madison had been dating Anthony Mong but broke off their relationship in May of 2018. Mong had been jealous of Madison's friendship with Ricco Martin and had made a number of threats against him, including a threat to kill him. On June 1, 2018, Mong drove to the home where Madison lived with her family while Ricco Martin was visiting. Mong drove past and looked at a group of people outside the house, then turned around, drove back to the house. Mong got out of the car and shot in the direction of Ricco Martin.

Shane Woods was near Ricco at the time and was shot through the back.

Twenty-two-year-old Madison Cobb lived with her parents Heather and Todd Hines at their home at 8185 Franklin Avenue. Tr. II, 45:18-46:4. Ms. Cobb started dating Anthony Mong in early November of 2017 and had what Ms. Cobb thought was an exclusive relationship, although she eventually learned that Mong was also dating a woman she knew only as Rachael. Tr. II, 46:16-47:13; 49:4-24. Madison and Mong's relationship was "very on and off all the time." She broke up with Mong for the last time no more than two weeks before the date of the shooting. Tr. II, 56:7-15; 58:10-15; 58:16-20.

Todd and Heather Hines owned a semi-pro football team in Iowa and Ricco played for their team. Madison met Ricco through football events she was involved in. He became friends with the whole family and would go to their home on occasion. Madison and Ricco were friends before she met the defendant. Tr. II, 47:21-49:3; 92:6-93:25. Madison considered to be a friend whom she had never dated. Tr. II, 48:9-25. Ricco considered he and Madison to be "friends with benefits." Tr. II, 94:3-7.

Ricco had met Mong, but they did not have much interaction. Ricco got "a bad vibe" from Mong and tried to avoid him. Tr. II, 94:8-22. The year before the shooting, Ricco had received thirty to forty intimidating text messages from Mong, one after the other. Ricco had texted Mong back to tell him that he was not afraid of Mong. Ricco then changed his phone number to avoid receiving further messages from Mong. Tr. II, 96:13-98:16.

Ricco would visit Madison parents at their home and Madison would also be home when Ricco visited. The defendant was not happy about that and he voiced his displeasure to Madison. Tr. II, 49:25-50:17.

Just before June 1, Ricco and Mong had an argument during which Mong told Ricco that "he wasn't going to fight me; he was going to shoot me." That was the last time Ricco saw Mong before June 1. Tr. II, 94:23-95:5; 96:6-9. Madison was present when the defendant and Ricco had an argument. She, too, heard Mong tell Ricco that, "he was done arguing, he didn't want to fight anymore, that he was just going to shoot [Ricco]." Tr. II, 50:18-51:6.

On June 1, Ricco was at the Hines home. Sometime around 8:00 p.m., Ricco was outside the home with Todd Hines, David

Woods, and Shane Woods. The men were just standing there having a conversation when Mong drove by, made a U-turn in front of the elementary school right across the street from Hines' home, and came back. Tr. II, 99:7 -100:11. Todd Hines told Ricco to go inside, but he did not. Ricco saw Mong jump out of the car. He saw Mong run behind a tree. Then, he saw Mong's arm reach around the tree and shoot. Shane was hit. Tr. II, 100:12-101:21; 114:5-13.

Ricco ran to Shane's aid. Tr. II, 101:22-25. Ricco believed that Mong was trying to shoot him instead of Shane. Tr. II, 102:20-23.

Before Mong jumped behind the tree, Ricco had seen Todd Hines come out onto the deck with a gun. Ricco believed that Mong saw the gun, as well, and that was why Mong jumped behind a tree. Tr. II, 113:19-114:7. Ricco took the gun from Todd because he did not want him to get into trouble. Tr. II, 104:7-105:1. Someone then took the gun from Ricco and put it in the house. Tr. II, 106:24-107:5. Ricco did not fire a gun that day. Likewise, Todd Hines never pointed a gun nor fired a gun that day. Tr. II, 117:9-17.

Todd Hines became friends with Ricco Martin when Ricco played football on the semi-pro football team Todd and Heather Hines owned. Todd Hines met Anthony Mong through some off the

other football players. Tr. II, 207;4- 208:2. Mong dated Todd's daughter Madison. Tr. II, 208:15-20.

Todd testified that Mong and Ricco Martin did not get along. Within two weeks of June 1, Todd was present when Mong threatened Ricco. Mong told Ricco that he would not fight him; he was just going to shoot him. Tr. II, 208:21-210:4.

Mong had taken a red Cadillac to Todd's house around Saturday, March 24. Todd was going to put a starter and some other parts on the car and then the car was going to be returned to Mong. Mong was at the house on Thursday, May 31 talking to Todd about the Cadillac. Todd told Mong that he would give him the title to the car and the car keys and told him to come back over the weekend to get the car. Tr. II, 223:24-225:4.

Todd recalled that around 8:00 p.m. on June 1, 2018, his nephew David Wood, David's father Shane Wood, and Ricco Martin were outside. His wife and children were inside the house. Tr. II, 210:5-25. Todd noticed Mong driving down the street in a Hyundai Sonata; the music in the car was blaring loudly. The vehicle belonged to "Rachel," he was not sure of her last name. Tr. II, 212:7-24.

Todd saw Mong drive past his house, go around the corner, turn around in the circle lot at the school and saw him making his way back to Todd's house. He thought, "Oh, boy, it's going to happen now."

Todd ran inside to his bedroom, got his gun, and went back outside. He had the gun tucked into the back of his waistband. Tr. II, 214:2-24. When he first walked outside with his gun, Todd saw Mong walking into his driveway. He saw that Mong had a gun in his hand. Tr. II, 218:25-219:12. Todd thought Mong was going to shoot Ricco. Tr. II, 212:25-213:18. As Mong had driven past his house, Todd thought he heard Mong rack the gun, chamber a bullet. Tr. II, 219:13-220:10; 223:16-23.

Todd saw Mond approaching his driveway and told him, "Don't do this." He said that twice. Then he ran into the house because the shooting started. He was inside the house but standing by the sliding door to his home and looking outside when he heard Mong fire two shots. Tr. II, 215:4-8; 218:17-24; 228:21-23. He turned around and told Shane to run because Mong was shooting. Shane said, "I'm hit." Todd told his wife to call 911, then he realized that his phone was in his pocket, so he called 911, too. Tr. II, 218:4-10; 220:14-221:1.

When the police arrived, they took Todd to the police station and questioned him. He told them he had a gun. Tr. 221:4-16.

Todd testified that he had been going to draw his gun and point it towards Mong, but Ricco grabbed his arm and reminded him that there were children playing outside in the neighbor's yard. Todd did not point the gun, then. He dropped it or it fell out of his waistband and Ricco took it. Todd did not shoot his gun. Tr. II, 215:9-9-15; 217:17-218:3; 228:23-229:4. Todd estimated there were at least eight teenaged girls outside jumping on a trampoline in the neighbor's yard. Tr. II, 215:9-216:9.

David Woods is Shane Woods son. Tr. II, 173:15-22. He was at the Hines home on June 1. He, his dad, his uncle Todd Hines, and Ricco Martin were outside smoking a cigarette and talking about baseball when he saw Anthony Mong drive by in a dark blue or black Hyundai. He had seen Mong in that vehicle before. Mong gave the men "a little stare down" as he drove by. David saw Mong turn around at the school, then Mong "cranked his music and came back." Tr. II, 174:8-177:1.

David's instincts told him that something was going to happen, so he went to the garage and grabbed a ball bat. He could see in

Mong's face that something was going to happen. Tr. II, 177:3-11; 181:14-19. While David was in the garage, he heard a gunshot and heard his uncle say, "He's got a gun," then heard his dad yell, "I'm hit. I'm hit." Tr. II, 177:12-19. David immediately left the garage. He saw that his dad was bleeding and he chased after Mong with the baseball bat. Mong got back in his car really quickly and sped off. Tr. II, 177:14-179:1; 180:5-12.

On June 1, 2018, Madison was at home with her parents, her uncle Shane Woods, her cousin David Woods, and her younger siblings. Ricco Martin was also there. Tr. II, 46:5-15. That evening, Madison was inside her home and was just about to open the door to go outside when she heard a gunshot. Madison opened the door and saw what she recognized as defendant's back and then saw him open the door to Rachael's Hyundai Sonata, get in, and drive off. Madison was familiar with the car and had ridden in it with Mong "plenty of times." She knew it was Rachel's car. Tr. II, 51:7-55:9; 58:21-25; Exhs. 14, 15 (photographs of car); App. --.

Madison then noticed her uncle Shane Woods leaning up against the garage. She saw that there was blood pouring out of Shane's shirt. Tr. II, 55:10-17.

Heather Hines is married to Todd Hines and is the mother of Madison Hines. Tr. II, 158:14-159:2. She testified that Shane Woods was living with her family on June 1. Tr. II, 171:16-21. Heather was aware that there was a conflict between Mong and Ricco. A few weeks before the shooting, she had heard Mong threaten to beat up Ricco or just shoot him. Tr. II, 164:7-23; 165:6-10. She was not aware of any conflict between Mong and Todd Hines. Tr. II, 163:21-164:6.

Heather Hines was inside the house on June 1 and did not see Shane Woods get shot. Tr. II, 162:18-21. Her husband called her outside and she found that Shane had been shot. She called 911. Tr. II, 162:4-12. Ricco gave her a gun that night, though, and asked her to put it upstairs in their room for Todd. She took the gun and put it under their mattress. Tr. II, 167:15-18; 170:19- 171:1.

Shane Woods lives with the Hines family. Tr. II, 239:21-240:9. On the evening of June 1, 2018, Shane was outside with his son David and Ricco. Shane and David were smoking cigarettes and talking about baseball. Shane was playing for a semi-pro baseball team and David coached the team and they were talking about the game. Tr. II, 241:8-242:6. Shane saw Mong drive by and pulled up on front of the

yard, but then went on. Mong went around the corner the school and turned around and came back. Tr. II, 242:10-243:25.

Mong stopped in front of the house, got out of the car, and walked to the back of the car. By that time, Todd had gone into the house and come back out. Shane heard Todd say, "Don't Tony, don't." Shane looked and saw that Mong was at the driveway with a gun pulled. Tr. II, 2444:1-20.

Shane did not have any ongoing conflict with Mong; he "had no problems with him at all." Tr. II, 243:4-13. When he saw that Mong had a gun, he did not run because he did not think he had a problem. Shane just turned around to walk back towards the house. He heard a shot and he was hit on the left side of his back. The bullet came out of his arm. Tr. I, 244:21-245:2. At the time he was shot, Shane was approximately six to eight feet from Ricco, who was standing by the front of the deck. Shane and Ricco were talking back and forth. Tr. III, 25:15-27:11; Exh. 10 (photograph); App. ___.

Rachael Janousek is the fiancée of the defendant. By the time of trial, they and had been in relationship with him for five years. Before June 2, 2018, she spent time with Mong at the home of her friend Rachel. Rachel lived in a house at 913 62nd street with her

fiancé and the two sons. Janousek and Mong "pretty much" lived there full-time. Tr. II, 75:15-77:23.

On June 1, Mong and his friend Brandon, known as Griz, dropped Janousek off at work. Janousek worked 4:00 p.m. to either 8:00 or 9:00 p.m. that day. Mong was driving Rachael's Hyundai Sonata. The same car Madison Cobb had seen Mong leave in after the shooting. Tr. II, 78:4-80:22; 87:17-88:1; Exh. 15 (photograph of car); App. ___.

Mong was supposed to pick Janousek up after she got off work but he did not do so. She called him a few times and drank with her co-workers for about one and one-half hours while she waited for defendant, then got tired of waiting. She started walking home and then had another friend pick. Her up. The friend was going to take Janousek to her mother's house, but then Janousek got a call from a detective telling her that her car had been towed, so the friend took Janousek to the Clive Police Department. Tr. II, 80:23-82:8.

Janousek gave police permission to search her impounded car. Tr. II, 83:3-25. She testified that it was not her who put a shell casing in her car. Tr. II, 86:8-13. Ms. Janousek's boss verified that she clocked out of work at 9:47 p.m. on June 1. Tr. III, 77:8-21.

Willie Carl McClairen, Jr. is a general surgeon. Tr. III, 8:25-9:17. He was one of the attending trauma surgeons when Shane Woods was brought into the emergency room at about 9:10 p.m. Tr. III, 11:3-8; 14:20-15:4. He testified that Shane was shot in the back of his lower left chest and the bullet traveled through his chest cavity and exited through the front. The bullet passed close enough to Shane's lung to cause a wave to contuse the lung, but did not hit the lung. Dr. McClairen testified that there are vital organs throughout the chest – the heart, lungs, major blood vessels – and if the bullet had struck any of those Shane could have died. Tr. III, 12:3-13:7.

At the scene of the shooting, police found a 9-millimeter shell casing. There were also cigarette butts lying on the ground in the area by the deck, near where the casing was found. The casing was found against the west curb on Northwest 82nd Street. Tr. III, 60:8-18; p. 64:25-65:18; 67:8-15Exh. 1 (aerial photograph; App. ___.

Officers located Rachel Janousek's black Hyundai Sonata later on the night of the shooting. An officer looked into the car and saw a live round on the passenger seat. Tr. III, 32:3- 8; 36:1-37:21; 38:9-24; 44:10-17. Ms. Janousak gave police permission to search her car

and they seized a 9-millimeter shell from the front passenger seat. Tr. III, 77:22-79:12.

Sgt. Richard Stoen spoke with Todd Hines at the scene and then took him to the police station to interview him. During the course of that interview at the station, Hines told the officer that when he had heard Mong rack a gun, Hines went into his house and got his gun. Tr. III, 107:16-108:16; 130:9-19.

Rachel Kleiber testified for the defense. She testified that Mong was living with her and her fiancé on June 1, 2018; he lived with them for three to five months. She never saw a firearm in Mong's portion of the house. Tr. III, 196:10-198:22; 216:14-23. Ms. Kleiber knew Mong for about five years. During that time, she never saw Mong with a firearm. Tr. III, 216:24-217:5.

Anthony Mong testified at his trial. He was thirty-one years old at the time of trial. Tr. IV, 11:16-12:7. He had a red Cadillac stored at the Hines residence. While Mong and Madison were still dating, they planned to fix the Cadillac as they needed a car. Todd Hines was going to help them. Tr. IV, there because Todd Hines was goin. Tr. IV, 20:24-23:16. After Mong and Madison broke up, Mong wanted his car back. Tr. IV, 23:17-24. On May 31, 2018, Mong went to the

Hines residence and spoke with Todd. Todd told Mong to return over the weekend to get the car because Madison had the keys and title and she was not home at the time. Tr. IV, 24:3-17.

Mong testified that on the evening of June 1, 2018, he picked up Brandon Henlon. He and Rachel Janousek picked up Henlon, then dropped Janousek off at her job. Tr. IV, 25:21-28:2. Mong and Henlon then went to the home of Rachel Kleiber. Mong ran inside and "grabbed a couple items," then he and Henlon sat in the car and smoked marijuana for about forty-five minutes. Tr. IV, 28:3-14.

When they were done smoking, Mong testified, he and Henlon drove around for half an hour. Mong was driving, though he did not have a license. Mong decided he wanted to pick up the Cadillac since Henlon could drive one of the cars. Tr. IV, 28:19-340:1.

Mong testified that he drove to the Hines residence in Rachel's car. They had the music in the car blasting. When they got to the Hines' residence, Mong saw Todd Hines, Ricco Martin, Shane Woods, and David Woods sitting outside. He testified that he started to pull into the driveway, but then realized that would block the Cadillac in, so he drove on, turned around in a nearby school area, returned to

Hines' house, and parked in front of a large tree in the Hines' yard. Tr. IV, 30:2-5; 31:25-33:16.

Mong testified that he told Henlon to stay in the car because Henlon was going to drive Rachel's car and Mong would drive the Cadillac. Mong testified that he got out of the car. He was holding his cell phone in his hand because he was still texting as he got out of the car and walked up the driveway. Tr. IV, 33:17-36:12. As he walked, Mong noticed that Todd Hines had a gun. Mong testified that he saw Ricco Martin "go for" Todd's gun and that is when Mong ducked behind the tree. Mong testified that he "felt like I was going to get shot." Tr. IV, 33:17-34:1; 36:1 – 37:7.

Mong stated that he heard a shot fired from the direction of the group of people in Hines' yard. Then, he heard a second shot fired from behind him. Tr. IV, 37:8-38:9; 59:2-18; 63:13-64:14. He stated that the shot came "from the car" – the Hyndai Sonata that Mong drove to the scene. Tr. IV, 81:21-82:17. He testified, though, that Henlon never got out of the car. Tr. IV, 62:9-20. He also testified that he did not know that Henlon had a gun and had not seen it while the two were in the car together. Tr. IV, 90:13-91:10.

The group of people started to disperse and Mong ran to the car, got into the driver's seat, and sped away. Tr. IV, 38:2-25. He testified that when he got into the car he saw that Henlon had a gun in his hand. Tr. IV, 39:1-8. Mong testified that he did not see anyone get shot at the Hines residence. Tr. IV, 39:9-11.

Mong testified that they stopped a block away and Henlon got in the driver's seat because Hanlon had a license. Then, they went to Rachel Kleiber's house and dropped off the car and went their separate ways. Tr. IV, 39:1-16; 60:7-61:15. Mong testified that he hid out in a hotel because he was afraid of someone coming after him or shooting him. The next morning, a friend drove him to Las Vegas. He went to Las Vegas because his mother lives there and his mother was sick so he "needed to see her anyway. Tr. IV, 39:19-41:5; 79:7-9.

Mong testified that he did not have a gun and did not intend to shoot or fight Ricco Martin, Shane Woods, or anyone else at the Hines residence. He testified that he had his black cell phone in his hand when he approached the Hines residence. Tr. IV, 41:8-22; 43:6-13. He testified that he had no problem with Shane Woods. Tr. IV, 50:18-20.

Mong testified that he did not learn that Shane Woods had been shot until a couple days after he got to Las Vegas. Mong was arrested in Las Vegas two months later. During the two months he was there, he did not try to contact authorities in Iowa to report that Henlon had shot Shane because Henlon was his best friend and Mong thought that Henlon had saved his life. Tr. IV, 42:15-43:5; 79:21-80:10; 81:13-20. Henlon died in February of 2019, before trial. Mong did not tell anyone before Henlon died that it was Henlon who shot Shane Woods or that Henlon had fired the second shot, though he did testify that he had told his lawyer. Tr. IV, 55:12-15; 85:20-90:6.

Additional facts will be discussed where relevant to the State's argument, below.

ARGUMENT

I. The Defendant Failed to Establish the Jury Pool in his case Violated the Fair Cross-Section Requirements of the Federal and State Constitutions.

Preservation of Error

The State does not challenge error preservation. On the first day of trial, before the start of voir dire, the defendant made an oral motion challenging the jury panel because of alleged deficient representation of African Americans in the jury pool. Specifically, the defense asserted that the jury pool violated both the Sixth

Amendment of the United States Constitution, and article I, section 10 of the Iowa Constitution for failure to represent a fair-cross-section of the community. Tr. I, 62:19-71:21. In arguing his motion, defense counsel advised the district court that of the forty names drawn for Mong's jury panel, only one juror identified himself or herself as African-American. Tr. I, 63:4-24. Mong objected only to the composition of the jury *panel*, rather than to the jury *pool*, the State does not challenge error preservation to Mong's appellate challenge to the pool. The authority cited by Mong in support of his motion, *State v. Plain*, 898 N.W.2d 801 was a case reviewing the composition of the jury pool, the prosecutor pointed out that *Plain* requires proof of systemic exclusion from the jury pool rather than the panel, and the district court ruled on Mong's motion as if it were a challenge to the jury pool. *See*, Tr. I, 63:5-71:21. The district court's ruling preserved error for Mong. *State v. Paredes*, 775 N.W.2d 554, 561 (Iowa 2009).[1]

[1] Generally, objections to evidence or other matters and proceedings must be made as soon as the grounds for doing so become apparent. *See State v. Johnson,* 476 N.W. 2d 330, 333 (Iowa 1991); *State v. Yaw,* 398 N.W. 2d 803, 805 (Iowa 1987). Normally, the State would argue that Mong waived his objection to the composition of the jury pool by waiting until the day of trial to raise his challenge rather than filing a written motion once the jury pool

Mong raises an alternative claim that if his attorney failed to preserve error, his attorney was ineffective. Because the State is not challenging error preservation, the Court need not reach Mong's claim of ineffective assistance.[2]

Scope and Standard of Review

The Court reviews de novo Mong's claim that he was denied his right to fair trial under the United States and Iowa constitutions. *See State v. Plain*, 898 N.W. 2d 801, 810 (Iowa 2017) (modified on other grounds by *State v. Lilly*, 930 N.W. 2d 293, 302 (Iowa 2019)).

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questionnaires were available. However, the prosecutor at trial did object to the timeliness of Mong's motion and did not oppose conducting an evidentiary hearing on the cross-section challenge. Tr. Vol. I, p. 21, line 23 – p.29, line 8; Vol. II, p. 15, line 25 – p.16, line 12; Vol. III, p. 7, line 3 – p. 11, line 7. Under these circumstances, the State agrees that the defendant's general claim under both the state and federal constitutions has been preserved. *See Lamasters v. State*, 821 N.W. 2d 856, 863 (Iowa 2012).

[2] A 2019 amendment to Iowa Code section 814.7 deprives the Court of jurisdiction over claims of ineffective assistance of counsel on direct appeal. The amendment to section 814.7 went into effect on July 1, 2019 and applies to those cases in which judgment and sentence is entered on or after July 1, 2019. *State v. Macke*, 933 N.W.2d 226, 228 (Iowa 2019); *see also State v. Trane*, 934 N.W.2d 447, 464-65 (Iowa 2019) (summarizing *Macke*, noting that SF589 does not apply "if the appeal was already pending on July 1, 2019," but does apply to later appeals); *State v. Draine,* 936 N.W.2d 205, 206 (Iowa 2019). Judgment and sentence in Mong's 's case was entered on May 23, 2019. Judgement & Sent.; App. ____. Thus, the amendment to section 814.7 does not apply to Mong's case.

Because Mong does not urge a separate rule or analytical framework under the state constitution, the same standards are applied under both constitutions. *See State v. Lowe*, 812 N.W. 2d 554, 566 (Iowa to 12).

Mong makes an alternative claim of ineffective assistance of counsel. As argued below, that claim has been waived. However, should the Court reach that claim, review would be *de novo*. *Taylor v. State*, 352 N.W.2d 683, 684 (Iowa 1984).

Merits

Anthony Mong challenges his convictions on the ground that he was denied his state and federal right to trial by a fair cross-section of the community. His claim should be rejected as he had not met his burden to establish that African Americans were underrepresented in the venire from which his jury was selected and has not met his burden to show that the alleged underrepresentation was due to systemic exclusion of African Americans in the jury selection process. His claim therefore fails.

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State

and district wherein the crime shall have been committed." U.S. Const. amend. VI. Likewise, article I, section 10 of the Iowa Constitution provides a right to trial before "an impartial jury." *State v. Lilly*, 930 N.W.2d 293, 300 (Iowa 2019). The right to an impartial jury entitles the criminally accused to a jury drawn from a fair cross-section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

When faced with a Sixth Amendment claim of unconstitutional underrepresentation of a racial group in a jury pool, Iowa follows the three-part test set forth in *Duren v. Missouri*, 439 U.S. 357 (1979). To establish a prima facie violation of the fair cross-section requirements of the Sixth Amendment, the defendant must establish the following:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

State v. Plain, 898 N.W.2d at 821–22 (quoting *Duren v. Missouri*, 439 U.S. at 364).

Our Court has explained that, under the second *Duren/Plain* prong, the percentage of the distinctive group in the population

should be determined using the most recent available census data. *State v. Williams*, 929 N.W.2d 621, 629–30 (Iowa 2019) (citing *Lilly*, 930 N.W.2d at 304; *State v. Veal*, 930 N.W.2d 319, 328 (Iowa 2019)). These data may be adjusted to account for those who are actually eligible to serve as jurors, for example, by eliminating the population that is under eighteen and the population (if any) that is incarcerated in a state prison located in the county. *Williams*, 929 N.W.2d at 630.

For Sixth Amendment purposes, the defendant must then show that the percentage of the group in the jury pool is less than this expected percentage by at least two standard deviations. *Lilly*, 930 N.W.2d at 303 (citing *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977)); *Williams*, 929 N.W.2d at 630; *Lilly*, 930 N.W.2d at 302-305. Under the Iowa Constitution, the defendant must show only one standard deviation. *Lilly*, 930 N.W.2d at 304. Pools may be aggregated, so long as pools closer in time to the trial date are not omitted when earlier pools are included. *Williams*, 929 N.W.2d at 630; *Lilly*, 930 N.W.2d at 305. The aggregation of pools can help solve the problem with performing statistical analysis on small numbers. *Williams*, 929 N.W.2d at 630.

Under the third prong of the *Duren/Plain* analysis, the defendant must show that some practice or practices caused the underrepresentation. *Duren*, 439 U.S. at 364; *Plain*, 898 N.W.2d at 822; *Williams*, 929 N.W.2d at 630.

A. Mong Has Satisfied the First Prong of the *Plain/Duran* Test.

Mong asserts the fair cross-section requirement was violated because African Americans constitute a distinctive group for purposes of the constitutional right to an impartial jury. The State agrees. *See, United States v. Weaver*, 267 F. 3d 231, 240 (3d Cir. 2001). Thus, Mong has satisfied the first prong of the *Duren* test.

B. Mong Has Not Satisfied the Second Prong of the *Plain/Duran Test*; He Has Not Established That African-Americans Were Underrepresented in his Jury Pool.

The second prong of the *Plain/Duren* test is whether there is a fair and reasonable representation of the distinctive group in the jury pool. A challenger must establish that "the representation of the group in the jury venires" is not "fair and reasonable in relation to the number of such persons in the community." *See, Weaver*, 267 F. 3d at 240. Citing to *State v. Plain,* Mong asserts that there are three tests available to determine whether a distinctive group is

underrepresented in the jury pool: absolute disparity, comparative disparity and standard deviation. Defendant's Brief at 30. However, in *Lilly* and *Veal*, our Court held that disparity is to be determined solely under the standard deviation method. *Lilly*, 930 N.W.2d at 302-305; *Veal*, 930 N.W.2d at 328. Those cases were decided on May 24, 2019. Mong filed his notice of appeal on May 30. Notice of Appeal[3]; App. ____. Consequently, the decisions in *Lilly* and *Veal* apply to this case on appeal and review of Mong's challenge to his jury is limited to analysis under the standard deviation test. *See State v. Royer,* 436 N.W. 2d 637, 640 (Iowa 1989) (new appellate decision generally applicable to other similar cases then pending on direct appeal).

Mong has not shown that he has met the standard deviation test, or either of the other two tests discussed in *Plain*. In the district court, Mong failed to present any evidence to support his claim of unconstitutional underrepresentation of a racial group in his jury venire. Mong merely pointed out to the district court that in his jury panel of forty potential jurors, only one juror self-identified as Black

[3] EDMS shows the notice of appeal as filed both May 30, 2019 and June 3, 2019. The certified notice of appeal was filed on June 3, 2019.

and/or African American. Tr. I, 63:4-12. Defense counsel asserted that the most recent census records for Polk County showed that seven percent of the population is African American. Mong then attempted to calculate the absolute and comparative disparities using that asserted census data and the make-up of Mong's jury panel. He did not address the standard deviation test and did not address any disparity in his jury pool.

Mong did not present any evidence in support of his claim that African Americans were underrepresented. He did not make the juror questionnaires of his jury pool, or even his jury panel, part of the record and he did not present evidence establishing what percentage of the population in Polk County is African American. Counsel's argument will not substitute for evidence.

Mong failed to offer evidence to support his claim of underrepresentation even though the district court bent over backwards to give Mong an opportunity to do so. When defense counsel did not provide the court with the juror questionnaires during the hearing on Mong's challenge to his jury, the district court assisted Mong in gathering the necessary information. The court called the clerk of court and instructed the clerk to provide defense

counsel with the "bios" of all of the 195 people who showed up for jury duty. The district court advised Mong's attorney that if he had evidence of systemic exclusion based upon that jury pool information, he could raise the issue again. Tr. I, 69:20-71:21. Mong never raised the issue again.

Mong never provided evidence of a racial disparity in his jury pool. Thus, he failed to meet his burden of establishing the second part of the *Duren* test.

Moreover, Mong's argument in the district court was based upon the wrong data set. While Mong asserted that only one of the forty jurors who made up his jury panel was African American, Mong never discussed the racial composition of the jury pool from which his panel was chosen. He discussed only the racial make-up of those jurors who had been assigned to his trial.[4] "The *Plain/Duren* right applies to the jury pool." *State v. Wilson,* 941 N.W.2d 579, 593 (Iowa 2020) (citing *Plain*, 898 N.W.2d at 822 ("[A] defendant must

[4] "Under Iowa's jury-selection statutes, a jury 'pool' (i.e., venire) consists of all persons who are summoned for jury service and who report. A jury 'panel' consists of 'those jurors drawn or assigned for service to a courtroom, judge, or trial.'" *State v. Gibson*, No. 19-0779, 2020 WL 3569566, at *1 (Iowa Ct. App. July 1, 2020) (quoting *Plain*, 898 N.W.2d at 821 n.5 (in turn citing Iowa Code § 607A.3 (2015)).

establish the proportion of group members in the jury pool is under representative.…."); and citing *Lilly*, 930 N.W.2d at 305 ("A defendant whose jury pool has a percentage of the distinctive group at least as large as the percentage of that group in the jury-eligible population has not had his or her right to a fair cross section infringed ….")).

Mong did not meet his burden to show that African Americans were underrepresented in his jury pool. Consequently, the district court properly denied Mong's fair-cross-section challenge. *Wilson,* 941 N.W.2d at 593 (holding that the district court properly denied Wilson's challenge to his jury as Wilson did not make a record as to the racial makeup of jurors in the entire jury pool that day— he showed underrepresentation only in the subset of jurors who had been assigned to his trial.).

C. Mong Has Not Established Systemic Exclusion.

The third requirement for a successful fair cross-section challenge is to establish that the alleged underrepresentation is due to systematic exclusion of the group in the jury-selection process. *Plain*, 898 N.W.2d at 821-22 (quoting *Duren*, 439 U.S. at 364). "[D]isproportionate exclusion of a distinctive group from the venire need not be intentional to be unconstitutional, but it must be

systematic." *Randolph v. California*, 380 F. 3d 1133, 1141 (9th Cir. 2004). Exclusion must be "inherent in the particular jury-selection process utilized.'" *Plain*, 898 N.W. 2d at 824 (quoting *Duren*, 439 U.S. at 366). Mong has failed to meet this requirement.

In the district court, Mong did not present either evidence or argument on systemic exclusion of African-American jurors. In arguing that Mong was being denied his right to a fair cross-section, defense counsel stated,

> Moving to the third prong of the [*Duran*] test, systematic exclusion, we don't have the information available as to whether or not the – how the panel was selected, what the grounds are for picking jurors.
>
> We would indicate that the test, as it currently stands, makes it very difficult to establish the third prong. But given the results of the panel, the absolute disparity, the comparative disparity, the fact that there's only one African-American juror on this entire panel, we would urge that is proof of systemic exclusion and, therefore, we're raising a challenge to the panel.

Tr. I, 64:24-65:10.

Later, when specifically invited by the district court to present evidence of systemic exclusion of African-Americans, defense counsel responded,

> I don't have evidence of that, Your Honor. The argument that I was making is that it's very difficult to fulfill that prong under the [Duren] test and , therefore, it is an unfair test.

Tr. I, 68:19-69:2. After a recess, the district court again advised the defense that it would take evidence on systemic exclusion. Defense counsel simply responded that "I've already spoken to the evidence I have of that." Tr. I, 70:3-71:8.

On appeal, the defendant likewise fails to identify any systemic exclusion. He appears to argue that evidence of statistical disparity of representation of African Americans in his jury panel is alone sufficient to establish systematic exclusion in this case. Defendant's Brief at 26-32. The defendant is incorrect. As previously argued, he has not established any underrepresentation in violation of the fair-cross-section requirement. Furthermore, even if he had done so, there is still no showing of a causal link between any alleged underrepresentation and the procedures used to select Mong's jury pool.

Barring exceptional demonstrations of total exclusion over time, statistics alone cannot prove that underrepresentation is systematic. *See United States v. Rodriguez*, 581 F.3d 775, 790 (8th Cir. 2009) (quoting *United States v. Morin*, 338 F.3d 838, 844 (8th Cir. 2003)) ("[E]thnic and racial disparities between the general population and jury pools do not by themselves invalidate the use of [specific source]

lists and cannot establish the systematic exclusion of allegedly under-represented groups."); *United States v. Hernandez-Estrada*, 749 F.3d 1154, 1166 (9th Cir. 2014) ("[W]hile Hernandez has introduced significant evidence regarding underrepresentation . . . , he has failed to provide evidence that this underrepresentation is due to the system employed . . . , and has therefore failed to establish a prima facie case under *Duren*."); *People v. Henriquez*, 406 P.3d 748, 763 (Cal. 2017).

The defendant never articulated any theory of systematic exclusion below and does not present such a theory on appeal, aside from his apparent claim statistics alone may be sufficient. But that method of proof is specifically foreclosed by *Lilly*. Indeed, it was already foreclosed by the *Plain* decision in 2017, which *Lilly* took pains to point out:

> We said in *Plain*, "[T]he defendant must show evidence of a statistical disparity over time *that is attributable to the system for compiling jury pools*." 898 N.W.2d at 824 (emphasis added).
>
> We also quoted a law student note in *Plain* for the following point: "If there is a pattern of underrepresentation of certain groups on jury venires, it stands to reason that some aspect of the jury-selection procedure is causing that underrepresentation." 898 N.W.2d at 824 (quoting David M. Coriell, Note, *An (Un)fair Cross Section: How the Application of* Duren *Undermines the Jury*, 100 CORNELL L. REV. 463, 481 (2015)). However, his quotation about what "stands to reason" should not be taken as a suggestion

> that we were eliminating the third prong of the prima facie case. To the contrary, we repeatedly noted that the defendant had the burden to establish systematic exclusion, not merely underrepresentation.

Lilly, 930 N.W.2d at 306 & n.8. The district court issued the ruling in this case, before *Lilly* was decided. However, even before *Lilly*, it was well-established that the defendant needs to prove causation, and that statistics alone are insufficient. *Plain*, 898 N.W.2d at 824.

Lilly elaborated on the manner of proof required to carry the burden of establishing systematic exclusion: a litigant must allege a causal link between jury management and underrepresentation, and then *prove* their causation theory with some kind of evidence:

> Litigants alleging a violation of the fair cross section requirement would still have to demonstrate that the underrepresentation was the result of the court's failure to practice effective jury system management. This would almost always require expert testimony concerning the precise point of the juror summoning and qualification process in which members of distinctive groups were excluded from the jury pool and a plausible explanation of how the operation of the jury system resulted in their exclusion. Mere speculation about the possible causes of underrepresentation will not substitute for a credible showing of evidence supporting those allegations.

Lilly, 930 N.W.2d at 307 (quoting Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 DRAKE

L. REV., 761, 790–91 (2011)). Mong did not even attempt to carry his burden to show systemic exclusion.

Mong has failed to show underrepresentation is "inherent in the particular jury-selection process utilized." *State v. Fetters*, 562 N.W.2d 770, 777 (Iowa Ct. App. 1997) (quoting *Duren*, 439 U.S. at 366). Both before and after *Lilly*, there has always been a requirement that a defendant raising a fair-cross-section challenge to a jury panel must "show causation, that is, that underrepresentation is produced by some aspect of the system.'" *See, Jones v. State*, No. 18–0134, 2019 WL 3330451, at *6 (Iowa Ct. App. July 24, 2019) (quoting *Lilly*, 930 N.W.2d at 306); *accord Williams*, 929 N.W.2d at 630 ("Once underrepresentation has been shown, the defendant must then show that some practice or practices caused the underrepresentation—i.e. the third *Duren*/*Plain* prong."); *Fetters*, 562 N.W.2d at 777 (quoting *Duren*, 439 U.S. at 366). Having failed to meet the requirement of causation, even assuming arguendo improper representation of African Americans, the district court rightly rejected the defendant's challenge to the jury.

D. Mong's Claim Should Be Rejected without Remanding to the District Court.

Finally, Mong notes that the record is inadequate to establish a fair-cross-section claim, places the blame for the lack of evidence on the district court, and seeks a remand to allow him to develop a record. Following the recent decisions in *State v. Lilly*, *State v. Veal,* and *State v. Williams,* appellate courts have dealt with fair-cross-section challenges that were initially ruled on before those decisions, by remanding them for consideration under the new standards for judging underrepresentation and systematic exclusion. *See, e.g.*, *State v. Shaw*, No. 18–0421, 2019 WL 5790884, at *4 (Iowa Ct. App. Nov. 6, 2019); *State v. Voigts*, No. 18–1927, 2019 WL 5424965, at *2 (Iowa Ct. App. Oct. 23, 2019). Although the defendant here requests a remand, such is not appropriate in this case for two reasons. First, while the Court has remanded in cases in which the district court ruled prior to issuance of the Court's decisions in *Lilly*, *Veal*, and *Williams*, it has done so to permit analysis of the issue under its more recent decisions. It has not remanded to permit defendants to present additional evidence. Because Mong failed present evidence on the second and third prongs of the *Duran* test, a remand would serve no purpose. Second, Mong's apparent argument on appeal that

he need not, and could not, prove causation for systematic exclusion was already wrong before *Lilly* was decided, as the Court explained in *Lilly*. *See Lilly*, 930 N.W.2d at 306 & n.8. A litigant should not be given a second crack at carrying his burden on remand as a reward for arguing that his burdens do not exist. This claim was meritless when it was rejected, and nothing can save it.

Mong has failed to establish that he was denied a trial by a fair cross-section of the community. His challenge to his convictions must be rejected. Further, his request for a remand should be denied. A remand would serve no purpose as Mong failed to offer any evidence on the second and third prongs of the *Duran* test. Therefore, whether viewed under this Court's holding in *Plain* or its subsequent decisions in *Lilly*, *Veal*, and *Williams*, the lack of evidence would be fatal to Mong's claim.

Finally, Mong has raised an alternative claim of ineffective assistance of counsel. Mong has not, however, explained in what manner he believes that counsel was ineffective. His bare assertion that counsel was ineffective fails to state the specific ways in which counsel's performance was inadequate and identify how competent representation probably would have changed the outcome. *See State*

v. Astello, 602 N.W.2d 190, 198 (Iowa Ct.App.1999). It also fails to comply with our rules of appellate procedure. See Iowa R. App. P. 6.14(1). The Court is not bound to consider claims that fail to comply with our procedural rules, *Hanson v. Harveys Casino Hotel*, 652 N.W.2d 841, 842 (Iowa Ct.App.2002), or that require the Court to assume a partisan role and undertake a party's research and advocacy, *State v. Stoen*, 596 N.W.2d 504, 507 (Iowa 1999).

To the extent that Mong's brief might be read to claim that counsel was ineffective in failing to provide the district court with evidence of underrepresentation of African Americans or of systemic exclusion, that claim, too, must be rejected in this direct appeal. To prevail on an ineffective assistance claim involving complaints of specific acts or omissions, the defendant must show that "(1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom." *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *State v. Miles*, 344 N.W.2d 231, 233-34 (Iowa 1984); *State v. Clay*, 824 N.W.2d 488, 495 (Iowa 2012). The existing record is not adequate to reach that issue.

II. The District Court Did Not Err in Denying Mong's Motion to Compel Witness Testimony as the Witness Was Asserting His Fifth Amendment Right against Self-Incrimination.

Preservation of Error

The State does not challenge preservation of Mong's claim that the district court erred in denying his motion to compel testimony. Mong made a written motion and the district court denied his motion. That was adequate to preserve error.

However, to the extent that Mong may be arguing that trial counsel was ineffective in failing to make a record of the questions defense counsel intended to ask the witness, Mong has waived that claim by failing to argue it. His bare assertion that counsel was ineffective fails to state the specific ways in which counsel's performance was inadequate and identify how competent representation probably would have changed the outcome. *See Astello*, 602 N.W.2d at 198. It also fails to comply with our rules of appellate procedure. See Iowa R. App. P. 6.14(1). The Court is not bound to consider claims that fail to comply with our procedural rules, *Hanson*, 652 N.W.2d at 842, or that require the Court to assume a partisan role and undertake a party's research and advocacy, *Stoen*, 596 N.W.2d at 507.

Scope and Standard of Review

The Court reviews de novo Mong's constitutional claim that his right to compulsory process was violated. *State v. Heard*, 934 N.W.2d 433, 439 (Iowa 2019); *State v. Russell*, 897 N.W.2d 717, 724 (Iowa 2017). Should the Court reach Mong's alternative claim of ineffective of trial counsel, that claim also would be reviewed de novo. *Taylor v. State*, 352 N.W.2d 683, 684 (Iowa 1984).

Merits

Next, Mong challenges his convictions on the ground that the district denied his motion to compel testimony from Tyrone Hughes, Jr. The district court properly denied Mong's motion as Hughes was asserting his Fifth Amendment right against self-incrimination. Mong's challenge should be rejected.

The Fifth Amendment to the United States Constitution provides, "No person … shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Fifth Amendment's protections extend to nonparty witnesses. *State v. Heard*, 934 N.W.2d 433, 439–40 (Iowa 2019) (citing *Ohio v. Reiner*, 532 U.S. 17 (2001) (per curiam)).

> "[W]hen a witness' privilege against self-incrimination under the Fifth Amendment collides with an accused's right to compulsory process under the Sixth Amendment, the latter must give way."

Heard, 934 N.W.2d at 439–40 (quoting *State v. McDowell*, 247 N.W.2d 499, 500–501 (Iowa 1976) (collecting cases)).

"The privilege against self-incrimination extends to answers that 'would furnish a link in the chain of evidence needed to prosecute the claimant for a … crime.'" *Heard*, 934 N.W.2d at 440 (quoting *Hoffman v. United States*, 341 U.S. 479, 486 (1951)). A witness cannot claim the privilege "unless he has reasonable cause to apprehend danger from a direct answer." *State v. Parham*, 220 N.W.2d 623, 627 (Iowa 1974). The federal standard set out in *Hoffman* applies in a prosecution by a state in determining whether the privilege is properly asserted. *Heard*, 934 N.W2d at 440. The trial court has the discretion to decide if the witness has grounds to assert the privilege against self-incrimination and may require the witness to answer if "it clearly appears to the court that he is mistaken." *Heard*, 934 N.W2d at 440 (cleaned up); *Parham,* 220 N.W.2d at 626.

In *Bedwell,* our Court reviewed the district court's refusal to permit Bedwell to call as a witness his companion at the scene of the

crime. This determination was based on the fact that this witness had indicated, through counsel, an intention to claim his fifth amendment privilege against self-incrimination. Bedwell argued that restrictions against calling witnesses before the jury who have indicated an intention to invoke their fifth amendment privileges only preclude the State from calling such witnesses and that there is no similar restriction against a defendant calling a witness who has predetermined to invoke the privilege. *State v. Bedwell*, 417 N.W.2d 66, 69 (Iowa 1987).

Our Supreme Court held that the district court properly refused to let Bedwell call the witness. It found that it is improper to permit a defendant to call a witness predetermined to invoke his fifth amendment privilege. It further found that the jury is not entitled to draw any inference from the decision of a witness to exercise his constitutional privilege, whether those inferences be favorable to the prosecution or the defense. *Bedwell*, 417 N.W.2d at 69.

Our court recently revisited *Bedwell* and reached the same conclusion. In *Heard*, the defense gave the trial judge the specific questions he intended to ask Brown to review before the judge exercised his discretion to allow Brown to invoke a blanket privilege

against self-incrimination. The questions were aimed at impeaching Brown, which would be unnecessary without his trial testimony, or at implicating Brown in the murder by placing him in the group and at the scene of the murder, which would incriminate Brown and classically support his assertion of the Fifth Amendment privilege. The Court held that the district court correctly ruled Brown was entitled to a blanket assertion of the privilege. *State v. Heard*, 934 N.W.2d 433, 441 (Iowa 2019)

Similarly, here, Hughes made a blanket assertion of this Fifth Amendment right against self-incrimination. Hughes was relying on the advice of his attorney in making a blanket assertion. Tr. I, 9:22-10:23. If the district court had compelled Hughes to testify, Hughes would have been forced assert his Fifth Amendment privilege in front of the jury and would have created an inference of Hughes' guilt. Our Court has provided a "categorical prohibition" on calling a witness to the stand simply to have the jury hear him invoke the privilege in order to infer his guilt. *Heard*, 934 N.W.2d at 441 (citing *McDowell*, 247 N.W.2d 499 and *Bedwell*, 417 N.W.2d at 69).

In the district court, Mong attempted to distinguish *Heard* on the ground that the witness in *Heard* had testified in Heard's first

trial and then invoked his Fifth Amendment rights in Heard's retrial. In *Heard*, the Court rejected that basis for distinction. The Court noted that "a waiver of a [F]ifth [A]mendment privilege is limited to the particular proceeding in which the waiver occurs." *Heard*, 934 N.W.2d at 442 (cleaned up). The Court concluded that the witness' waiver of his privilege in Heard's first trial did not preclude him from invoking the privilege at the second trial because those trials were separate proceedings. *Heard*, 934 N.W.2d at 442–43.

On appeal, Mong argues that the district court made no inquiry into whether Hughes had grounds to assert the privilege against self-incrimination. Here, the district court was advised that the subject matter of the defense's questions to Hughes would revolve around a statement Hughes had given claiming that Brandon Henlon had been in the same prison pod with Hughes and had told Hughes that he had committed the crimes for which Mong was on trial. Henlon died sometime around the time Hughes wrote a statement implicating Henlon and prior to trial. Tr. I, 6:21-8:12.[5] If the statement Hughes

[5] At a scheduled deposition for Hughes, defense submitted a list of the questions he wished to ask of Hughes. Hughes' attorney confirmed that Hughes would invoke his Fifth Amendment right as to all of those questions. Attachment to State's Resistance to Motion to

wrote falsely claimed that Henlon had confessed to him, then Hughes would have committed perjury by testifying about it at trial. The record also shows that Hughes' attorney was advising him to invoke the Fifth Amendment. This was sufficient to permit the district court to find that Hughes could invoke the Fifth Amendment as to the whole subject matter of what he claimed to have learned from Henlon.

The district court properly found that Hughes could invoke the protections of the Fifth Amendment and that he could do so in a blanket invocation outside the presence of the jury. *See, Heard*, 934 N.W.2d at 441 (Given that there was no element of the witness' testimony that would not be incriminating, we concluded the blanket assertion of privilege was appropriate.); *Bedwell*, 417 N.W.2d at 69 (Holding that it is improper for a prosecutor to require a witness to claim his privilege against self-incrimination in the presence of the jury when, as in this case, the prosecutor knows or has reason to anticipate the witness will assert it.); *McDowell,* 247 N.W.2d at 501 (witness could assert blanket privilege).

Compel (transcript of Hughes' deposition); App. ____. However, those questions are not contained in the record.

Mong makes an alternative argument of ineffective assistance of counsel. As noted above, that bare assertion is not sufficient to obtain review. To establish that his attorney was ineffective, Mong must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *State v. Miles*, 344 N.W.2d 231, 233-34 (Iowa 1984); *State v. Clay*, 824 N.W.2d 488, 495 (Iowa 2012). Mong has not satisfied either requirement. The Court should reject this alternative claim.

III. There is Sufficient Evidence to Support Mong's Convictions for Attempted Murder, Intimidation with a Dangerous Weapon with Intent, and Willful Injury Causing Bodily Injury.

Preservation of Error

A defendant must preserve error by making a motion for judgment of acquittal. *State v. Grosvenor*, 402 N.W.2d 402, 406 (Iowa 1987); *State v. Dickerson*, 313 N.W.2d 526, 528 (Iowa 1981). If the motion for judgment of acquittal is limited to specific grounds, then the challenge on appeal should be limited to those same grounds. *State v. Schertz*, 328 N.W.2d 320, 321 (Iowa 1982). Mong's motions for judgment of acquittal made at the close of the State's case and at the close of all the evidence were adequate to preserve error. See, Tr. III, 175:6-185:23; Tr. IV, 101:23-104:7.

Scope and Standard of Review

The Court reviews a challenge to the sufficiency of the evidence for correction of errors of law. If the verdict is supported by substantial evidence, the Court will uphold a finding of guilt. "Substantial evidence" is that upon which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *State v. Henderson*, 696 N.W.2d 5, 7 (Iowa 2005); *State v. Hagedorn*, 679 N.W.2d 666, 668-69 (Iowa 2004). Mong's motions for judgment of acquittal made at the close of the State's case and renewed at the close of all the evidence, and the district court's denial of his motions, were sufficient to preserve his challenge to the sufficiency of the evidence. *See*, Tr. III, 175:7-185:23; Tr. IV, 101:23-104:7

Merits

Mong challenges the sufficiency of the evidence to support his convictions for attempted murder, intimidation with a dangerous weapon, and willful injury causing bodily injury. He does not challenge the sufficiency of the evidence to support his conviction for going armed with intent. He challenges the sufficiency of the evidence to prove that he shot a gun and also challenges the sufficiency of the evidence to prove the specific intent elements of his

crimes. His challenge to his convictions should be rejected as there is sufficient evidence to establish the challenged elements.

The test for whether the evidence is sufficient to withstand appellate scrutiny and support a verdict is whether the evidence is "substantial." *State v. Aldape*, 307 N.W.2d 32, 39 (Iowa 1981). In making that determination, the Court reviews the record in the light most favorable to the State. *Henderson*, 696 N.W.2d at 7. In reviewing the evidence in this "favorable light," the Court makes any legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record. *State v. Bass*, 349 N.W.2d 498 (Iowa 1984). The findings of the factfinder are to be broadly and liberally construed, rather than narrowly or technically, and in cases of ambiguity they will be construed to uphold, rather than defeat, the verdict. *State v. Price*, 365 N.W.2d 632, 633 (Iowa Ct. App. 1985). Evidence meets the threshold criterion of substantiality if it would convince a rational factfinder that the defendant is guilty beyond a reasonable doubt. *State v. LeGear*, 346 N.W.2d 21, 23 (Iowa 1984).

The jury members is free to give each witness' testimony such weight as it thinks it thought it should receive. *State v. Shanahan*,

712 N.W.2d 121, 135 (Iowa 2006) (citing *State v. Schrier*, 300 N.W.2d 305, 309 (Iowa 1981)). The jury is free to accept or reject any of a witness' testimony. *Shanahan*, 712 N.W.2d at 135 (*citing State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993)). The function of the jury is to weigh the evidence and "place credibility where it belongs." *Shanahan*, 712 N.W.2d at 135 (citing *State v. Blair*, 347 N.W.2d 416, 420 (Iowa 1984)).

Mong challenges the sufficiency of the evidence to prove that he shot a firearm and to prove the intent elements of his crimes. The evidence amply establishes those elements. Mong's jury was instructed that, for the purposes of the charges of attempted murder and willful injury, the State was required to prove that Mong shot, or shot at, Shane Woods with a firearm. Jury Instruction Nos. 17, 25 (marshalling instructions); App. ____. His jury was instructed that for the purposes of the charge of intimidation with a dangerous weapon, the State was required to prove that Mong shot a dangerous weapon. Jury Instruction No. 23 (marshalling instruction); App. ____. The dangerous weapon was a firearm. Instruction No. 34 (defining dangerous weapon); App. ____. There was sufficient evidence to prove that Mong fired a firearm.

Mong also challenges the sufficiency of the evidence to prove the intent elements of the charges against him. Each of Mong's charges contained a specific intent element. For the purposes of the charge of attempted murder, the State was required to prove that Mong specifically intended to cause the death of Shane Woods. Jury Instr. No. 17; App. ____. For the purposes of the charge of intimidation with a dangerous weapon, the State was required to prove that Mong had the specific intent to injure or cause fear or anger in Shane Woods. Jury Instr. No. 23; App. ____. To prove that Mong committed willful injury the State was required to show that Mong specifically intended to cause a serious injury to Shane Woods. Instruction No. 25; App. ____.

Mong's challenge to the evidence to support his convictions is based the language of the jury instructions that required the State to prove that Mong intended to act upon Shane Woods. He contends that the evidence was insufficient because to the evidence showed that Mong wanted to kill, injure or cause fear or anger injury Ricco Martin rather than Shane Woods. The flaw in Mong's argument is that his jury was also instructed on transferred intent, as follows.

> Under the doctrine of transferred intent, once the intent to inflict harm on one victim is established, the criminal intent

> transfers to any other victim who is actually assaulted. A party is liable for a wrongful act, where there exists a criminal intent, although the act done, is not that which was intended. The wrongful intent to do one act, is transposed to the other, and constitutes the same offense.

Jury Instruction No. 16; App. ____.

Under the doctrine of transferred intent, Mong was properly convicted of attempted murder of Shane Woods, intimidation of Wood with a dangerous weapon, and willful injury of Woods based upon his act of shooting at Ricco Martin and his intent to kill, seriously injury, and injure or cause fear and anger in Woods. The evidence at trial showed that Mong's intended target was Ricco Martin. Mong was nursing a deep grudge against Ricco because both men had been involved with Heather Martin. Mong and had made numerous threats to shoot Ricco. The evidence shows that Mong shot at Ricco Martin, but hit Shane Woods who was near Ricco at the time. That evidence is summarized as follows.

Anthony Mong and Madison Hines had an on-and-of-again dating relationship from November of 2107 until just before the shooting on June 1, 2018. During that time, Ricco Martin and Madison Hines were "friends with benefits." Tr. II, 46:16-47:13; 49:4-24; 94:3-7. Mong was not happy that Ricco would visit Madison

at the Madison family home and that Ricco would be there when he visited. Tr. II, 49:25-50:17.

The year before the shooting, Ricco had received thirty to forty intimidating text messages from Mong, one after the other. Ricco changed his phone number to avoid receiving further messages from Mong. Tr. II, 96:13-98:16.

Just before June 1, 2018, Ricco and Mong had an argument during which told Ricco that "he wasn't going to fight me; he was going to shoot me." That was the last time Ricco saw Mong before June 1. Tr. II, 94:23-95:5; 96:6-9. Madison was present during that argument and she heard Mong tell Ricco that, "he was done arguing, he didn't want to fight anymore, that he was just going to shoot [Ricco]." Tr. II, 50:18-51:6.

Todd Hines also testified that Mong and Ricco Martin did not get along. Within two weeks of June 1, Todd was present when Mong threatened Ricco. Mong told Ricco that he would not fight him; he was just going to shoot him. Tr. II, 208:21-210:4.

Heather Hines, too, was aware that there was a conflict between Mong and Ricco. A few weeks before the shooting, she had heard

Mong threaten to beat up Ricco or just shoot him. Tr. II, 164:7-23; 165:6-10. Tr. II, 163:21-164:6.

Around 8:00 p.m. on June 1, 2018, Todd Hines was outside in his yard with his nephew David Wood, David's father Shane Wood, and Ricco Martin. Tr. II, 210:5-25. Todd noticed Mong driving down the street in a Hyundai Sonata; the music in the car was blaring loudly. Tr. II, 212:7-24. Todd saw Mong drive past his house, go around the corner, turn around in the circle lot at the school and saw him making his way back to Todd's house. He thought, "Oh, boy, it's going to happen now."

Todd ran inside to his bedroom, got his gun, and went back outside. He had the gun tucked into the back of his waistband. Tr. II, 214:2-24. When he first walked outside with his gun, Todd saw Mong walking into his driveway. He saw that Mong had a gun in his hand. Tr. II, 218:25-219:12. Todd thought Mong was going to shoot Ricco. Tr. II, 212:25-213:18. When Mong drove past his house the first time, Todd heard Mong rack the gun, chamber a bullet. Tr. II, 219:13-220:10; 223:16-23.

Todd told Mong, "Don't do this." He repeated the warning twice. Then Todd ran into the house. He was inside the house but

standing by the sliding door to his home and looking outside when he heard Mong fire two shots. Tr. II, 215:4-8; 218:17-24; 228:21-23. He turned around and told Shane to run because Mong was shooting. Shane said, "I'm hit." Tr. II, 218:4-10; 220:14-221:1.

Shane corroborated Todd Hines' account of events. Shane saw Mong drive by, pull up in front of the yard, but then drive on. He watched as Mong went around the corner the school and turned around and came back. Tr. II, 242:10-243:25. This time, Mong stopped in front of the house, got out of the car, and walked to the back of the car. By that time, Todd had gone into the house and come back out. Shane heard Todd say, "Don't Tony, don't." Shane looked and saw that Mong was at the driveway with a gun pulled. Tr. II, 2444:1-20.

Shane did not have any ongoing conflict with Mong; he "had no problems with him at all." Tr. II, 243:4-13. When he saw that Mong had a gun, he did not run because he did not think he had a problem. Shane just turned around to walk back towards the house. He heard a shot and he was hit on the left side of his back. The bullet came out of his arm. Tr. I, 244:21-245:2. At the time he was shot, Shane was approximately six to eight feet from Ricco, who was standing by the

front of the deck. Tr. III, 25:15-27:11; Exh. 10 (photograph); App. ___.

Ricco Martin was outside with Todd Hines, David Woods, and Shane Woods when Mong arrived. He, too, saw Mong drove by, make a U-turn, and come back. Tr. II, 99:7 -100:11. Todd Hines told Ricco to go inside, but he did not. Ricco saw Mong jump out of the car. He saw Mong run behind a tree and shoot. Shane was hit. Tr. II, 100:12-101:21. Ricco believed that Mong was trying to shoot him instead of Shane. Tr. II, 102:20-23.

David Woods saw Anthony Mong drive by the Hines house. Mong gave the men "a little stare down" as he drove by. David saw Mong turn around at the school, then Mong "cranked his music and came back." Tr. II, 174:8-177:1.

David's instincts told him that something was going to happen, so he went to the garage and grabbed a ball bat. He could see in Mong's face that something was going to happen. Tr. II, 177:3-11; 181:14-19. While David was in the garage, he heard a gunshot and heard his uncle say, "He's got a gun," then heard his dad yell, "I'm hit. I'm hit." Tr. II, 177:12-19. David immediately left the garage. He saw that his dad was bleeding and he chased after Mong with the baseball

bat. Mong got back in his car really quickly and sped off. Tr. II, 177:14-179:1; 180:5-12.

In his trial testimony, Mong denied that he had a gun with him and denied that he intended to shoot anyone at the Hines residence or that he intended to fight anyone there and denied that he shot at anyone at the Hines residence. Tr. IV, 41:8-22. He testified that he was storing a red Cadillac at the Hines residence. Todd Hines had planned to help Mong and Madison fix up the car. After Mong and Madison broke up, Mong wanted his car back. Tr. IV, 20:16-23:24. Mong testified that he went to Hines' house on May 31, 2018 and talked to Todd Hines about getting the car back. Todd told him to come back on the weekend because Madison had the title and keys to the car and she was not home. Tr. IV, 23:25-24:17.

Mong testified that after he got off work on June 1, 2018, he and Brandon Henlon were riding around and Mong decided to go get his Cadillac. Tr. IV, 24:21-29-30:1. Mong testified that when he got to the Hines residence, he saw Todd Hines, Ricco Martin, and Shane and David Woods all sitting outside. He pulled up in front of the house and parked behind a big tree in the yard. He told Henlon to stay in the car and then he got out with his cell phone in his hand.

Mong testified that he saw that Todd had a gun. He saw Ricco grab the gun, so Mong ducked behind the tree. Tr. Iv, 32:16-36:12; 43:6-13.

While he was behind the tree, Mong testified, he heard one shot fired from the direction of the men in the Hines' yard. Then, he heard a second shot. That shot was fired from behind Mong, from his car. Mong ran back to the car and drove off. Tr. Iv, 37:8-38:25; 82:9-17. Mong saw that Henlon had a gun in his hand. Tr. IV, 39:1-8. No other witness at the scene reported seeing a passenger in the car Mong drove that night.

Mong was afraid that someone would come after him or shoot him, so he stayed in a hotel until morning, then a friend drove him to Las Vegas, where his mother lived. He testified that he was afraid and also that his mother was sick and he wanted to visit her. Tr. IV, 39:19-40:25. He claimed that he did not know that Shane Woods was shot; he did not learn that Shane Woods had been injured until a day or two after he arrived in Las Vegas. He testified that he did not try to contact the police in Iowa because Henlon was his best friend and had saved his life and he did not want to get him in trouble. Tr. IV, 42:15-43:5; 73:15-22; 81:13-20; 82:22-25.

Mong was arrested in Las Vegas two months after Shane Woods was shot. Tr. IV, 79:21-23. Henlon died before Mong's trial. Tr. IV, 55:12-15. Mong never told the police that Henlon shot the second shot until after Henlon had died. Tr. IV, 89:9-90:6

The jury was free to disbelieve Mong's testimony that the shot that hit Shane Woods was fired by Brandon Henlon. *Shanahan*, 712 N.W.2d at 135. By its verdict the jury showed that it did so.

The evidence overwhelmingly proved that it was Anthony Mong who shot Shane Woods. It also overwhelmingly proved the necessary intent elements. The evidence showed that Mong was angry with Ricco Martin and threatened to shoot him. About two weeks later Mong found Ricco at Todd Hines' home and tried to carry out that threat, though his aim was off. Mong's specific intent was shown by his earlier threats and by the fact that Mong first drove by the house and glared at the men outside, then turned around, parked, and got out with a gun. Mong ignored the entreaties from Todd Hines not to shoot, stayed at the scene even when he saw Todd also had a gun, and shot his weapon in the direction of Ricco Martin and Shane Woods. Thus, even though Mong's intent to kill, his intent to seriously injure, and his intent to injure or cause fear or anger was directed at Ricco

Martin, Mong was properly convicted of attempting to murder Woods of intimidation of Woods with a dangerous weapon, and willful injury of Woods causing bodily injury. *State v. Harlow*, 886 N.W.2d 106 (Iowa Ct. App. 2016) (Affirming Harlow's conviction for assault where the evidence showed Harlow inadvertently struck the baby in the face and gave the baby a black eye while assaulting the baby's mother, who was holding the baby at the time of the assault.). Mong's challenge to the sufficiency of the evidence should be rejected.

CONCLUSION

The Court should affirm Anthony Alexander Mong's convictions.

REQUEST FOR NONORAL SUBMISSION

Oral argument is unlikely to assist the Court in deciding the issue raised on appeal. Therefore, the State waives oral argument. However, if appellant is granted oral argument, counsel for appellee desires to be heard in oral argument, as well.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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Dated: September 8, 2020

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1998 WL 541975 (U.S.) (Appellate Brief)
Supreme Court of the United States.

Patrick KNOWLES, Petitioner, v. STATE of Iowa, Respondent.

No. 97-7597.
October Term, 1997.
Aug. 24, 1998.

On Writ Of Certiorari To The Supreme Court Of Iowa

BRIEF FOR RESPONDENT

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*i COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Iowa statutes authorize peace officers either to make a custodial arrest or to issue a citation in lieu of arrest for nearly any offense. Iowa Code section 805.1(4) provides that "the issuance of a citation ... does not affect the officer's authority to conduct an otherwise lawful search." The Iowa Supreme Court has interpreted that provision to authorize a full search incident to arrest where officers have probable cause to make a custodial arrest but forego a highly intrusive custodial arrest and, instead, elect to issue a citation.

The questions presented are:

1. Does Iowa Code section 805.1(4) violate the Fourth Amendment by authorizing search incident to issuance of a citation where the statute conditions search upon the existence of probable cause to arrest and statutory authority to make a custodial arrest?

2. Does the exclusionary rule apply to the fruits of a search conducted incident to issuance of a citation where the officer relied on a state statute which authorizes such search?

3. Is Knowles precluded from challenging the search in this case due to his failure to seek review of the final judgment in a companion case which involved an identical challenge to the same search which is being challenged in this proceeding?

West Headnotes (3)

*ii TABLE OF CONTENTS

*iv TABLE OF AUTHORITIES

*1 OPINIONS BELOW

State v. Knowles, 569 N.W.2d 601 (Iowa 1997) (J.A. 30).

State v. Knowles, 570 N.W.2d 255 (Iowa 1997) (table) (unpublished per curiam) (Addendum 1).

JURISDICTION

Jurisdiction to review the decision of the Iowa Supreme Court is conferred by 28 U.S.C. § 1257(a). The petition for certiorari was filed on January 20, 1998, within ninety days of the October 22, 1997 decision of the Iowa Supreme Court, and is therefore timely under Supreme Court Rule 13.

Knowles, however, did not seek review of a companion decision of the Iowa Supreme Court entered on September 17, 1997, upholding Knowles' conviction for ordinance violations. That unpublished decision rejected the identical challenge to the admission of evidence from the same search. *State v. Knowles*, Addendum 1. On June 29, 1998, Respondent State of Iowa filed a motion to dismiss the writ as improvidently granted based on the preclusive effect of this final judgment. That motion was denied on August 12, 1998.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment Four:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be *2 violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Iowa statutes:

804.7 Arrests by peace officers.

A peace officer may make an arrest in obedience to a warrant delivered to the peace officer; and without a warrant:

1. For a public offense committed or attempted in the peace officer's presence.

2. Where a public offense has in fact been committed, and the peace officer has reasonable ground for believing that the person to be arrested has committed it.

3. Where the peace officer has reasonable ground for believing that an indictable public offense has been committed and has reasonable ground for believing that the person to be arrested has committed it.

4. Where the peace officer has received from the department of public safety, or from any other peace officer of this state or any other state or the United States an official communication by bulletin, radio, telegraph, telephone, or otherwise, informing the peace officer that a warrant has been issued and is being held for the arrest of the person to be arrested on a designated charge.

5. If the peace officer has reasonable grounds for believing that domestic abuse, as defined in section 236.2, has occurred and has *3 reasonable grounds for believing that the person to be arrested has committed it.

6. As required by section 236.12, subsection 2.

Iowa Code section 804.7 (1995).

805.1. Issuance of citation—release

1. Except for an offense for which an accused would not be eligible for bail under section 811.1 or a violation of section 708.11 [the stalking statute], a peace officer having grounds to make an arrest may issue a citation in lieu of making an arrest without a warrant or, if a warrantless arrest has been made, a citation may be issued in lieu of continued custody.

4. The issuance of a citation in lieu of arrest or in lieu of continued custody does not affect the officer's authority to conduct an otherwise lawful search. The issuance of a citation in lieu of arrest shall be deemed an arrest for the purpose of the speedy indictment requirements of R.Cr.P. section 27, subsection 2, paragraph "a", Ia.Ct.Rules, 3rd ed.

6. When a citation is not issued for an offense for which a citation is authorized, the arrested person may be released pending initial appearance on bail or on other conditions determined by pretrial release guidelines. When an arrested person furnishes bail, the officer then in charge of the place of detention shall secure it in safekeeping and shall see that it is forwarded to *4 the office of the clerk of court during the clerk's next regular business day.

Iowa Code section 805.1 (1995).

STATEMENT OF THE CASE

A. STATUTORY BACKGROUND:

Iowa law provides officers with the option to make a custodial arrest or to issue a citation for nearly any offense, ranging from very minor traffic offenses to very serious crimes, including most felonies. Iowa Code §§ 804.7, 805.1(1), 805.1(6) (1995). Section 805.1(4) provides that issuance of a citation does not affect the officer's authority to conduct an otherwise lawful search. Iowa Code section 805.1(4) (1995).

B. FACTS:

The facts are not contested. On March 9, 1996, Newton police officer Ronald Cook observed Patrick Knowles speeding 43 miles per hour in a 25 miles per hour zone. J.A. 11-14. Officer Cook stopped Knowles' car and obtained Knowles' driver's license and registration, then returned to his patrol car and requested a computer check on Knowles' license. Officer Cook was informed that Knowles had a valid license and that there was no outstanding warrant for his arrest. Officer Cook, although aware that he had statutory authority to make a custodial arrest, then wrote a speeding citation and awaited the arrival of a backup officer. J.A. 11-17. After the backup officer arrived, Officer Cook returned to Knowles' car and gave Knowles the citation.

*5 Contemporaneously with issuance of the citation, the officer searched Knowles' car. J.A. 15, 17-19. During the search of the car, Officer Cook found two cotton gloves under the driver's seat. Inside one of the gloves were a "pot" pipe and a plastic bag containing a green plant material. J.A. 16. The search of Knowles' car led to the filing of both state and municipal charges.

C. PROCEDURAL HISTORY:

As a result of the search of his car, Knowles was charged with possession of a controlled substance and prohibited acts by a registrant (keeping marijuana in a motor vehicle) in violation of Iowa Code sections 124.401(3) and 124.402(1)(e). J.A. 2-5. He moved to suppress the evidence found in his car on the ground that the statute which authorized the search, Iowa Code section 805.1(4), violated the Fourth Amendment to the United States Constitution. J.A. 6-8. After his motion to suppress was denied, Knowles stipulated to the minutes of testimony and waived his right to a jury trial. J.A. 20-23. He was found guilty of both crimes and sentenced to concurrent ninety-day jail terms. J.A. 26-29. It is these convictions which are at issue in the instant certiorari proceeding.

As a result of the same search, Knowles was separately charged with possession of drug paraphernalia, in violation of a municipal ordinance. Knowles also sought in those proceedings to suppress the evidence obtained during the search of his car. His motion to suppress was denied and he was found guilty. Addendum 1.

Knowles timely appealed his convictions to the Iowa Supreme Court. Knowles moved to consolidate his cases *6 on appeal. His application to consolidate the appeals stated that "[b]oth appeals involved the exact same facts and issues." Addendum to Motion to Dismiss Writ 1. The State resisted consolidation because there were separate trials below and consolidation "would lead to confusion as to the facts and issues." Addendum to Motion to Dismiss Writ 2-3. The Iowa Supreme Court denied the motion to consolidate. In his separate appeals, Knowles unsuccessfully raised an identical challenge to the March 9 search. Addendum 1; J.A. 30.

In a per curiam opinion issued September 17, 1997, the Iowa Supreme Court affirmed the municipal ordinance conviction and rejected Knowles' constitutional challenge to the search. Addendum 1. Knowles did not seek review by certiorari of that decision.

On October 22, 1997, in an en banc ruling, the Iowa Supreme Court upheld Knowles' convictions for violations of state laws prohibiting possession of marijuana and keeping a controlled substance in an automobile. J.A. 30. The Court held that Iowa Code section 805.1(4) provides authority to search when a violation has occurred that would constitute grounds for arrest. J.A. 32. The Court further held that section 805.1(4) does not offend the Fourth Amendment. J.A. 33.

The Court refused to consider Knowles' argument that the statutory authorization of custodial arrest for speeding violated the Fourth Amendment because Knowles had not raised that argument in his motion to suppress. J.A. 33. Knowles does not raise that claim in this certiorari proceeding. Pet. Br. at 24.

On January 20, 1998, Knowles filed a petition for certiorari from the October 22, 1997 decision. The only *7 question presented in the petition is a facial challenge to section 805.1(4). The petition for writ of certiorari was granted on March 23, 1998.

On June 29, 1998, the State of Iowa filed a motion to dismiss the writ as improvidently granted because Knowles had not sought review of the companion decision rejecting defendant's identical challenge to the same search as is challenged in this proceeding. This Court denied the motion on August 12, 1998.

SUMMARY OF ARGUMENT

Iowa Code section 805.1(4) (1995) authorizes law enforcement officers to conduct a search contemporaneously with issuance of a citation where the officer has probable cause to arrest but elects to issue a citation and release the suspect. The scope of the search authorized under section 805.1(4) is the same as that constitutionally permitted for searches incident to custodial arrest.

I.

Knowles makes a facial challenge to the statute. Under *Sibron v. New York*, 392 U.S. 40 (1968), Knowles is precluded from making a facial Fourth Amendment challenge to a statute authorizing warrantless searches. Knowles does not raise a challenge to the statute as it applies to him. Consequently, Knowles presents no question for review.

If the Court reaches Knowles' Fourth Amendment challenge to Iowa Code section 805.1(4), Knowles must show that there is no case in which the statute may *8 constitutionally be applied. Knowles cannot meet that heavy burden. He has impliedly conceded that the statute can be constitutionally applied in some contexts, *i.e.*, where a citation is issued for an offense other than a traffic offense; and where a citation is issued in lieu of continued detention after a custodial arrest has been made. Even if Knowles has not conceded, he cannot show that there is no case in which section 805.1(4) could be constitutionally applied.

II.

A. The Court has long recognized that searches incident to lawful arrest are permissible under the Fourth Amendment. Such searches are *per se* reasonable under the Fourth Amendment as they are based upon probable cause to arrest.

B.1. Search incident to citation is a constitutionally valid subcategory of search incident to arrest. Iowa Code section 805.1(4) complies with the Fourth Amendment as the statute:

(1) authorizes search incident to citation only where the officer has probable cause to arrest and is statutorily authorized to make a custodial arrest;

(2) furthers the same justifications underlying search incident to custodial arrest, i.e. officer safety and preservation of evidence;

(3) promotes the privacy concerns which underlie the Fourth Amendment as it encourages officers to cite and release suspects rather than effecting much more intrusive custodial arrests; and,

*9 (4) establishes a bright-line rule which is clear and easily applied by officers in the fluid, often confusing, circumstances surrounding detention of criminal suspects.

Therefore, search incident to citation is *per se* reasonable under the Fourth Amendment where there is probable cause to arrest.

B.2. If section 805.1(4) is not deemed *per se* reasonable, a balancing test applies. The Court balances the State's interest in searching against the intrusion on protected privacy interests. Because the searches authorized by the challenged statute are conditioned upon probable cause, there can be no doubt that the statute complies with the Fourth Amendment.

The validity of that conclusion is reinforced by an examination of the particular interests at stake. The intrusion on suspects' privacy interests is limited. That is because Iowa law enforcement officers have authority to make a custodial arrest, and to search incident to that arrest, in any case where a citation might be issued. On the other hand, the State has a weighty interest in searching in order to protect officer safety and preserve evidence. That interest clearly outweighs any intrusion on the privacy of suspects.

B.3. The permissible scope of a search incident to citation is the same as for a search incident to custodial arrest. The scope of the search must be limited to the rationales which underlie the search. Search incident to citation, like search incident to custodial arrest, is justified by the need to protect officer safety and to prevent destruction of evidence. Those objectives can only be met through a full search; a *Terry*-type *10 search would not be sufficient to protect officers or prevent the destruction of evidence.

B.4. The Court should issue a bright-line rule authorizing a search whenever a citation is issued and there is probable cause to arrest. Determining whether it is reasonable to believe that a particular suspect is likely to use a weapon or destroy evidence is a difficult question of law and fact. That determination must be made frequently, quickly and in a wide variety of factual circumstances. Under those circumstances, the protections of the Fourth Amendment can be realized only if police act under a clear rule which permits officers to accurately predetermine whether a search is permitted.

B.5. Iowa Code section 805.1(4) permits searches only where there is probable cause to arrest. The requirement of probable cause is sufficient to prevent random, suspicionless searches, prevent expansion of officers' authority to search and curb potential abuses of police power.

III.

A. To the extent that Knowles may be raising a challenge to Iowa Code section 805.1(4) as it applies to him, the search of Knowles' car was lawful as it was based upon probable cause to arrest Knowles.

B. Further, even if the search was unlawful, the exclusionary rule does not apply as the search was conducted in good faith reliance on the validity of section 805.1(4).

*11 Knowles has failed to carry his burden to establish that Iowa Code section 805.1(4) violates the Fourth Amendment. That section is constitutionally reasonable as it is based upon probable cause and because the State's interest in searching outweighs any impact on suspects' privacy interests. Consequently, Knowles' convictions should be affirmed.

ARGUMENT

Knowles makes a facial challenge to the validity of Iowa Code section 805.1(4) (1995). He contends that a statutory grant of authority to search based upon the issuance of a citation violates the Fourth Amendment to the United States Constitution. The Iowa Supreme Court properly rejected that claim, holding that a search incident to citation is a lawful search incident to arrest and does not offend the Fourth Amendment where the officer has probable cause and statutory authorization to make a custodial arrest. The decision of the Iowa Court should be affirmed.

I. KNOWLES' FACIAL CHALLENGE TO IOWA CODE SECTION 805.1(4) SHOULD NOT BE PERMITTED BUT, IF THE COURT REACHES THE MERITS OF THAT CLAIM, KNOWLES CANNOT MEET HIS BURDEN TO SHOW THAT THE STATUTE COULD NEVER BE CONSTITUTIONALLY APPLIED.

Knowles challenges Iowa Code section 805.1(4) on its face; his facial challenge should not be permitted. This Court refused to review a "stop-and-frisk" law on its face *12 in *Sibron v. New York*, 392 U.S. 40, 59 (1968), finding facial review under the Fourth Amendment to be an "abstract and unproductive exercise."

> The constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case.

Id. Thus, Knowles cannot challenge the validity of section 805.1(4) on its face. Instead, he is limited to challenging the statute as it applies to him. Because Knowles has not made an "as applied" challenge to the statute, he presents no issue for review, and therefore his convictions should be affirmed.

Knowles' challenge is precluded for a second reason. Prior to the decision in this case, the Iowa Supreme Court rejected an identical challenge by Knowles to section 804.1(5); that case arose out of the same search at issue here. Addendum 1. Knowles did not seek review of that decision. That earlier, final decision on the same issue is conclusive in this proceeding. *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981); Restatement Second of Judgments § 14, comment a; § 27, comment 1 (1981); 18 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4404.

If the Court chooses to reach Knowles' facial challenge, Knowles still must carry a heavy burden. He must show that the statute could *never* be lawfully applied. *Skinner v. Railway Labor Exec. Ass'n*, 489 U.S. 602, 632 n. 10 (1989) (involving a facial challenge to a federal regulation authorizing drug and alcohol testing of railway employees), citing *Bell v. Wolfish*, 441 U.S. 520, 560 (1979). *13 Any overbreadth of the statute is not ground for reversing the judgment below. *Sibron*, 392 U.S. at 59, n. 20. Knowles cannot meet his burden to show that section 805.1(4) could not be constitutionally applied. In fact, Knowles has impliedly conceded that the statute can be constitutionally applied in some situations.

First, Knowles' statement of the question presented and his brief on the merits challenge section 805.1(4) only as it applies to issuance of a traffic citation. Pet. Br. at i. Apparently, he does not even challenge the constitutionality of search incident to citations for non-traffic offenses.

Second, section 805.1(4) authorizes search incident to citation in lieu of arrest as well as incident to citation in lieu of continued custody after an arrest has been made. Iowa Code § 805.1(4) (1995). Knowles concedes that a search incident to a custodial arrest is constitutional, pointing to custody as the essential factor underlying the reasonableness of searches incident to arrest. Pet. Br. at 8-9, 24. In making that concession, Knowles necessarily concedes that section 805.1(4) can be constitutionally applied in some situations, i.e., in cases where a custodial arrest and search incident to arrest are made and the suspect is later released on a citation.

Knowles has in effect conceded the constitutionality of section 805.1(4). Even if Knowles has not conceded, however, he has not met his burden to establish that search incident to citation violates the Fourth Amendment.

***14 II. IOWA CODE SECTION 805.1(4) COMPLIES WITH THE FOURTH AMENDMENT AS IT AUTHORIZES SEARCHES INCIDENT TO CITATION ONLY WHERE THERE IS PROBABLE CAUSE TO ARREST AND CONSTITUTES A LESSER INTRUSION ON FOURTH AMENDMENT INTERESTS THAN CUSTODIAL ARREST AND INCIDENT SEARCH.**

The Iowa Supreme Court has interpreted Iowa Code section 805.1(4) as authorizing officers to make a search of the same scope as a search incident to custodial arrest upon issuance of a citation. J.A. 33; *State v. Doran*, 563 N.W.2d 620 (Iowa 1997). Knowles claims that such searches do not fall within the search incident to arrest exception to the warrant requirement, and that they violate the Fourth Amendment. He argues that when a citation is issued, officers may not search unless one of the recognized exceptions to the warrant requirement applies. Knowles' claim should be rejected.

Reasonableness is the standard by which Iowa Code section 805.1(4) must be judged. That statute fully satisfies the Fourth Amendment as it authorizes searches only where the officer has probable cause to arrest and is statutorily authorized to make a custodial arrest. Searches under the statute are, therefore, merely a subset of searches incident to arrest. Thus, searches incident to citation, like the more familiar searches incident to custodial arrest, are *per se* reasonable and an exception to the warrant requirement. In addition, if a balancing test is applied, the State's interests in searching, i.e., officer safety and preservation of evidence, outweigh the affected privacy interests—particularly in light of the fact *15 that Iowa officers may unquestionably make a custodial arrest and incident search. Therefore, Knowles' challenge to section 805.1(4) should be rejected.

Knowles' claim is made against the following statutory background. Iowa peace officers are authorized to make custodial arrests for any "public offense." *See* Iowa Code §§805.1(6) and 804.7 (1995). Alternatively, an officer having grounds to make an arrest for a bailable offense [1] may forego arrest and, instead, elect to issue a citation. If an arrest has already been made, the officer may issue a citation in lieu of continued detention. Iowa Code § 805.1(1) (1995). The challenged statute then provides that "issuance of a citation ... does not affect the officer's authority to conduct an otherwise lawful search." Iowa Code § 805.1(4) (1995).

The Iowa Supreme Court has interpreted section 805.1(4) as creating a bright-line rule authorizing a search, of the same scope as the Constitution authorizes for a search incident to a custodial arrest, when an officer issues a citation. *16 *State v. Knowles*, 569 N.W.2d 601 (Iowa 1997); *State v. Doran*, 563 N.W.2d 620 (Iowa 1997); *State v. Cook*, 530 N.W.2d 728, 731-732 (Iowa 1995); *State v. Meyer*, 543 N.W.2d 876, 879 (Iowa 1996). The Court recognized that officers in Iowa have statutory authority to make a custodial arrest in every case, and found that, "'[t]o the extent the officer elects to ... pursue a lesser intrusion [than custodial arrest], he has a right to condition that election on certain aspects of detention and search which are conducive to the officer's safety.'" *Doran*, 563 N.W.2d at 623, *quoting*, *State v. Becker*, 458 N.W.2d 604, 607 (Iowa 1990). *See also Knowles*, J.A. 33. In Knowles' case, the Court went on to hold that the authority to search conferred by section 805.1(4) does not extend beyond that permitted by the Fourth Amendment. J.A. 33. *Accord Doran*, 563 N.W.2d at 623.

In determining whether section 805.1(4) is consistent with the Fourth Amendment, the Court determines whether the authorized searches are "reasonable." In making a reasonableness determination, the Court looks to two sources: the traditional common-law protections against unreasonable searches and seizures; [2] and a *17 balancing of the government's interest requiring the intrusion against the individual's privacy interests. [3] However, "[w]ith rare exceptions ... the result of that balancing is not in doubt where the search or seizure is based upon probable cause." *Whren v. United States*, 517 U.S. 806, 816 (1996).

Where probable cause has existed, the only cases where the Court has found it necessary to actually perform a balancing analysis have involved searches or seizures conducted in an

> extraordinary manner, unusually harmful to an individual's privacy or even physical interests—such as, for example, seizure by means of deadly force, ... unannounced entry into a home, ... entry into a home without a warrant, ... or physical penetration of the body.

Whren, 517 U.S. at 818 (internal citations omitted).

Because no such "extraordinary" means of executing a search is at issue in this case, there is no need to perform the traditional Fourth Amendment balancing analysis. The requirement that the search be predicated *18 upon probable cause to arrest is, by itself, sufficient to satisfy the Fourth Amendment. Even if a balancing analysis is performed, Iowa Code section 805.1(4) passes Fourth Amendment muster.

A. SEARCHES INCIDENT TO ARREST ARE *PER SE* REASONABLE UNDER THE FOURTH AMENDMENT.

Searches incident to arrest are *per se* reasonable under the Fourth Amendment as they are based on probable cause to arrest. The validity of such searches is unquestionable.

"It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment." *United States v. Robinson*, 414 U.S. 218, 224 (1973). The right to search the person of an arrestee "has been regarded as settled from its first enunciation"; the right to search the area within the control of the arrestee has likewise been long-recognized. *Id. Accord*, *Agnello v. United States*, 269 U.S. 20, 30 (1925) (the right to make a warrantless search incident to arrest "is not to be doubted."); *Weeks v. United States*, 232 U.S. 383, 392 (1914) (the right of the State to make a warrantless search incident to arrest "was always recognized under English and American law ..."). The authority to search incident to arrest, and the reasons for such searches, have been "repeatedly" affirmed. *Robinson*, 414 U.S. at 226. Throughout the series of cases in which the Court addressed the issue of the proper scope

of a search incident to arrest, "no doubt has been expressed as to the unqualified authority of the arresting authority to *19 search the person of the arrestee." *Robinson,* 414 U.S. at 225. [4] Those cases establish that search incident to arrest is not only an exception to the warrant requirement but "reasonable" under the Fourth Amendment. *Robinson,* 414 U.S. at 225-26; [5] *accord Gustafson v. Florida,* 414 U.S. 260, 263-264 (1973).

The proper scope of a search incident to arrest is similarly well established. The arresting officer may search the person arrested in order to remove any weapons that the suspect might use to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, the arresting officer may search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. *Chimel v. California,* 395 U.S. 752, 762-763 (1969). Officers may also lawfully search the area within the arrestee's "immediate control." *Id.* at 763. When an occupant of an automobile has been arrested, the area within his control includes the entire passenger compartment of that automobile, including any *20 containers therein. *New York v. Belton,* 453 U.S. 454, 460-461 (1981).

A search incident to arrest is not limited by the offense which gave rise to the search. Rather, the Court has noted that the decision whether to search is "necessarily a quick ad hoc judgment" and has established a bright-line rule permitting a search even if it is apparent that no weapon or evidence of the crime would be found. *Robinson,* 414 U.S. at 235.

> The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment: that intrusion being lawful, a search incident to the arrest requires no additional justification.

New York v. Belton, 453 U.S. at 461, *quoting, United States v. Robinson,* 414 U.S. at 235.

It is beyond dispute that search incident to custodial arrest comports with the Fourth Amendment. Search contemporaneous with issuance of a citation is equally lawful where the officer has probable cause and statutory authority to make a custodial arrest. Under these circumstances, probable cause to arrest establishes the reasonableness of both searches incident to custodial arrest and those incident to citation.

***21 B. SEARCHES INCIDENT TO CITATION COMPLY WITH THE FOURTH AMENDMENT: THEY ARE *PER SE* REASONABLE; FURTHER, UNDER A BALANCING TEST, THE STATE'S INTERESTS IN PROTECTING OFFICERS AND PRESERVING EVIDENCE OUTWEIGH THE AFFECTED PRIVACY INTERESTS.**

Searches incident to citation are *per se* reasonable under the Fourth Amendment; that reasonableness is not dependent on the relative strength of the State's need to search and the affected privacy interest. Even if a balancing test is applied, however, the State's interests greatly outweigh the impact of a search incident to citation upon a suspect's Fourth Amendment rights.

1. Searches incident to citation are a type of search incident to arrest and are *per se* reasonable as it is the existence of probable cause, and not the fact of custody, which justifies searches incident to arrest.

Searches incident to citation are merely a subcategory of search incident to arrest and are constitutional for the same reasons as are searches incident to custodial arrest. Probable cause to arrest is the critical factor giving rise to the reasonableness of both types of searches. Because Iowa Code section 805.1(4) requires probable cause to arrest, that statute complies with the requirements of the Fourth Amendment.

That it is probable cause to arrest which underlies the reasonableness of searches incident to arrest is supported by the Court's rulings which permit a search incident to arrest to *precede* custodial arrest so long as there is probable cause to arrest at the time of the search. *See Peters v.* *22 *New York,* 392 U.S. 40, 66-67 (1968) (search of burglary suspect prior to formal arrest was proper as the officer had probable cause to arrest at the time the search was made); *Rawlings v. Kentucky,* 448 U.S. 98, 111-12 (1980) (upholding a search of defendant even though the search preceded defendant's formal arrest, stating, "where the formal arrest followed quickly on the heels of the challenged search ... we do not believe it particularly important that the search preceded the arrest rather than vice versa.").

In his concurring opinion in *Sibron,* Justice Harlan makes a strong case for the State's position that it is the presence of probable cause, and not the fact of custody, that justifies a search incident to arrest.

Of course, the fruits of a search may not be used to justify an arrest to which it is incident, but *this means only that probable cause to arrest must precede the search. If the prosecution shows probable cause to arrest prior to a search of a man's person, it has met its total burden.* There is *no* case in which a defendant may validly say, "Although the officer had a right to arrest me at the moment when he seized me and searched my person, the search is invalid because he did not in fact arrest me until afterwards."

Sibron, 392 U.S. at 77 (Harlan, J., concurring) (emphasis added).

In *Whren,* the Court noted that the existence of probable cause to arrest is dispositive of the reasonableness of a search or seizure.

For the run-of-the-mine case, which this surely is, ... there is no realistic alternative to *23 the traditional common law rule that probable cause justifies a search and seizure.

Here the district court found the officers had probable cause to believe that petitioner had violated the traffic code. That rendered the stop reasonable under the 4th Amendment, and the evidence admissible....

Whren, 517 U.S at 819. Searches under section 805.1(4) are conditioned upon probable cause to arrest. Thus, under the rationale of *Whren,* searches under the statute are reasonable.

2. The State's interest in searching incident to issuance of a citation outweighs the impact on suspects' privacy interests, particularly in Iowa where officers may elect in any case to make custodial arrests and contemporaneous searches.

If the Court finds that searches incident to citation are not *per se* constitutional based upon probable cause to arrest, a balancing analysis is applied. *See Whren,* 517 U.S. at 816-17; *New York v. Class,* 475 U.S. 106, 116 (1986); *Terry v. Ohio,* 392 U.S. 1, 21 (1968); *Delaware v. Prouse,* 440 U.S. 648, 654 (1979). The outcome of the analysis is unchanged— Iowa Code section 805.1(4) fully complies with the Fourth Amendment.

***24 (a) The State's interests in searching suspects for officer safety and to preserve evidence are strong.**

The State's interest in searching suspects before release is very strong. Searches incident to citation advance the same interests as do searches incident to custodial arrest: protecting officer safety and preventing destruction of evidence. *Chimel v. California,* 395 U.S. 752, 762-63 (1969). Those interests are equally at stake in searches incident to citation and searches incident to arrest.

In weighing the competing interests, the Court considers whether the legislature authorized a particular police practice. Where, as here, a legislative body has authorized a search, the Court is "reluctant" to decide that the search is unreasonable. *United States v. Watson,* 423 U.S. 411, 416 (1976); *United States v. DiRe,* 332 U.S. 581, 585 (1948); *and cf. Illinois v. Krull,* 480 U.S. 340, 351-52 (1987).

The Court has previously recognized the dangers posed to police during automobile stops. *Maryland v. Wilson,* 519 U.S. 408, ----, 117 S.Ct. 882, 885 (1997) ("Regrettably, traffic stops may be dangerous encounters. In 1994 alone, there were 5,762 officer assaults and 11 officers killed during traffic pursuits and stops."); *Pennsylvania v. Mimms,* 434 U.S. 106, 110-11 (1977) (noting the "inordinate risk confronting an officer as he approaches a person seated in an automobile."); *Adams v. Williams,* 407 U.S. 143, 148, n. 3 (1972) (noting that according to one study, approximately 30% of police shootings occurred when a police officer approached a suspect seated in an *25 automobile, *citing* Bristow, Police Officer Shootings—A Tactical Evaluation, 54 Crim. L.C. & P.S. 93 (1963)); *New York v. Class,* 475 U.S. at 116 (noting the danger to officer safety when a suspect is seated in an automobile with possible access to a dangerous weapon); *Robinson,* 414 U.S. at 234 ("Nor are we inclined, on the basis of what seems to us to be a rather speculative judgment, to qualify the breadth of the general authority to search incident to lawful custodial arrest on an assumption that persons arrested for the offense of driving while their licenses have been revoked are less likely to possess dangerous weapons than are those arrested for other crimes."). In fact, the Court's concern with officer safety is so great that it has even permitted intrusion on the privacy interests of persons merely accompanying a suspect. *Maryland v. Wilson,* 519 U.S. at ----, 117 S.Ct. at 886 (holding that an officer making a traffic stop may order passengers to get out of the car pending completion of the stop).

Investigatory stops pose a clear and present danger to law enforcement officers. The most recent statistics available from the Federal Bureau of Investigation report that in 1996, fifty-five officers were killed in the line of duty. Of those, eleven officers (or one-fifth of those killed) were slain while enforcing traffic offenses. Another twelve were killed while investigating suspicious persons or circumstances. Uniform Crime Reports, 1996, United States Department of Justice, Federal Bureau of Investigation, "Law Enforcement Officers Killed and Assaulted," p. 3. In contrast, during that same year only eight officers were killed by robbery suspects and three by suspects during "drug-related situations." *26 *Id.* A significant number of officer injuries are also attributable to traffic offenders: 4,333 (9%) of the 46,695 reported non-fatal assaults on officers in 1996 were committed by suspected traffic offenders. *Id.* at 65-66, 69.

It is not surprising that persons stopped for citable offenses would assault officers, attempt to escape, or destroy evidence. While Knowles attempts to portray all such cases as "minor" traffic stops, that is not in fact the case. Iowa permits the use of citations for even serious felonies. [6] Moreover, conviction on many "minor traffic offenses" can result in very serious penal and extrajudicial consequences. [7]

The mere fact that one is stopped and cited for a violation may pose a serious threat to offenders who have reason to fear being identified, such as persons with outstanding warrants, persons who (unbeknownst to the officer) are fleeing after committing other, more serious offenses, [8] or persons who are evading creditors or others. *27 In fact, initially the suspect may not know of what crime he is suspected. During that period of uncertainty, the incentive to destroy evidence or effect an escape will exist equally in cases which ultimately end in issuance of a citation as in those which end in custodial arrest. Thus, issuance of a "mere" citation, in fact, creates strong incentives for a suspect to flee or destroy evidence of the crime for which he was cited as well as evidence of other, as yet undetected, crimes.

(b) The impact of section 805.1(4) on privacy interests is minimal.

While the State's interest in searching is very strong, the impact of section 805.1(4) on suspects' privacy is limited. Iowa law enforcement officers have authority to make custodial arrests. Given that fact, no additional invasion of privacy results from a search of the same scope made incident to a citation rather than to arrest. *Cf. Pennsylvania v. Mimms,* 434 U.S. 106, 111 (1977) (the additional intrusion of asking a driver of already lawfully detained vehicle to get out of the vehicle is *de minimus*); *Maryland v. Wilson,* 519 U.S. 408, ----, 117 S. Ct. 882, 886 (1997) (the additional intrusion when a passenger in a lawfully stopped car is required to exit the vehicle is "minimal"). Searches incident to citation are actually much *less* intrusive than the available alternative of search incident to custodial arrest.

*28 In fact, the practice of issuing citations is a reform aimed at minimizing the severity of warrantless intrusions on Fourth Amendment interests and limiting the length of pretrial detentions. *See, e.g.,* ABA Standards for Criminal Justice §§ 10-2.1, 10-2.2, 10-2.3 (2d ed. rev.1985); Model Code of Pre-Arraignment Procedure § 120.2 (1975); LaFave, Search and Seizure: A Treatise on the Fourth Amendment, 3d ed., section 5.2(h).

(c) Issuance of a citation combined with a contemporaneous search is less intrusive on suspects' privacy than is custodial arrest and search.

The intrusion on privacy interests occasioned by a search incident to citation is much less than would result from an officer's election to make a custodial arrest and search. Given the State's strong interest in searching, that minimal intrusion is "reasonable" under the Fourth Amendment.

This Court has recognized as constitutionally "reasonable" some searches and seizures "significantly less intrusive than an arrest"—even when made in the *absence* of probable cause to search or seize. *Michigan v. Summers,* 452 U.S. 692, 697-698 (1981) (upholding the detention of a resident of a house during execution of a search warrant for the premises). *See also Terry v. Ohio,* 392 U.S. 1 (approving a weapons frisk for weapons as a justifiable response to an officer's reasonable belief that a suspect is armed and dangerous); *Adams v. Williams,* 407 U.S. 143 (1972) (approving the forcible seizure of a suspect to investigate an informant's tip that the suspect was armed *29 and carrying narcotics); *United States v. Brignoni-Ponce,* 422 U.S. 873 (1975) (special law enforcement problems confronted by roving border patrols were adequate to support vehicle stops based on the agents' awareness of specific articulable facts indicating the vehicle contained illegal aliens). *New York v. Class,* 475 U.S. at 118-19 (the Court noted that the detention of a suspect and limited search of his car was "far less intrusive than a formal arrest, which would have been permissible ... under New York law ...").

The rationale of those cases is even more persuasive in Knowles' case. Section 805.1(4) requires probable cause and the intrusion upon citizens' privacy which results from search incident to citation is actually less intrusive than the other available alternative, i.e., search incident to custodial arrest.

3. The permissible scope of a search incident to citation is the same as for a search incident to custodial arrest; it is not limited to the scope of a *Terry* search.

Petitioner argues that where police lack probable cause to *search,* searches incident to citation should be limited to a *Terry* [9] weapons sweep. However, search incident to citation is based upon probable cause to *arrest* and serves a function quite different from a *Terry* search. Thus, the limitations of *Terry* do not apply to search incident to citation.

The scope of a search must be strictly tied to and justified by the circumstances which make initiation of *30 the search reasonable. Thus, the scope of a *Terry* search must be "strictly circumscribed by the exigencies which justify its initiation"—officer safety. Consequently, a search for weapons in the absence of probable cause to arrest must be limited to that which is necessary to discover weapons which might be used to harm the officer or others nearby and is less than a "full" search. *Terry,* 392 U.S at 25-26.

In contrast, search incident to arrest is a "wholly different kind of intrusion" from a *Terry* search and serves a "quite different" purpose. *Robinson,* 414 U.S. at 228. There is a fundamental difference between a *Terry* protective frisk and a search incident to arrest, a distinction in purpose, character, and extent—probable cause to arrest. *Robinson,* 414 U.S. at 227-28. The bases for searches incident to arrest are two-fold: the need to disarm suspects for officer safety and the need to preserve evidence. *Id.* Those rationales also apply where a citation is issued in lieu of custodial arrest and justify searches incident to citation of the same scope as would be permitted if a custodial arrest were made.

The need to perform a more expansive search incident to arrest than in *Terry* situations arises from essential differences in the two types of encounters:

> An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its law obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows. The protective search for weapons, on the other hand, constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person.

*31 *Robinson,* 414 U.S. at 228, *quoting, Terry v. Ohio,* 392 U.S. at 25-26. Because of these essential differences, *Terry* affords no basis to carry over to a probable-cause arrest the limitations placed on a stop-and-frisk search permissible without probable cause. *Robinson,* 414 U.S. at 228. Issuance of a citation, like arrest, initiates a prosecution with attendant restrictions on freedom of movement. Thus, search incident to citation is a wholly different kind of intrusion from a *Terry* search.

The first justification for the authority to search incident to a lawful arrest is officer safety. *Robinson,* 414 U.S. at 234. That justification applies as well in cases where a citation is issued.

The Court in *Robinson* rejected the suggestion that the traditional scope of a search incident to arrest should be restricted on the "questionable" assumption that one arrested for a traffic offense is less likely to possess dangerous weapons than are those arrested for other crimes. Instead, the Court focused not on the nature of the crime but on the extended exposure which follows the taking of a suspect into custody and transporting him to the police station, as compared to the "relatively fleeting" contact resulting from a *Terry*-type stop. *Robinson,* 414 U.S. at 234-235.

Similarly, the scope of a search incident to citation should not be restricted to a *Terry* search. Like custodial arrest, issuance of a citation initiates a (possibly very serious) prosecution, with attendant restrictions on suspects' freedom, including the threat of possible future incarceration. Because a citation signals the start of a prosecution, it creates the same incentives to make a violent escape or destroy evidence as does a custodial *32 arrest. Further, although the contact between officers and suspects during issuance of a citation might be less extensive than where a custodial arrest is made, contact is much more extended than in a brief *Terry* stop. A citation also involves contact at very close range.

The Court has recognized that concern with officer safety is strongly present even absent custodial arrest. "If a suspect is 'dangerous', he is no less dangerous simply because he is not arrested." *Michigan v. Long,* 463 U.S. 1032, 1050 (1983).

> [I]f a suspect is not placed under arrest, he will be permitted to reenter his automobile, and he will then have access to any weapons inside. [Citation omitted.] Or, ... the suspect may be permitted to reenter the vehicle before the Terry investigation is over, and again, may have access to weapons. In any event, we stress that a Terry investigation ... involves a police investigation 'at close range' [citation omitted] when the officer remains particularly vulnerable in part *because* a full custodial arrest has not been effected....

Michigan v. Long, 463 U.S at 1052 (emphasis in original). *Accord New York v. Class,* 475 U.S. at 116 (where in evaluating the reasonableness of the detention of a suspect and limited search of his car, which uncovered a gun, the Court noted the danger inherent in returning a suspect to his car and, thus, permitting him possible access to a dangerous weapon and the benefit of partial concealment provided by the car's exterior); *Pennsylvania v. Mimms,* 434 U.S. at 110 (recognizing the risk to officer safety when approaching a suspect seated in an automobile).

*33 The Court has refused to make a case-by-case analysis of the danger to officer safety presented by custodial arrests. The authority to search does not depend upon the likelihood in a particular case that weapons would actually be found; neither is it of any moment that the officer did not have a subjective fear of the suspect or suspect that the suspect was armed. *Gustafson v. Florida,* 414 U.S. 260, 265-66 (1973). The Court should likewise decline to require a case-by-case determination of danger in the context of searches incident to citation.

The second justification for searches incident to arrest is to prevent destruction of evidence. That interest justifies an "automatic" search. *Michigan v. Long,* 463 U.S. 1032, 1049, n. 14 (1983). While this interest does not exist in the *Terry* context, it is strongly present in cases where citations are issued. That difference dictates that the *Terry* limitations do not apply to searches incident to citation.

The need to preserve evidence is at least as great when a citation is issued as when a custodial arrest is made. The use of citations in Iowa is not limited to those types of offenses for which arguably there is little possibility that evidence will be uncovered. [10] The probability that evidence will be found is unrelated to the manner in which prosecution is initiated. Further, in both contexts, the suspect is made aware that charges are being pressed *34 and that officers might seek evidence to support those charges. There is, in fact, a special need to search where a suspect is cited and released. The fact that the suspect is released gives him access to any evidence which might exist and unfettered opportunity to hide or destroy it.

Professor LaFave rejects Knowles' argument that a *Terry*-type search marks the limit of searches incident to citation. LaFave notes that, although the citation process is currently used primarily for minor traffic offenses, there is no reason why citations should not be used for all minor offenses. He points out that the use of citations is "most desirable" and has been recommended in recent law reform efforts. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, 3d ed., § 5.2(h). *And see* ABA Standards for Criminal Justice Sections 10-2.1, 10-2.2, 10-2.3 (2d ed. rev.1985); Model Code of Pre-Arraignment Procedure section 120.2 (1975); Unif.R.Crim.P. 211, 10 U.L.A. 16 (1992). In fact, Iowa law exceeds the reforms recommended by Professor LaFave.

Reform would be impeded if officers are permitted to conduct only a *Terry*-type search when a citation is issued, "for then it would never be feasible to give a citation for any offense where there is no need for custody of the defendant ... yet a need to acquire evidence from his person." He thus concludes that the "better view" is that a search is no less lawful when incident to an arrest not of a "custodial" nature. *Id.*

Professor LaFave finds support for his position in section 10-2.4 of the ABA standards (2d ed. rev.1985) which provides that "the defendant's subsequent release on citation should not affect the lawfulness of any search *35 incident to the arrest." [11] He also points to the Model Code, which permits search incident to arrest [section 330.1] together with release on citation after arrest [section 120.2(2)], and to the commentary to the Uniform Rule 211(b)(3), which quotes the ABA position. LaFave, *supra* at n. 153.

Some lower courts have begun to accept this position as well. *See State v. Greenslit,* 151 Vt. 225, 559 A.2d 672 (1989) (probable cause to arrest is the rationale which underlies search incident to arrest; thus the Fourth Amendment permits a search notwithstanding that a citation was issued in lieu of custodial arrest); *People v. Blond,* 884 P.2d 312 (Colo.1994) (noncustodial arrest for an offense for which statute barred custodial arrest entitled police to make a search for evidence "equal in scope to a full search incident to a custodial arrest" although scope of search is tied to the offense for which the officer has probable cause to arrest).

LaFave's reasoning is particularly compelling in this case because Iowa law not only allows the use of citations *36 for all "minor" offenses, but also for more serious misdemeanors and even for some felonies. In those situations, the need to search for evidence and weapons is self-evident.

4. A bright-line rule authorizing search incident to citation is necessary to ensure uniform application of the protections of the Fourth Amendment.

Knowles' approach would require the Court to determine the constitutionality of searches on a case-by-case basis. This Court has flatly rejected any suggestion that there must be a case-by-case determination of whether a search incident to arrest was justified by one of the underlying reasons for the doctrine. Instead, the Court has found that "[a] custodial arrest of a suspect based upon probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification." *Robinson,* 414 U.S. at 235; *Accord Gustafson v. Florida,* 414 U.S. at 266. The Court should also reject Knowles' suggestion that searches incident to citation be evaluated on a case-by-case basis.

While the Court has generally eschewed *per se* rules in the Fourth Amendment context, *see, e.g., Ohio v. Robinette,* 519 U.S. 33 (1996), it has not always done so, *Maryland v. Wilson,* 519 U.S. at ----, 117 S.Ct. at 885, n. 1. The Court has been particularly willing to set forth bright-line rules in the context of decisions that must be made by officers in the field, including searches incident to arrest. *See, e.g.,* *37 *United States v. Robinson,* 414 U.S. 218 (1973) (search may be conducted incident to any custodial arrest); *Gustafson v. Florida,* 414 U.S. 260 (1973) (same); *New York v. Belton,* 453 U.S. 454 (1981) (bright-line rule establishing the scope of a search of a vehicle incident to arrest); *Pennsylvania v. Mimms,* 434 U.S. 106 (1977) (officer as a matter of course may order the driver of a lawfully stopped vehicle to exit the vehicle); *Michigan v. Long,* 463 U.S. 1032 (1983) (a *Terry* search may include the driver of the car and the passenger compartment); *Maryland v. Wilson,* 519 U.S. 408 (1997) (police officer making a traffic stop may order passengers out of the vehicle pending completion of the stop).

The Court's repeated use of bright-line search rules may be explained by the purpose of the Fourth Amendment. As Professor LaFave has noted, Fourth Amendment doctrine is primarily intended to regulate the police in their day-to-day activities. LaFave, "Search and Seizure: A Treatise on the Fourth Amendment," 3d ed. § 5.2(c). Thus, search and seizure rules should be expressed in terms of bright-line rules which will be applied to all cases of a certain type, regardless of the factual circumstances presented in a particular case. LaFave cautions that "we must resist 'the understandable temptation to be responsive to every relevant shading of every relevant variation of every relevant complexity' lest we end up with 'a Fourth Amendment with all of the character and consistency of a Rorschach blot.' " *Id., quoting,* Amsterdam, Perspectives on the Fourth Amendment, 58 Minn.L.Rev. 349, 397-398 (1974).

A bright-line rule is particularly appropriate to searches incident to citation, which involve relatively *38 minor intrusions into privacy, occur with greater frequency than any other type of police search, and require officers to make difficult legal decisions of a type that virtually defy on-the-spot analysis. LaFave, *supra,* § 5.2(c). In such circumstances, the security guaranteed by the Fourth Amendment can only be realized if the police are acting under a clear set of rules which will make it possible in most cases to determine beforehand whether an invasion of privacy is justified in the interest of law enforcement. *Id.*

The decision to search incident to arrest or citation cannot be made with the degree of forethought and reflection possible in most other search decisions. Instead, the decision to search must be made immediately upon the, often unanticipated, decision to arrest or cite. The fact of arrest or citation gives rise to an immediate need to search because, at the moment of arrest or citation, the suspect is motivated to conceal, destroy or furtively abandon any incriminating evidence. At that moment also arises incentive to flee, with or without the use of a weapon. *LaFave, supra,* § 5.2(c). Because the decisions to cite or arrest and to search must be made quickly, frequently, and under an infinite number of factual situations, a bright-line rule is necessary to ensure that officers can accurately determine when searches are permitted, and when they are not. Only then can the protections afforded by the Fourth Amendment be uniformly and consistently applied in practice.

***39 5. Search incident to citation is conditioned upon probable cause to arrest; that standard is sufficient to curb police discretion and prevent discriminatory enforcement or random, suspicionless searches.**

Petitioner claims that section 805.1(4) authorizes random, suspicionless searches and will lead to discriminatory enforcement of the criminal code. That claim should be rejected. The existence of probable cause to arrest is the essential factor which curbs police discretion and ensures that the Fourth Amendment's protections will be provided to all suspects.

Knowles attempts to equate search incident to citation to general warrants and writs of assistance in colonial America and England. Pet. Br. at 5-6. This analogy is faulty: the critical and obvious difference is that a search incident to citation requires that the officer first have probable cause to make an arrest. That requirement is sufficient guarantee against the dangers of random, suspicionless searches the Fourth Amendment was designed to prevent.

Further, unlike persons affected by general warrants and writs of assistance, traffic offenders control their own fate: their actions determine whether an officer may stop, cite and search them. Knowles and his amicus imply that it is virtually impossible to avoid violating one of the "myriad" traffic regulations. Pet. Br. 20; Amicus Brief of the A.C.L.U. 8-9. However, while it may be tempting to speed, for example, it is no more impossible to comply with that traffic law than it is impossible to comply with other laws. Surely, Petitioner and his amicus would not apply this same logic to income tax violations, petty theft *40 or other crimes which are widely believed to be pervasive in our society.

Next, Knowles contends that search incident to citation would expand the authority of officers to make warrantless searches, and thus violate the Fourth Amendment. However, Iowa's statute regarding search incident to citation does not expand officers' authority to search. Knowles concedes, as he must, that without that statute, officers who wished to search could simply make a custodial arrest and search incident thereto. Pet. Br. at 24. *See* State v. Meyer, 543 N.W.2d 876, 878 (Iowa 1996) *citing* State v. Becker, 458 N.W.2d 604, 607 (Iowa 1990) (officers are permitted "virtually unlimited discretion in deciding when to make an arrest, issue a citation, or give a warning.").

In reality, any expansion in the authority of Iowa peace officers to search results, not from section 805.1(4), but from Iowa Code sections 804.1(6) and 804.7 (1995), which authorize officers to make custodial arrests for any public offense. Knowles did not, however, raise a Fourth Amendment challenge in the district court to Iowa's statutory authorization of custodial arrest for speeding. The Iowa Supreme Court therefore deemed that issue waived. J.A. 33. He does not challenge that section in this proceeding; in fact, he concedes that a custodial arrest would be constitutional. Pet. Br. at 24-25.

Moreover, any such claim would be futile. In *Whren,* the petitioner argued that some traffic stops, even if based upon probable cause, violated the Fourth Amendment. In dicta, the court noted that, "we are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly *41 violated that [the] infraction itself can no longer be the ordinary measure of the lawfulness of enforcement. And even if we could identify such exorbitant codes, we do not know by what standard (or by what right) we would decide, ... which particular provisions are sufficiently important to merit enforcement." *Whren,* 517 U.S. at 818-19. [12]

Knowles also asserts that "Iowa's search incident to citation statute provides police with no standards or guidance as to when and against whom it should be invoked. A police officer making a traffic stop has complete discretion to search or not to search." Pet. Br. at 23-24. In this regard, Petitioner fails to make a principled distinction between a search incident to custodial arrest, which Petitioner concedes is constitutional, [13] and a search incident to citation.

An officer making a custodial arrest, like an officer making a search incident to citation, has discretion as to whether or not to actually search. Notwithstanding that discretion, the Court has never placed any restraints on an officer's discretion to conduct a search incident to custodial arrest. To the contrary, the Court has refused to limit officers' discretion to make a stop or an arrest, *42 *Whren,* 517 U.S. at 806, or to search, *Robinson,* 414 U.S. at 235-36.

An argument similar to Knowles' was raised, and rejected, in *Whren.* There, in dicta, the Court noted that probable cause affords the " 'quantum of individualized suspicion' necessary to ensure that police discretion is sufficiently constrained." *Whren,* 517 U.S. at 817-18, *quoting, United States v. Martinez-Fuerte,* 428 U.S. 543, 560 (1976) and *Delaware v. Prouse,* 440 U.S. 648, 654-655 (1979).

Knowles gives no valid reason why that discretion should be limited where a citation is issued but not where a custodial arrest is made. Furthermore, limiting officers' discretion to search incident to citation would not have any appreciable effect on officer discretion. Officers would retain discretion to stop and to make custodial arrests and searches.

Petitioner's proposal would have little or no effect upon the number of searches conducted pursuant to traffic stops and would actually require officers to make more severe intrusions into suspects' freedom by requiring custodial arrests. If search incident to citation is deemed to violate the Fourth Amendment, the unfortunate effect will be to create incentive for officers who fear for their safety or for the destruction of evidence to make custodial arrests where they might otherwise have simply issued a citation. This Court has previously rejected such a countereffective interpretation of the Fourth Amendment. *California v. Acevedo,* 500 U.S. 565, 574-575 (1991) (if police know that they may open a bag only if they search the entire car, they may search more extensively than they otherwise would).

*43 Petitioner attempts to compensate for the weakness in his analysis by suggesting that "the requirement of an arrest as a predicate to a search will at least temper the officer's discretion because the required documentation [of a custodial arrest] will allow assessment of how and against whom this discretion is exercised." Pet. Br. at 24. That argument is unpersuasive.

First, Petitioner does not elaborate on the type of documentation which would be created where a custodial arrest and search are made or how any such documentation would protect a suspect's Fourth Amendment rights. Second, if Knowles is suggesting that the time required to effect a custodial arrest might act as a factor limiting the number of arrests which would be made for minor offenses, that suggestion is both ineffective and unprincipled.

Knowles' proposal is ineffective as it ignores the reality that even if a custodial arrest is initially made, the suspect could be released on citation immediately after a search is conducted. *See* Iowa Code section 805.1(1) (authorizing issuance of citations in lieu of continued custody in situations where a custodial arrest had already been made). His proposal is also unprincipled. The practice of searching incident to citation must stand or fall on its reasonableness; the number of such searches conducted is simply irrelevant to the analysis.

Knowles' ultimate objection is that section 805.1(4) permits discriminatory law enforcement. In *Whren,* this Court rejected a similar argument in the context of allegedly pretextual traffic stops. *Whren,* 517 U.S. at 813. The court has also rejected that argument in the context of searches incident to custodial arrest for minor offenses. *44 *Robinson,* 414 U.S. at 234-35; *Gustafson,* 414 U.S. at 263-264. Petitioner has not demonstrated how the danger of discriminatory law enforcement practices in the context of search incident to citation is different from, or greater than, the danger of pretextual stops or pretextual arrests.

Ultimately, the potential for discriminatory law enforcement, while a grave concern, is simply a problem for which the Fourth Amendment is not the proper remedy. While the Constitution prohibits selective enforcement of the law based upon considerations such as race, the constitutional basis for objecting to deliberately discriminatory enforcement of the laws is the Equal Protection Clause rather than the Fourth Amendment. *Whren,* 517 U.S. at 813.

Should the alleged potential for discriminatory application of the search incident to citation doctrine be realized, the best remedy lies in state and federal legislation and police policy guidelines. Non-judicial processes are better suited to determining the precise scope of any problem and to tailoring an appropriate remedy. Among the nearly infinite number of non-judicial responses should discriminatory enforcement become a problem are: police regulations or legislation to limit the offenses for which search incident to citation is authorized or to limit the circumstances under which such searches may be carried out; citizen review boards of police search and seizure actions; and, civil actions for damages. *See Whren v. United States* and Pretextual Traffic Stops: The Supreme Court Declines to Plumb Collective Conscience of Police, Christopher R. Dillon, 38 B.C.L. Rev. 737, 764-70 (1997).

*45 Knowles has failed to carry his burden to show that Iowa Code section 805.1(4) can never be constitutionally applied. The statute fully complies with the Fourth Amendment as it conditions search upon probable cause to arrest and statutory authorization to make a custodial arrest. Searches conducted under section 805.1(4) are a type of search incident to arrest and are *per se* reasonable. Alternatively, such searches are reasonable because the State's strong interests in searching cited suspects to protect officer safety and prevent destruction of evidence outweigh the minimal intrusion on Fourth Amendment interests. Therefore, Knowles' facial challenge to Iowa Code section 805.1(4) fails.

III. TO THE EXTENT THAT PETITIONER CHALLENGES IOWA CODE SECTION 805.1(4) AS IT APPLIES IN HIS CASE, THE SEARCH COMPLIED WITH THE FOURTH AMENDMENT AND, EVEN IF IT DID NOT, THE EXCLUSIONARY RULE DOES NOT APPLY TO THE FRUITS OF THE SEARCH AS THE OFFICER RELIED IN GOOD FAITH ON THE VALIDITY OF THE STATUTE.

It is the State's position that Knowles has not raised a challenge to Iowa Code section 805.1(4) as it applies to him; rather, he has raised only a facial challenge to the statute. If his brief can be read as challenging the statute as applied, any such claim lacks merit for two reasons. First, as shown above, searches under the statute are based upon probable cause to arrest and are, therefore, valid in every case. Second, if the search did violate the Fourth Amendment, the exclusionary rule does not apply *46 as the officer searched in good faith reliance on the statute authorizing the search.

A. THE SEARCH OF KNOWLES' CAR WAS A PROPER SEARCH INCIDENT TO ARREST AS IT WAS BASED UPON PROBABLE CAUSE TO ARREST.

Knowles has failed to show that the search of his car, which led to the discovery of marijuana, violated the Fourth Amendment. Knowles does not contest that the officer had probable cause to arrest him for speeding and the record clearly establishes that fact. J.A. 12-14. As shown above, the existence of probable cause, standing alone, was sufficient to permit the officer to search Knowles and his car.

B. EVEN IF THE SEARCH OF KNOWLES' CAR VIOLATED THE FOURTH AMENDMENT, THE EXCLUSIONARY RULE DOES NOT APPLY AS THE OFFICER SEARCHED IN GOOD FAITH RELIANCE ON IOWA CODE SECTION 805.1(4) WHICH AUTHORIZED THE SEARCH.

Further, even if the search in this case violated the Fourth Amendment, the fruits of the search should not be excluded.

Officer Cook searched Knowles' car in good faith reliance on an Iowa statute, Iowa Code section 805.1(4). That reliance was reasonable: section 805.1(4) expressly authorizes search incident to issuance of a citation in lieu of arrest where the search would be constitutional if made pursuant to arrest. In addition, the officer had *47 probable cause to make an arrest and could do so under Iowa law. Significantly, on the date of the stop in this case, the Iowa Supreme Court had upheld searches in the face of Fourth Amendment challenges, finding that the searches were valid searches incident to citation. *See* Iowa Code § 805.1(4) (1995); *State v. Meyer,* 543 N.W.2d 876, 879 (Iowa 1996); *State v. Cook,* 530 N.W.2d 728, 732 (Iowa 1995).

Thus, even if this Court were to accept the claim that Iowa Code section 805.1(4) violates the Fourth Amendment, the seized evidence is not subject to exclusion [14] as the searching officer relied in good faith on a statute which authorized the search. *Michigan v. De Fillippo,* 443 U.S. 31, 40 (1979); *Illinois v. Krull,* 480 U.S. 340 (1987). *See also United States v. Leon,* 468 U.S. 897, 920-922 (1984) (The exclusionary rule does not apply when the officer reasonably relied on an invalid search warrant); *Arizona v. Evans,* 514 U.S. 1 (1995) (exclusionary rule does not apply where erroneous information leading to search resulted from clerical error of court employees).

The reasons for the exclusionary rule do not apply where the *legislature* erred in authorizing unconstitutional warrantless searches. The suppression of evidence obtained by an officer relying on a statute would have little deterrent effect, which is the "prime purpose" of the exclusionary rule. *Krull,* 480 U.S. at 347-349. The exclusionary rule was designed to deter police misconduct, not *48 that of legislators. *Id.* at 350-351. Invalidation of the statute, not the exclusion of evidence, is the greatest deterrent to unconstitutional legislation. *Id.* at 352.

> The purpose of the exclusionary rule is to deter unlawful police action. No conceivable purpose of deterrence would be served by suppressing evidence which, at the time it was found ..., was the product of ... a lawful search. To deter police from enforcing a presumptively valid statute was *never* remotely in the contemplation of even the most zealous advocate of the exclusionary rule.

De Fillippo, 443 U.S. at 38, n. 3. As noted in *Krull,* cases in which the Court applied the exclusionary rule to the fruit of searches carried out in reliance on unconstitutional statutes did not involve assertion of a good faith exception to the exclusionary rule. Those cases also differed from this case in that the statutes in question authorized warrantless searches without probable cause. *Krull,* 480 U.S. at 355, n. 12.

In the case at bar, Iowa Code section 805.1(4) requires officers to have probable cause to arrest, authorizes a less intrusive alternative to custodial arrest, and then permits the officer to search *if he could have searched had he chosen to arrest.* Thus, section 805.1(4) is consistent with *De Fillippo* in that it does not authorize officers to search in investigations where they otherwise could not search; rather, it allows officers to reserve their existing right to search incident to arrest while at the same time authorizing a less intrusive means of commencing the prosecution process.

*49 "Because the exclusionary rule precludes consideration of reliable, probative evidence, it imposes significant costs: it undeniably detracts from the truthfinding process and allows many who would otherwise be incarcerated to escape the consequences of their actions." *Pennsylvania Board of Probation and Parole v. Scott,* 524 U.S. 357, 118 S. Ct. 2014, 2020 (1998). This "costly toll" on the law enforcement and adjudicative goals should not be imposed unless its imposition would significantly deter unconstitutional searches. *Id.* The exclusionary rule only applies in "those instances where its remedial objectives are thought most efficaciously served," *Arizona v. Evans,* 514 U.S. at 11; *Pennsylvania Board of Probation and Parole v. Scott,* 524 U.S at ----, 118 S. Ct. at 2023 (Souter, J., dissenting).

As held in *Krull,* there is little or no deterrence where evidence is excluded because of an unconstitutional statute. Further, there are little or no incremental benefits to be gained from "punishing" officers for issuing a citation rather than taking the offender into custody. In rural states like Iowa, where the 99 county courthouses and jails are often many miles apart, custodial arrest of drivers imposes a significant burden on law enforcement and the arrested driver. The core values of the Fourth Amendment are further impinged by a rule forcing officers to engage in a custodial arrest in order to avoid after-the-fact litigation over measures taken to protect themselves in the fluid and dangerous situations that occur in automobile stops based on probable cause of a crime.

Any challenge to Iowa Code section 805.1(4) as it applies to Knowles would be groundless. Even if the record established that the search of Knowles' car violated the Fourth Amendment, the exclusionary rule *50 would not apply. As a result, Knowles' convictions should be affirmed.

CONCLUSION

Knowles' convictions should be affirmed.

***1A IN THE SUPREME COURT OF IOWA**

No. 212/96-1426

Filed September 17, 1997

STATE OF IOWA,

Appellee,

vs.

PATRICK KNOWLES,

Appellant.

Appeal from the Iowa District Court for Jasper County, Thomas W. Mott and Dale B. Hagen, Judges.

Defendant convicted of possession of drug paraphernalia in violation of local ordinance appeals via grant of discretionary review and challenges evidentiary rulings allowing evidence of a marijuana pipe obtained by a search incident to the issuance of a traffic citation. AFFIRMED.

Maria Ruhtenberg of Paul Rosenberg & Associates, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Steve Johnson, County Attorney, and Christine Branstad, Assistant County Attorney, for appellee.

Considered by Harris, P.J., Carter, Andreasen, and Ternus, JJ., and Schultz, * S.J.

*2a PER CURIAM.

Defendant, Patrick Knowles, was convicted of possession of drug paraphernalia in violation of a local ordinance of the City of Newton. He appeals via grant of discretionary review and challenges evidentiary rulings that allowed evidence of a marijuana pipe that had been obtained by a search of his person and automobile incident to the issuance of a traffic citation. Defendant divides his grounds for reversal into three contentions: (1) the lack of probable cause to search under the Fourth Amendment to the federal constitution; (2) the invalidity of a purported statutory grant of authority to search based on the issuance of a traffic citation; and (3) the contention that it was unreasonable to detain the defendant after the issuance of the citation had been completed. Because we find that the controlling issues of law have been determined adversely to appellant in *State v. Doran,* 563 N.W.2d 620 (Iowa 1997), we affirm the judgment of the district court.

We need not consider defendant's first contention as existing separate and distinct from the second. The State does not contend that there was probable cause to search under the warrant standards of the Fourth Amendment. Defendant was stopped by police for driving at an excessive speed. There were no circumstances indicating that evidence of crime existed on his person or in his automobile. The officer's election to search his person and his car was based solely on the perceived authority to search conferred by Iowa Code section 805.1(4) (1995). We thus proceed to the consideration of defendant's second contention.

*3a We have consistently interpreted section 805.1(4) as providing authority to search when a traffic violation has occurred that would constitute grounds for an arrest. *State v. Meyer,* 543 N.W.2d 876, 879 (Iowa 1996); *State v. Becker,* 458 N.W.2d 604, 607 (Iowa 1990). In *Doran* we upheld this statutory grant of authority to search in the face of challenges based on the Fourth Amendment and article I, section 8 of the Iowa Constitution. Defendant urges us to reconsider our *Doran* holding, but we decline the invitation.

Defendant's final argument, based on an alleged unreasonable detention following the issuance of the citation is without merit. The further detention was for purposes of making the search, which we have found to have been lawful under section 805.1(4). We have considered all issues presented and conclude that the judgment of the district court should be affirmed.

AFFIRMED.

Footnotes

FN
* Counsel of Record

1 Section 805.1(1) (1995) authorizes use of citations for any bailable offense, except violations of section 708.11 (stalking). Iowa limits nonbailable offenses to the following:

> Any class "A" felony, murder, felonious assault, sexual abuse in the second or third degree, kidnapping, robbery in the first degree, arson in the first degree, or burglary in the first degree, or any felony included in section 124.401, subsection 1, paragraph "a" [manufacture, possession and possession with intent to deliver a controlled substance].

Iowa Code §§ 805.1(1), 811.1, 708.11, 124.401(1)(a) (1995).

2 *See e.g. Steagald v. United States,* 451 U.S. 204, 217 (1981) ("The common law may, within limits, be instructive in determining what sorts of searches the Framers of the Fourth Amendment regarded as reasonable."); *Whren v. United States,* 517 U.S. 806, 819 (1996) (following "the traditional common-law rule that probable cause justifies a search and seizure."); *Gerstein v. Pugh,* 420 U.S. 103, 111 (1975) ("Both the standards and procedures for arrest and detention have been derived from the Fourth Amendment and its common-law antecedents."); *Weeks v. United States,* 232 U.S. 383, 389-396 (1914) (looking to the common-law of England and the United States in evaluating the constitutionality of searches incident to arrest).

3 *See, e.g., Whren,* 517 U.S. at 816 (Fourth Amendment cases involve a balancing of all relevant factors); *Delaware v. Prouse,* 440 U.S. 648, 654 (1979) (the permissibility of a particular law enforcement practice is judged by balancing its intrusion against its promotion of legitimate governmental interests); *Camara v. Municipal Court,* 387 U.S. 523, 536-37 (1967) ("there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails."); *Terry v. Ohio,* 392 U.S. 1, 21 (1968) (in determining reasonableness, the Court balances the need to search against the invasion which the search entails).

4 *Citing Carroll v. United States,* 267 U.S. 132 (1925); *Marron v. United States,* 275 U.S. 192 (1927); *Go-Bart v. United States,* 282 U.S. 344 (1931); *United States v. Lefkowitz,* 285 U.S. 452 (1932); *Harris v. United States,* 331 U.S. 145 (1947); *Trupiano v. United States,* 334 U.S. 699 (1948); *United States v. Rabinowitz,* 339 U.S. 56 (1950); *Preston v. United States,* 376 U.S. 364 (1964); *Chimel v. California,* 395 U.S. 752 (1969).

5 Knowles concedes that the Iowa statutes authorizing custodial arrest for any offense, [*see* Iowa Code §§ 805.1(6), 804.7 (1995)], are constitutional. Pet. Br. at 23-24. Therefore, it is only the common-law authority to *search* that bears discussion; the power to *arrest* at common-law is not at issue in this case.

6 Examples would include: second degree burglary and first degree theft, both punishable by up to ten years in prison and a fine of $500 to $10,000, *see* Iowa Code §§ 713.4, 714.2(1), 902.9(3) (1997); and, auto theft, punishable by imprisonment for up to five years and a fine $500.00 to $7,500.00, *see* Iowa Code §§ 714.1(2), 902.9(4) (1997).

7 For example, in Iowa, driving while one's license is barred is an aggravated misdemeanor, carrying a penalty of not to exceed two years in prison and a fine of between $500 and $5,000 and an additional two to six year license bar. Iowa Code §§ 321.561, 321.555, 903.1(2), 321.555 (1995).

8 For example, both serial killer Ted Bundy and terrorist Timothy McVeigh were apprehended after being identified during a "routine" traffic stop. *Bundy v. State,* 455 So.2d 330, 336 (Fla.1984); Stephan Braun, "Trooper's Vigilance Led to Arrest of Blast Suspect," L.A. Times, A-1 (April 22, 1995) (convicted Oklahoma City bomber arrested after traffic stop).

9 *Terry v. Ohio,* 392 U.S. 1 (1968).

10 Knowles argues that "there is no evidence a motorist could destroy to avoid prosecution for speeding." Pet. Br. at 12. However, no such categorial conclusion can be drawn. For example, identification may be raised as an issue at trial and there would often be evidence on the person or in his automobile which would be helpful in proving the identity of the driver.

11 Knowles correctly points out that standard 10-2.3 of the 1986 ABA Standards contained language very similar to Iowa Code section 805.1(4) and that the standard has subsequently been amended. However, the standard as it now exists does not *prohibit* search incident to citation, it merely stops short of affirmatively advocating such searches. Searches incident to citation are clearly consistent with the reforms urged by the American Bar Association and not inconsistent with the current language of standard 10-2.3. These factors undoubtedly led to Professor LaFave's conclusion that the ABA Standards reflect his own view that searches incident to citation are permitted by the Fourth Amendment.

12 The State's power to authorize custodial arrest even for *malum prohibitum* offenses of a type which some might deem minor is supported by common practice. One recent commentator has determined that officers have "unfettered discretion" to arrest for traffic offenses in twenty-six states and can arrest "subject to minimal constraints" in an additional sixteen states. Janet Koven Levit, "Pretextual Traffic Stops: United States v. Whren and the Death of Terry v. Ohio," 28 Loy. U. Chi. L.J. 145, 152 (1996).

13 Petitioner's Brief at 8-9, 24.

14 The exclusionary rule was first developed in Iowa. *State v. Sheridan,* 96 N.W. 730 (1903). Eleven years later, this Court adopted a federal exclusionary rule. *Weeks v. United States,* 232 U.S. 383 (1914).

* Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (1997).

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