STATE 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.

Gina Catherine Badding

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

District Court Judge—Second Judicial District

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

May 27, 1979

4. State your current city and county of residence.

Carroll, Carroll County

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.

The University of Iowa College of Law
Attended August 2001 – May 2004
J.D. *with Distinction*, May 2004

The University of Iowa
Attended August 1997 – May 2001
B.A. in English and Religion *with Honors*, May 2001

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.

Second Judicial District
Position: District Court Judge
Dates: April 1, 2019 to present
Address: Carroll County Courthouse
114 E. 6th St., Suite 5
Carroll, IA 51401
Supervisor: The Honorable Kurt Stoebe (515-332-1806)

Neu, Minnich, Comito, Halbur, Neu & Badding, P.C.
Position: Associate Attorney (January 2013 to December 2015)
Partner (January 2016 to April 2019)
Dates: January 2013 to April 2019
Address: 721 N. Main St.
Carroll, IA 51401
Supervisor: Frank Comito (712-792-3508)

Iowa Court of Appeals
Position: Staff Attorney
Dates: March 2007 to January 2013
Address: Iowa Judicial Branch Building
1111 East Court Avenue
Des Moines, IA 50319
Supervisors: The Honorable Richard Doyle (515-281-8198)
The Honorable Anuradha Vaitheswaran (515-281-5748)

Marks Law Firm, P.C.
Position: Associate Attorney
Dates: August 2005 to March 2007
Address: 4225 University Ave.
Des Moines, IA 50311
Supervisor: Sam Z. Marks (515-276-7211)

Iowa Court of Appeals
Position: Interim Law Clerk
Dates: June 2005 to August 2005
Address: Iowa Judicial Branch Building
1111 E. Court Ave.
Des Moines, IA 50319
Supervisor: The Honorable Van Zimmer

Sixth Judicial District
Position: Law Clerk
Dates: September 2004 to July 2005
Address: Linn County Courthouse
P.O. Box 1468
Cedar Rapids, IA 52406-5488
Supervisors: The Honorable Patrick Grady
The Honorable William Thomas

Dubuque County Attorney's Office
Position: Prosecutor Intern
Dates: May 2003 to August 2003
Address: Dubuque County Courthouse
720 Central Ave.
Dubuque, IA 52001
Supervisor: Alisha Stach

The University of Iowa Hospitals and Clinics
Position: Student Assistant, Pediatric Cardiology
Dates: August 2001 to May 2004 (approx.)
Address: 200 Hawkins Dr.
Iowa City, IA 52242
Supervisor: Jean Gingerich, R.N.

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.

Iowa, 2004

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.

Law Clerk and Staff Attorney Positions (Sept. 2004 – Aug. 2005; March 2007 – Jan. 2013)

While I was a law clerk for the Sixth Judicial District, I worked with thirteen district court judges on a wide variety of civil and criminal cases. I helped research and draft substantive rulings, reviewed and drafted orders regarding routine motions, and prepared memorandums summarizing and analyzing issues presented in motion hearings. It would be difficult to approximate the percentage of time spent in each area of practice when I was clerking since I was exposed to all areas of law in this position.

As a staff attorney for the Iowa Court of Appeals, I performed extensive research on complex issues in appeals from civil, criminal, and juvenile cases. I assisted judges on the court by drafting proposed opinions and bench memorandums, preparing case summaries, and reviewing and editing cases circulated by other staff attorneys and law clerks. I also assisted other staff attorneys in drafting the law clerk manual and presenting law clerk orientation, along with guiding and assisting the law clerks in their work with the court. Like with the law clerk position, it would be difficult to approximate the percentage of time spent in each area of practice because I worked on such a range of cases.

During the times when I was working as a law clerk and staff attorney, I did not have clients. Although I attended court with the judges I was helping, I did not litigate any cases in these positions. In the six years when I was a staff attorney for the Iowa Court of Appeals, I handled hundreds of appellate cases.

Private Practice (Aug. 2005 – March 2007; Jan. 2013 – April 2019)

When I was employed as an associate attorney at Marks Law Firm, P.C. in Des Moines, my caseload was comprised primarily of court-appointed work in criminal, juvenile, postconviction, and appellate cases. I also handled family law cases for the firm, which included dissolutions, custody disputes, and child support matters. I would estimate that about 60% of my time was spent on the court-appointed work detailed above, while the remaining time was spent on family law cases. I was in court almost every day. My clients were generally low income and at critical stages in their lives due to their involvement with the legal system, either because of

pending criminal charges, removal of their children, the ending of relationships, substance abuse issues, mental illness, or a combination of all these things. It was a tough and busy practice but rewarding.

At Neu, Minnich, Comito, Halbur, Neu & Badding, P.C., I was able to engage in a small-town general law practice. I represented a broad range of people from my community across all economic and social levels. My practice included the following areas of law: family, juvenile, criminal, civil litigation (personal injury, insurance defense, land disputes, and will contests), small claims (money judgments and evictions), probate (estates and guardianships/conservatorships), transactional (wills, trusts, real estate contracts, and business contracts), and appellate. Many attorneys in the area referred their appeals to me, which helped me build a vibrant appellate practice. I would estimate that approximately 13% of my practice focused on civil law, 10% criminal, 40% family, 10% juvenile, 10% probate, and 15% appellate. The remaining 2% was administrative law, which included license revocation hearings, child abuse appeals, and social security disability cases.

While at this firm, I was frequently in court with my civil caseload, both for routine hearings and for trials. Before my appointment to the bench, I tried 4 cases to a jury. I was sole counsel on one of the cases, which was a criminal matter, and co-counsel on the others. I tried 57 cases before a judge, all as sole counsel. When I was not in court, I was busy counseling clients about various legal issues, including estate planning, contract drafting, and settlement options.

As far as the appeals that I have handled, I had one before the Iowa Supreme Court and 43 before the Iowa Court of Appeals. I presented oral arguments in 10 of those cases, which was something I loved to do. I was sole counsel in all of these appellate cases.

District Court Judge (April 2019 – present)

Since becoming a district court judge, I have continued to be exposed to a wide range of civil and criminal cases. In the two years since my appointment, I have presided over approximately 60 trials. Of those, 38 were dissolutions, custody disputes, or child support actions, 6 were estate, trust, or guardianship matters, 5 were criminal or postconviction relief actions, and 11 were miscellaneous civil cases. I have tried 5 jury cases. Two of those were civil cases and 3 were criminal. One of the criminal cases was a pilot jury trial in Calhoun County, which took place before jury trials resumed across the state in our first COVID-19 reopening. We did not have an alternate jury selection site available to us in Calhoun County. As a result, we piloted the method of separating the jury pool into two different rooms in the courthouse during jury selection. Because we were able to livestream the proceedings from the courtroom into the overflow room, we were able to pick our jury before noon on the first day of trial.

I have also handled countless motion hearings, guilty pleas, and sentencings. The motion hearings have included summary judgment motions, motions to dismiss, motions to suppress, temporary matters in family law cases, contempt applications, and discovery disputes. These motions at times involve complex issues that take significant time to research, although they are heard in a thirty-minute timeslot on our weekly court service days.

Like with the law clerk and staff attorney positions, it would be difficult to estimate the percentage of time I devote to each practice area as a judge. It's also difficult to estimate the percentage of time I spend on civil versus criminal cases because it varies from county to county. But overall, it's about equal. Administrative actions, such as judicial review petitions, comprise a small percentage of my docket.

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.

During the time when I was in private practice, I would estimate that I handled approximately 15-20 pro bono cases varying in scope and size. Per year, I spent about 50 hours or so on pro bono service.

My last pro bono case involved a young woman who was attempting to terminate a guardianship and conservatorship her parents had put in place. Others included family law cases, as well as some criminal and social security disability cases. I also provided legal advice on a pro bono basis for different nonprofit organizations in my community before becoming a judge.

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.

I was appointed by Governor Kim Reynolds as a district court judge for the Second Judicial District on April 1, 2019. I wound up my practice in the thirty days following my appointment and started my first day as a judge on May 1, 2019. The Second Judicial District is comprised of twenty-two counties. The district is divided into two subdistricts—2A and 2B. My counties are located in 2B and include: Pocahontas, Humboldt, Wright, Sac, Calhoun, Webster, Hamilton, Hardin, Carroll, Greene, Boone, Story, and Marshall. I have rotated through, or tried cases in, all of these counties except for Wright and Marshall.

As a district court judge, I have "exclusive, general, and original jurisdiction of all actions, proceedings, and remedies, civil, criminal, probate, and juvenile, except in cases where exclusive or concurrent jurisdiction is conferred upon some other court, tribunal, or administrative body." Iowa Code § 602.6101. In some of the counties where I am stationed, I handle only class A, B, and C felonies, while in others I handle class D felonies and misdemeanors as well. In all of the counties, I am assigned probate matters and civil cases, which can include dissolutions, custody disputes, personal injuries, and contract disputes.

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.

None as of the time this application was authored. I do have several cases on appeal, however.

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.

Many of the motions to suppress that I have handled in criminal cases involved federal or state constitutional issues. I have attached those opinions, as well as a ruling on a motion to correct an illegal sentence. *See* Att. A. None have been appealed.

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.

None.

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.

None.

ii. 180 days.

None.

iii. 240 days.

None.

iv. One year.

None.

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. Pendleton

a. TITLE OF CASE/VENUE: FECR360158, Webster County (trial venue transferred to Scott County)

b. BRIEF SUMMARY OF CASE: The Defendant, Joshua Pendleton, was charged with the murder and robbery of a well-respected pastor in Fort Dodge in October 2019. Pendleton suffered from schizophrenia and other mental illnesses. Early on in the case, defense counsel filed a motion for a competency hearing. Following an evaluation, Pendleton was found not competent to stand trial. Once competency was restored, the case was reset for trial. Pendleton relied upon an insanity defense at trial, which involved competing experts. The jury ultimately found him guilty of first-degree murder and first-degree robbery. Sentencing is set for June 18, 2021.

c. SUMMARY OF SIGNIFICANCE: I was specially assigned to this case just a few months after my appointment as a district court judge. On top of being a very serious case, it was also highly publicized. The issues presented throughout the case were complex given the early competency issues and later insanity defense. Trying the case outside of my judicial district during the COVID-19 pandemic was also challenging. Despite these challenges, the trial went very smoothly and finished early.

d. NAME OF PARTY YOU REPRESENTED: None. I was the trial judge.

e. NATURE OF PARTICIPATION IN CASE: Because I was specially assigned to the case, I handled all of the motions and issues that arose before trial, as well as the trial itself.

f. DATES OF YOUR INVOLVEMENT: October 2019 to present.

g. OUTCOME OF CASE: Guilty verdict for first-degree murder and first-degree robbery.

h. NAME AND ADDRESS OF CO-COUNSEL: None.

i. NAME OF COUNSEL FOR PARTIES: Douglas Hammerand, Assistant Attorney General, and Ryan Baldridge, Assistant Webster County Attorney for the State; Michelle Wolf and Alessandra Marcucci for the Defendant.

j. NAME OF JUDGE BEFORE WHOM YOU TRIED CASE: Not applicable.

In re Glen Hayden Carlock Supplemental Care Trust

a. TITLE OF CASE/VENUE: TRPR502372, Calhoun County

b. BRIEF SUMMARY OF CASE: This case began as a petition to approve the transfer of structured settlement payment rights from a medical assistance special needs trust. The beneficiary of the trust, Glen Hayden Carlock, was injured when he was a child. His mother, Marie Louise Boudreaux Carlock n/k/a Zinnel, negotiated a personal injury settlement on his behalf. The settlement was approved by a court in Louisiana, and the proceeds were transferred to a trust established in Louisiana for Glen's benefit. Zinnel was the designated trustee.

As part of the settlement, an annuity policy was purchased with the payee listed as the trust. Monthly payments of $5669.99 commenced on January 1, 2016. At some point after the annuity payments began, Glen and Zinnel moved to Iowa where Glen received medical assistance from the state. Because Glen received this medical assistance, the Iowa Department of Human Services

(DHS) became a residuary beneficiary of the trust pursuant to a special statute, as well as the terms of the trust.

In September 2018, a petition was filed on Zinnel's behalf to approve a transfer of the trust's structured settlement rights. No notice was given to DHS. The transfer was approved, which resulted in the trust giving up payments totaling $109,948.68 in exchange for $62,848.08. A second transfer was approved in June 2019. In this transfer, the trust exchanged payments of $63,780 for a lump sum of $26,000.

In October 2019, Zinnel attempted a third transfer of payments from the trust. This time, the proposed amount of payments sought to be transferred was $2,461,732.68 in exchange for $344,159.36. Unlike the previous two transfers, notice was given to DHS. DHS objected to the transfer and argued jurisdiction over the trust was vested exclusively in the district court sitting in probate under Iowa Code chapter 633C. I agreed and granted DHS's motion to dismiss the petition to approve the structured settlement.

Undeterred, Zinnel invoked the jurisdiction of the court sitting in probate in March 2020 so that she could proceed with the structured settlement annuity transfer. DHS responded by filing a motion to remove Zinnel as trustee, along with a request for an accounting from her. I presided over the trial on the motion, which I ultimately granted. A successor trustee was then appointed, preserving the funds left in the trust for Glen and DHS as the residuary beneficiary.

c. SUMMARY OF SIGNIFICANCE: This case was significant because of the initially simple and routine manner in which it was presented. Petitions to approve structured settlement transfers frequently come before the court without much fanfare. Had notice not been given to DHS, the trustee's request to approve the transfer of what appeared to be all of the trust assets may have been approved, leaving both the beneficiary and DHS in the lurch. The case is also significant because of the novel issues it presented, specifically the interplay between the structured settlement protection act and the statute governing medical assistance special needs trusts.

d. NAME OF PARTY YOU REPRESENTED: None. I was the trial judge.

e. NATURE OF YOUR PARTICIPATION IN CASE: I presided over most of the motions filed in both cases, as well as the trial on DHS's motion to remove the trustee.

f. DATES OF YOUR INVOLVEMENT: October 2019 to February 2021.

g. OUTCOME OF CASE: The structured settlement transfer was not approved, the trustee was removed, and a successor trustee was appointed.

h. NAME AND ADDRESS OF CO-COUNSEL: None.

i. NAME OF COUNSEL FOR PARTIES: Matthew Hrubetz, Alan Daut, and David Coco for the trustee; Benjamin Chatman for DHS.

j. NAME OF JUDGE BEFORE WHOM YOU TRIED CASE: Not applicable.

<u>Thorpe v. Hostetler</u>

a. TITLE OF CASE/VENUE: DRCV021211, Greene County

b. BRIEF SUMMARY OF CASE: This case involved a request by a father, Troy Thorpe, to modify the caretaking arrangement for his daughter with Kelsey Hostetler. The initial custody decree was entered in May 2014. The parties' daughter was placed in their joint legal custody and Kelsey's physical care. A little over two years later, Troy filed a petition to modify physical care due in part to Kelsey's multiple relationships, changes in residences, and inconsistent employment. That modification was ultimately resolved in June 2017 by the parties agreeing that

their daughter should be placed in their joint physical care. At the time, both were living in Jefferson.

Soon after this agreement was reached, Kelsey began a relationship with a man in Waukee. Kelsey and the parties' daughter moved there in March 2018. Kelsey did not tell Troy about her new relationship or her move. When Troy found out, Kelsey maintained that she moved to Waukee for a new job, not her new relationship. Kelsey was willing to continue the joint physical care arrangement with Troy, proposing that she drive the parties' daughter back and forth to school in Jefferson during her time with her. Troy was opposed to this plan and sought physical care of the parties' daughter.

c. SUMMARY OF SIGNIFICANCE: This was the first trial I presided over after my appointment to the bench. It sticks out in my mind out because of that and because it was such a difficult decision. Both parties were caring, loving parents who were close to their daughter. There were pros and cons to each of their proposed caretaking arrangements. For instance, Troy was a farmer and trucker who worked long hours during the planting and harvesting seasons while Kelsey's schedule was more flexible. The factor that tipped the scales for me was stability for the child, which could be better provided in Troy's care.

d. NAME OF PARTY YOU REPRESENTED: None. I was the trial judge.

e. NATURE OF YOUR PARTICIPATION IN THE CASE: I was the trial judge.

f. DATES OF YOUR INVOLVEMENT: The case was tried before me on May 15 and 16, 2019.

g. OUTCOME OF CASE: I granted Troy's petition for modification and placed the parties' child in his physical care with visitation for Kelsey. Kelsey filed an appeal, and my decision was affirmed by the Iowa Court of Appeals on May 13, 2020. *See Thorpe v. Hostetler*, 2020 WL 2488205 (Iowa Ct. App. May 13, 2020).

h. NAME AND ADDRESS OF CO-COUNSEL: None.

i. NAME OF COUNSEL FOR PARTIES: Michael Lewis for Petitioner Troy Thorpe, and Tara Hofbauer for Respondent Kelsey Hostetler.

j. NAME OF JUDGE BEFORE WHOM YOU TRIED CASE: Not applicable.

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

Growing up in a small town and attending a Catholic school gave me a sense of service to my community that I have carried with me throughout my legal career. When I was a practicing attorney, I tried to be involved in as many local boards and organizations as possible so that I could help make my community a better place and serve the people in our area. This sense of service has stayed with me as a judge.

To that end, I took over managing family treatment court in Webster County at the beginning of this year. The participants in family treatment courts are parents who are involved in children-in-need-of-assistance proceedings in juvenile court, often due to drug use. The goal of the court is to ensure the safety and well-being of children while offering parents a viable option to reunify with their children. The parents meet each week with a team of providers who are there to offer support to the parents while they attempt to achieve sobriety. I attend the sessions every other week.

Participating in family treatment court has been one of the most rewarding things I've done since becoming a judge. It's allowed me to interact with people involved in the legal system in a way that's difficult to do outside of a family treatment court setting. I'm able to celebrate in their highs and try to help them out of their lows. Because I'm able to see the participants' daily struggles to overcome the obstacles in their way, I'm better able to understand some of the decisions people make that can lead to criminal or other legal trouble. This non-litigation legal experience through the family treatment court constantly reminds me that my role is not just to judge, but to strive to help all who come before me.

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.

Carroll Community School District, Board of Education (held)
September 2015 – April 1, 2019

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.

None.

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: September 2004 – present

Polk County Women's Attorney Association
Member: September 2005 – March 2007

Carroll County Bar Association
Member: January 2013 – present
President: 2013-2018

Iowa Board of Law Examiners
Temporary Examiner: 2013 – 2018
Team Leader: August 2018; March 2019

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.

Carroll Area Child Care Center & Preschool
Board Member: September 2011 – August 2018

Kuemper Mock Trial (middle school & high school)
Coach: March 2010 – September 2017; February 2019

Mock Trial State Competition (middle school & high school)
Judge: Off and on since 2007

Carroll Chamber of Commerce Young Professionals
Member: 2011 to approximately 2014 or 2015

Kuemper Ball
Business Committee: Approx. 2013 – 2019
2021 Ball Co-Chair

United Way
Board Member: August 2013 – January 2016

Carroll Public Library Foundation
Foundation Member: August 2013 – April 2019

Coon Rapids Rotary
Member: 2015 – April 2019

Community Foundation of Carroll County
Board Member: February 2018 – present

Carroll High School Foundation
Board Member: March 2019 – April 2019

712 Women on a Mission
Member: 2019 – present

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.

Sadler v. Bauer, Sac Co. Case No. DRCV020022

I selected this ruling because it is an example of the judicial philosophy I try to employ with every case that comes before me. That philosophy is to let the facts and law guide me, rather than any preconceived notion of what should be done in a case. When I read the file in this case before trial, I anticipated that I would be granting the petition to disestablish paternity. But that is not where the facts and law led me once the evidence was presented. My ruling was appealed. The appeal is still pending. I have attached both my initial opinion, as well as my ruling on a post-trial motion.

Paterson v. Woodruff, Webster Co. Case No. LACV319495

This ruling shows my approach to complicated summary judgment motions in civil cases. In ruling on these motions, I attempt to address every argument made even when a ruling on just one would be dispositive. I do so in order to provide the appellate court with multiple grounds on which to base their decision, as well as so the litigants know that I fully and fairly considered every issue put before me. My ruling was not appealed.

In re Marriage of Fishburn, Carroll Co. Case No. CDDM039366

My ruling in this case is typical of ones that I write in the dissolution and custody cases that come before me. I attempt to lay out the facts in a way that explains to the litigants why I reached the decision that I did. I also attempt to provide as much detail as possible regarding visitation arrangements and assignment of property and debt to minimize the need for parties to return to court in the future. My ruling was not appealed.

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.

Not applicable.

OTHER INFORMATION

20. If any member of the State Judicial Nominating Commission 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.

Not applicable.

21. If any member of the State Judicial Nominating Commission is a current law partner or business partner, state the Commissioner's name and describe his or her professional relationship with you.

Not applicable.

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.

Article in the Iowa Lawyer (Oct. 2019) about the Calhoun County Pilot Jury Trial

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.

Legal Issues Confronting Women Farmers
Annie's Project, ISU Extension Office
March 2014

United Way Board Training
United Way of Carroll
July 2014

Annual Iowa State Bar Citizenship Awards
Iowa State Bar Association
2013-2018

Semi-annual presentations to Coon Rapids Rotary
Variety of topics
2015-2018

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: Gina Stence Badding/Badding for School Board
LinkedIn: Gina Badding

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. with Distinction
The University of Iowa College of Law
May 2004

Moot Court Baskerville Competition, Quarter-finalist
The University of Iowa College of Law
May 2003

Moot Court Executive Board, Editor
The University of Iowa College of law
September 2003 – May 2004

B.A. in Religion with Honors
The University of Iowa
May 2001

Dean's List all years
The University of Iowa
1997 – 2001

Carroll Chamber of Commerce Heritage Business Award
Carroll Chamber of Commerce
February 2019

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 Matthew C. McDermott
(515) 348-4700
Former classmate, friend, and colleague.

The Honorable Anuradha Vaitheswaran
(515) 348-4931
I was Judge Vaitheswaran's staff attorney for several years.

The Honorable Richard Doyle
(515) 348-4937
I was Judge Doyle's staff attorney for several years.

The Honorable Kurt Stoebe
(515) 604-6393
Assistant Chief Judge for the Second Judicial District.

A. Eric Neu
(712) 792-3508
Former law partner and friend.

27. Explain why you are seeking this judicial position.

My parents, who were both teachers, instilled in me a love of reading from an early age. I can recall many summer days happily spent reading everything from Nancy Drew to Agatha Christie to Sweet Valley Twins. This love of reading led to an English and Religion major at college, where I discovered that I also enjoyed research and writing.

My first job out of law school capitalized on these loves. I was employed as a law clerk for the Sixth Judicial District in Cedar Rapids where I was able to work on motions for summary judgment in medical malpractice cases and motions to suppress in murder cases to name a few. This clerkship led to an interim clerkship with Judge Van Zimmer on the Iowa Court of Appeals. After a stint in private practice at a small law firm in Des Moines, I returned to work at the Iowa Court of Appeals as a staff attorney for Judge Zimmer, Judge Miller, Judge Richard Doyle, and Judge Anuradha Vaitheswaran. I knew after working with them, and the other judges on the court, that I wanted to do their job someday.

To achieve that goal, I made the tough decision to leave my position as a staff attorney at the beginning of 2013 and return to private practice. While I was frequently in the courtroom as part of my practice, my favorite cases were those that allowed me to brief issues to the court.

This love of research and writing has continued in my position as a district court judge. Just like when I was a practicing attorney, I thoroughly enjoy being in the courtroom. But my true passion is diving into the details of a case and writing an opinion that explains my decision to the litigants in clear, understandable terms. I feel that my experience as a law clerk, private practice attorney, staff attorney for the Iowa Court of Appeals, and now district court judge has uniquely prepared me to become a judge on the Iowa Court of Appeals.

28. Explain how your appointment would enhance the court.

I remember Iowa Court of Appeals Judge Robert Mahan once telling me that the key to being a good attorney was knowing how judges think while the key to being a good judge was knowing how attorneys think. Because I have served on both sides of the bar, I know how judges think and I know how attorneys think. This knowledge, in my opinion, is critical to the work of a judge on the Iowa Court of Appeals.

I have learned something from each judge who I have worked with. Iowa Court of Appeals Judge John Miller taught me the importance of precision and using the exact statutory language when drafting an opinion (i.e., "spousal support" instead of "alimony," which is no longer used in Iowa Code chapter 598, and "physical care" instead of "primary physical care," which although commonly used by practitioners appears nowhere in chapter 598). These nuances may seem small in the grand scheme of things, but preciseness is critical when interpreting a statute or contract. Iowa Court of Appeals Judge Van Zimmer and Judge Anuradha Vaitheswaran taught me the importance of succinct writing—saying more while writing less. And Iowa Court of Appeals Judge Richard Doyle showed me how to view cases from all angles, oftentimes discovering an issue or position that I had not thought of when first reviewing a case.

I have also learned something from each attorney who I worked with. From the most effective attorneys, I learned the importance of collegiality and doing onto others as you would

have done onto you. Early on after returning to private practice, I decided to resist an attorney's request for a short extension of time to file an appellate brief, thinking to myself, "He should really plan better." Months later, I needed an extension of time myself, which was readily and thankfully agreed to by the same opposing counsel whose request I had resisted. After that experience, I tried to place myself in the other party's shoes before taking action in a case.

These accumulated experiences have informed my work as a judge. I remember while working as a staff attorney sometimes being surprised by an evidentiary ruling that seemed simple to me on appeal after the issues had been thoroughly briefed. I know now that those evidentiary issues are anything but simple when you are called upon to make a quick decision during the course of a long trial.

Each step of my career up to this point has been focused on one day applying to be a judge on the Iowa Court of Appeals. I have tried to gear my legal experiences to best fit that goal, focusing much of my practice on appellate work. My skill at research and writing is obviously key to the work a judge on the Iowa Court of Appeals will perform. Added to this skill is the breadth of legal knowledge that I will bring to the court from my time as a staff attorney for the Iowa Court of Appeals, general practitioner, and district court judge.

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

I believe that my role as a wife and mother to four children has been perhaps the best training for my role as a judge. My children, who range in age from 14 to 7 years old, test my patience on a daily basis. They keep me on my toes with their many activities and constant questions, which I sometimes struggle to answer as they advance in school. And they remind me of what is most important in life—family. From them I have learned to (1) take a breath before speaking (or yelling), (2) tell them when I don't know something and help them find the answer, (3) determine who is telling the truth when there are two different stories being told, (4) multitask and prioritize, and (5) find a balance between their busy lives and mine. These lessons aided me when I was a practicing attorney and now as a judge handling a busy docket with litigants who are facing personal struggles in their lives.

My family has also reminded me of the importance of interests outside the legal profession. Attending my children's football or soccer games, track meets, and music recitals is a welcome relief from the stress that sometimes accompanies my work. I also make it a point to try to run three to four miles a day, during my lunch hour when I can or in the early mornings when I can't. During my runs, I'm able to clear my mind so that I can start my next task in a focused manner. I have run several half-marathons and hope to run a full marathon someday if my knees don't give out on me first. The drive and determination it takes to run these long distances is the same drive and determination I've used to achieve my professional goals.

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

Signed: Gina C. Badding Date: 5/26, 2021

Printed name: Gina C. Badding

ATTACHMENT A—10(c)

State v. Bender (Webster)

State v. Slininger (Calhoun)

State v. Pendleton (Webster)

Ruth v. State (PCR)

IN THE IOWA DISTRICT COURT FOR WEBSTER COUNTY

STATE OF IOWA Plaintiff, vs. **PERRY BERNARDO BENDER** Defendant.	Case Nos. FECR331222, FECR333021, AGCR317841 **ORDER**

The motion that came before the Court for hearing on July 29, 2019, travels down a path that has been well worn by Defendant Perry Bender. On June 28, 2019, Bender filed a "Motion for Hearing on Motion to Correct Illegal Sentence." This motion is attempting to revive a motion to correct an illegal sentence that Bender first filed with this Court on March 29, 2013. Despite several appellate court decisions rejecting the very same claims that have been raised by Bender yet again, the Court believes that it is constrained by the Iowa Supreme Court's recent decision in *Jefferson v. Iowa District Court*, 926 N.W.2d 519 (Iowa 2019) to grant Bender's request for an attorney before proceeding to a conclusion in this matter.

PRIOR PROCEEDINGS

The case that spawned Bender's many motions and appeals was a May 2, 2001 plea to willful injury, a class D felony, in Webster County Case No. AGCR317841. Bender was sentenced to a five-year suspended prison term and placed on probation. *State v. Bender*, 2013 WL 2368826, at *1 (Iowa Ct. App. May 30, 2013) (*Bender I*). No fine was imposed pursuant to Bender's plea agreement with the State. *Id.* Bender's sentence was discharged in 2005. Def.'s Ex. 1 (7/29/13 Tr. 10:16-20).

On May 2, 2007, Bender was convicted of possession of a firearm as a felon as a habitual offender in Webster County Case No. FECR331222. And on May 7, 2007, he

was convicted of burglary in the second degree as a habitual offender and stalking in violation of a no-contact order as a habitual offender in Webster County Case No. FECR333021. The May 2, 2001 willful injury conviction was one of the two felony convictions used for the habitual offender enhancements in FECR331222 and FECR333021. *State v. Bender*, 2016 WL 351326, at *1 (Iowa Ct. App. Jan. 27, 2016) (*Bender III*).

On November 9, 2011, Bender filed a motion to correct an illegal sentence in the willful injury case in AGCR317841. *Bender I*, 2013 WL 2368826, at *1. He argued the sentence imposed in that case was illegal because no fine was imposed, which was contrary to Iowa Code section 902.9(5) requiring "a fine of at least seven hundred fifty dollars but no more than seven thousand five hundred dollars." This court resolved Bender's motion through a nunc pro tunc order that imposed and then suspended the fine. 11/17/11 Order. Bender appealed.

While that appeal was pending, Bender filed motions to correct what he claimed were illegal sentences in FECR331222 and FECR333021 in March 2013. On April 17, 2013, the court entered an order stating that because

> resolution of the issue may be dependent upon an appeal currently pending in Webster County case number AGCR317841, the Motion will not be set for hearing until the appeal is concluded and procedendo issued. At that time movant may again request the matter be set for hearing.

4/17/13 Order.

The Iowa Court of Appeals issued its decision on Bender's appeal of the illegal sentence in the willful injury case on May 30, 2013. In that decision, the court vacated the initial sentencing order and remanded the case to this court for resentencing. *Bender I*, 2013 WL 2368826, at *3. Importantly to one of the issues raised here, the

court also rejected "Bender's pro se argument that due to a violation of Iowa Code section 708.4(2) his conviction should be vacated. We agree with the State's argument that *the time for appeal of that conviction has passed and affirm the conviction*." *Id.* (emphasis added).

On remand in the willful injury case, Bender filed a pro se "Motion to Vacate Plea Agreement, Motion to Withdraw Guilty Plea." 7/22/13 Mot. In support of this motion, Bender argued that because the bargained-for plea agreement provided that no fine would be imposed and he was now subject to imposition of a fine, albeit a suspended one, he should be allowed to withdraw his guilty plea. Ex. 1; 12/13/13 Br. The sentencing court rejected that argument, finding it could "not consider any matter outside the scope of the remand and under the law of the case doctrine." Ex. 5 (1/17/14 Order).

Meanwhile, Bender renewed his motions to correct the alleged illegal sentences in FECR331222 and FECR333021. 9/23/13 Mot. (FECR333021); 1/31/14 Mot. (FECR331222). These motions argued that Bender's May 2, 2001 conviction for willful injury could not be used to enhance his sentences in the above two cases because his sentence for willful injury had been vacated. *Id.* This court denied Bender's motions on April 23, 2014. 4/23/14 Order; *see also* 5/19/14 Order Denying Def.'s Mot. to Recon.

Bender appealed both the willful injury resentencing order in AGCR317841 and the denial of his motions to correct illegal sentences in FECR331222 and FECR33021. With respect to the appeal from the willful injury resentencing order, the Iowa Court of Appeals framed Bender's argument as follows:

> [B]ecause the 2001 plea agreement included an illegal sentence (no fine, contrary to statutory requirement), the district court was required on remand

> to allow him to withdraw his plea. Bender argues that the court on remand erred in concluding the law of the case was that his conviction could not be challenged. We disagree.

State v. Bender, 2016 WL 351263, at *2 (Iowa Ct. App. Jan. 27, 2016) (*Bender II*). The court concluded the law of the case doctrine did apply because *Bender I* had found "that the time for appeal of [the willful injury] conviction has passed" and affirmed that conviction. *Id.*; *see also Bender I*, 2013 WL 2368826, at *3. It further concluded: "The case was remanded for resentencing only. Thus, the district court had no discretion to vacate the conviction. The district court did not err in refusing to allow Bender to withdraw his plea" to willful injury. *Bender II*, 2016 WL 351263, at *2.

As for Bender's appeal from this court's denial of his motions to correct illegal sentences in the FECR cases, the Iowa Court of Appeals found "the illegality of Bender's sentence for the 2001 conviction did not affect the conviction itself." *Bender III*, 2016 WL 351326, at *4. Because "[c]onvictions alone trigger the habitual offender enhancement of Iowa Code section 902.8," and the 2001 willful injury conviction preceded his 2007 convictions, "the habitual offender enhancements were not in error." *Id.* at *3-4. The denial of Bender's motions to correct illegal sentences was accordingly affirmed. *Id.* at *4.

In another appellate decision entered on the same day as *Bender II* and *Bender III*, the Iowa Court of Appeals also affirmed the district court's denial of Bender's application for postconviction relief in which Bender argued "trial counsel was ineffective for allowing his sentence to be enhanced under the habitual offender statute because he received an illegal sentence for one of the underlying felony convictions." *Bender v. State*, 2016 WL 351274, at *1 (Iowa Ct. App. Jan. 27, 2016) (*Bender IV*). This argument

was rejected by the appellate court for the same reasons expressed in *Bender III*. *Id.* at *3.

Undeterred by these adverse appellate decisions, Bender filed the June 28, 2019 motion that is currently before the Court, which he captioned as "Motion for Hearing on Motion to Correct Illegal Sentence." 6/28/19 Mot. In this motion, Bender attempts to renew his March 2013 motions to correct illegal sentences by relying upon the Court's April 16, 2013 order that stayed resolution of those motions pending the appeal from Bender's willful injury sentence in AGCR317841. *Id.* Bender asserts in the June 28, 2019 motion "[t]hat matters concerning AGCR317841 have concluded thus far and procedendo has been issued and requests that "a hearing to be set pursuant to the ORDER entered on April 17, 2013." Nowhere in this motion does Bender acknowledge that he had already renewed his March 2013 motions after the conclusion of the willful injury appeal, that those motions were denied by this court, or that those denials were affirmed by the Iowa Court of Appeals in *Bender III*.

In any event, at the July 29, 2019 hearing on the most recent incarnation of Bender's attempts to overturn his 2007 convictions, Bender first sought to continue the hearing. The Court denied this request. He then requested that he be allowed to amend his motion to include the AGCR317841 case number. The Court granted that request and is also filing this order in the FECR331222 case to further complete the record. Bender finally requested that he be appointed counsel to represent him in this proceeding. The Court denied this request and proceeded with the presentation of the parties' arguments. The focus of Bender's argument at the hearing was his assertion that he should have been allowed to withdraw his guilty plea in the willful injury case.

He also tangentially raised a double jeopardy concern, contending that he was put in double jeopardy when he was resentenced in the willful injury case and "had to serve his sentence all over again." With the foregoing in mind, the Court concludes as follows:

ANALYSIS

In *Jefferson v. Iowa District Court*, 926 N.W.2d 519, 523-24 (Iowa 2019), our supreme court determined for the first time that "a motion to correct an illegal sentence is a stage of the criminal proceeding for which a right to counsel applies." *Cf. State v. Trueblood*, 2014 WL 636167, at *2 (Iowa Ct. App. Feb. 19, 2014) ("Whether a defendant has a constitutional right to have counsel appointed to represent him on a motion to correct an illegal sentence is an issue of first impression."). In reaching this decision, the court recognized that a "motion to correct an illegal sentence has the potential to be abused." *Jefferson*, 926 N.W.2d at 525. The court accordingly set forth tools to address potential abuse, among them its acknowledgment that "a motion challenging a defendant's underlying conviction is *not* a motion to correct an illegal sentence." *Id.* Thus, in order to determine whether Bender is entitled to court-appointed counsel to represent him in his most recent motion to correct an illegal sentence, the Court must first determine whether that motion is truly seeking to correct an illegal sentence.

As stated above, one of the arguments Bender advanced at the hearing on his motion was that he should have been allowed to withdraw his guilty plea in the willful injury case. That is a challenge to his conviction, not sentence. *Bender II*, 2016 WL 351263, at *2. Bender is therefore not entitled to court-appointed counsel to assist him in any challenge that is related to a claim that he should have been allowed to withdraw

his guilty plea when being resentenced for willful injury. Because Bender is not entitled to counsel on that claim, the Court next considers its merits.

Bender's assertion that he should have been allowed to withdraw his plea is one that has been considered and rejected by this court and the Iowa Court of Appeals on multiple occasions. *See id.*; *see also Bender I*, 2013 WL 2368826, at *3. The courts' holdings in *Bender I* and *Bender II*, both of which found Bender could not withdraw his willful injury plea, are the law of the case and "'controlling on both the trial court and on any further appeals in the same case.'" *Bender II*, 2016 WL 351263, at *2 (citation omitted). The Court accordingly finds that to the extent Bender's June 28, 2019 motion raises a challenge to his plea and conviction in the willful injury case, it is denied.

Bender's somewhat ill-defined double jeopardy claim presents a closer question on his entitlement to court-appointed counsel. In *State v. Jepsen*, 907 N.W.2d 495, 498-99 (Iowa 2018), the Iowa Supreme Court considered a double jeopardy challenge to a defendant's corrected sentence through an ineffective-assistance-of-counsel claim. While discussing the standard of review applicable to this claim, the court stated: "We review double jeopardy claims de novo. An illegal sentence may be corrected at any time. Therefore, if Jepsen's corrected sentence violates double jeopardy, we will not review counsel's effectiveness." *Id.* (internal citations omitted). This indicates to the Court that a double jeopardy challenge such as the one raised by Bender in this case does present a challenge to an illegal sentence. *Accord State v. Allen*, 601 N.W.2d 689, 690 (Iowa 1999) (characterizing a claim that the prohibition against double jeopardy was violated when a defendant was resentenced as a challenge to an illegal sentence).

However, in *Trueblood*, 2014 WL 636167, at *2, the Iowa Court of Appeals reviewed a claim that double jeopardy prevented a defendant "from being convicted and sentenced on more than one count of second-degree sexual abuse because the charges stemmed from a continuing offense involving only one victim." The court found such a challenge was "not a proper subject for a motion to correct an illegal sentence," reasoning that

> Trueblood was sentenced to two indeterminate terms of twenty-five years as authorized for second-degree sexual abuse. The sentences were imposed consecutively as permitted in the discretion of the court. The terms of the sentences were not illegal or unconstitutional in any respect.

Id. (internal citations omitted). And in *State v. Bruegger*, 773 N.W.2d 870-71 (Iowa 2009), when considering whether a challenge to a sentence as cruel and unusual punishment amounts to an attack on an illegal sentence, the court stated:

> [A] challenge to an illegal sentence includes claims that the court lacked the power to impose the sentence or that the sentence itself is somehow inherently legally flawed, including claims that the sentence it outside the statutory bounds or that the sentence itself is unconstitutional. This conclusion does not mean that any constitutional claim converts a sentence to an illegal sentence. *For example, claims under the Fourth, Fifth and Sixth Amendments ordinarily do not involve the inherent power of the court to impose a particular sentence*. Nor does this rule allow litigants to reassert or raise for the first time constitutional challenges to their underlying conviction.

(Emphasis added.) The right to be free from being "twice put in jeopardy of life or limb" for the same offense is guaranteed by the Fifth Amendment to the United States Constitution. U.S. Const. amend. V; *see also Jepsen*, 907 N.W.2d at 499.

Out of an abundance of caution in light of these conflicting cases, the Court concludes that Bender should be afforded counsel to represent him on his claim that he was placed in double jeopardy when resentenced in the willful injury case. If Bender

still desires counsel, he shall file an application for court-appointed counsel with this Court by August 26, 2019.

Assuming Bender will qualify for court-appointed counsel given his current incarceration, the attorney who is appointed to represent Bender shall be directed to proceed under a procedure similar to Iowa Rule of Appellate Procedure 6.1005 in investigating Bender's claim. *See Jefferson*, 926 N.W.2d at 525 (noting if motion to correct an illegal sentence is frivolous, "counsel should be appointed, but may ask to withdraw employing a procedure similar to that authorized by rule 6.1105 for frivolous appeals"). Any amendments to Bender's motion, briefs, or a motion to withdraw by court-appointed counsel, shall be filed by September 27, 2019. Bender is cautioned, however, that the Court will not entertain any claims that have already been raised and decided by this court or the Iowa Court of Appeals. The matter will then come before the Court for a final hearing on the limited double jeopardy issue on September 30, 2019, at 9:30 a.m. at the Webster County Courthouse in Fort Dodge, Iowa.

CONCLUSION

IT IS THEREFORE ORDERED as follows:

1. Bender's motion to correct an illegal sentence is **DENIED** insofar as it raises a challenge to whether he should have been allowed to withdraw his plea to willful injury in AGCR317841. Bender is not entitled to court-appointed counsel on that claim, which has already been rejected by this court and the Iowa Court of Appeals on multiple occasions.

2. Bender's oral motion for court-appointed counsel is provisionally **GRANTED** pending the filing of an application by Bender on the claim of whether his

resentencing for willful injury violated the prohibition against double jeopardy. Bender must file an application for court-appointed counsel by August 26, 2019, or his request will be deemed waived.

3. A final hearing on Bender's motion will be held on **September 30, 2019, at 9:30 a.m. at the Webster County Courthouse in Fort Dodge, Iowa**. Any amendments to Bender's motion, briefs, or a motion to withdraw by court-appointed counsel, shall be filed with the Court no later than September 27, 2019.

CLERK TO FURNISH COPIES TO:
Webster County Attorney
Perry Bender

IN THE IOWA DISTRICT COURT FOR CALHOUN COUNTY

STATE OF IOWA Plaintiff, vs. **GREGORY DALE SLININGER** Defendant.	No. OWCR505988 **ORDER DENYING MOTION TO SUPPRESS**

Defendant Gregory Dale Slininger seeks to suppress his blood alcohol test results because he was informed by a law enforcement officer that a first offense operating while intoxicated charge usually results in a deferred judgment. The Court finds this did not render Slininger's consent to chemical testing involuntary or coerced. Slininger's motion to suppress is therefore denied.

I. Background Facts and Proceedings

At about 8:00 p.m. on March 6, 2020, Gregory Slininger's wife called 911 to report that her husband was driving around and possibly suicidal. Calhoun County Deputy Sheriff Jason McKenney located Slininger's vehicle west of Farnhamville. After confirming that it was Slininger driving, Deputy McKenney activated his emergency lights and pulled the vehicle over. The deputy knew Slininger because he was a principal at the school the deputy's son attended.

Slininger was emotional when Deputy McKenney approached his vehicle. He explained to the deputy that he had a rough day at work. Because of the information reported by Slininger's wife, Deputy McKenney was concerned with keeping Slininger calm and trying to defuse the situation. A few minutes into the encounter, Slininger told the deputy that he couldn't think for himself and that his future was in the deputy's hands.

The deputy asked Slininger to perform field sobriety tests but Slininger refused, saying that he wouldn't be able to pass them. Slininger admitted to the deputy that he had too much to drink that evening, although he couldn't accurately report how much he had. About eleven minutes into their account, Deputy McKenney again asked Slininger if he was sure that he wouldn't agree to do some field sobriety tests to help him determine Slininger's level of intoxication. Slininger asked if that would hurt him or help him. The deputy replied, "I can't tell you that. It's going to help me, I'll tell you that." After a pause, the deputy asked Slininger if he ever had an operating while intoxicated charge before. When Slininger said no, the deputy told him "the first OWI is usually a deferred judgment. I shouldn't be telling you that . . . but that's where we're going with this." Slininger asked for a moment, and the deputy told him to take whatever time he needed. After a bit more discussion, Slininger agreed to perform the field sobriety tests.

Slininger failed some of those tests and was placed under arrest for operating while intoxicated. Deputy McKenney placed him into the back of his squad car to transport him to the law enforcement center. On the way, Slininger told the deputy that he didn't know where his life was headed. In response, Deputy McKenney told him that usually "if we end up doing this OWI, that's all going to play out however. But usually if it's your very first one . . . it will start with a deferred judgment, that'll be the first thing they offer ya. Okay. So deferred judgment means as long as you don't get in trouble again after this, it goes away, okay, after a year." A couple of minutes later, Slininger says he doesn't know how he can get out of this. Deputy McKenney responds that the "easiest

way" is that if "things go as smooth as possible, and so far they have, that will all be in your favor when we come to a court appearance."

Once at the law enforcement center, the deputy placed Slininger into a room with a Datamaster device. Slininger's handcuffs were removed, and he was left alone in the room with his cell phone while the deputy went to get paperwork. Upon the deputy's return, he read the implied consent advisory to Slininger. With very little discussion, Slininger consented to a breath test. The test results showed Slininger had a blood alcohol concentration of .170, which rendered him ineligible for a deferred judgment under Iowa Code section 321J.2(3)(b)(2).

On April 6, 2020, the State filed a trial information charging Slininger with operating while intoxicated (OWI), first offense. Slininger filed a motion to suppress the result of his breath test on July 31, 2020, arguing that his "decision to consent to chemical testing was not reasoned or informed and was involuntary and violated his constitution due process rights" because the deputy incorrectly informed him that he "would likely get a deferred judgment." Def.'s 7/31/20 Mot. to Supp. ¶ 9. In an amended and supplemental motion to suppress, Slininger additionally argued that his consent to chemical testing was not "voluntary, valid or freely given because it was the product of promissory leniency."

An evidentiary hearing was held on August 10, 2020, on Slininger's motion to suppress. With no objection by Slininger, the State offered two exhibits into evidence—Exhibit 1 is the body camera video of the traffic stop and Exhibit 2 is the video from the Datamaster room at the law enforcement center. Deputy McKenney also testified at the hearing. The deputy explained that when he told Slininger first offense OWIs usually

result in deferred judgments, he didn't know that Slininger would blow over the allowable limit. The purpose of telling Slininger about a deferred judgment, according to Deputy McKenney, was to put him at ease following the report by Slininger's wife that he was possibly suicidal. He was trying to be gentle with Slininger because he "knew him and what he did for a living."

II. Analysis

"Iowa Code chapter 321J 'establishes the basic principle that a driver impliedly agrees to submit to a test [to determine alcohol concentration or presence of a controlled substance] in return for the privilege of using the public highways.'" *State v. Hutton*, 796 N.W.2d 898, 902 (Iowa 2011) (citations omitted). Despite this statutory presumption of consent, "a person may refuse to submit to chemical testing." *Id.* (citing Iowa Code § 321J.9). "If a person refuses to submit to the chemical testing, a test shall not be given. . . ." Iowa Code § 321J.9(1).

"Valid consent therefore must be given voluntarily with the decision to submit to a chemical test being 'freely made, uncoerced, reasoned, and informed.'" *State v. Overbay*, 810 N.W.2d 871, 876 (Iowa 2012) (citation omitted). "'The ultimate question is whether the decision to comply with a valid request under the implied-consent law is a reasoned and informed decision.'" *Id.* (citation omitted). "Because there are both administrative and criminal repercussions for submitting to or refusing a chemical test, section 321J.8 requires an officer to advise the person of certain consequences that may result from the decision," specifically the potential periods of license revocation associated with refusal to take the test or those with a positive test result. *Id.*

Slininger does not take issue with the accuracy or content of the implied consent advisory that was read to him at the law enforcement center. *Cf. State v. Massengale*, 745 N.W.2d 499, 504-05 (Iowa 2008) (holding an implied consent advisory that failed to reflect a change in the law regarding commercial driving privileges violated a defendant's substantive due process rights). He instead asserts the deputy's inaccurate statement about his ability to receive a deferred judgment rendered his consent to chemical testing involuntary and coerced in violation of his federal and state substantive due process rights.

"When a person who has submitted to a chemical test asserts that the submission was not voluntary," the Court must "evaluate the totality of the circumstances to determine whether the decision was freely made or coerced." *State v. Gravenish*, 511 N.W.2d 379, 381 (Iowa 1994). The State bears the burden to prove a consent to testing was voluntary and uncoerced. *Id.*; *see also Overbay*, 810 N.W.2d at 879. "When coercion is alleged, the State must prove by a preponderance of the evidence the absence of undue pressure or duress." *Gravenish*, 511 N.W.2d at 381. "However, if the record as a whole shows the defendant would have made the same choice to undergo (or not undergo) chemical testing even if provided a more accurate advisory, the State has met its burden." *Overbay*, 810 N.W.2d at 879. Importantly, our supreme court has held "that not every inaccurate depiction by law enforcement officers that might bear on a subject's election to submit to chemical testing is a basis for suppressing the test results." *State v. Bernhard*, 657 N.W.2d 469, 473 (Iowa 2003).

The information the officer provided to Slininger regarding a deferred judgment was not tied to a request for him to consent to chemical testing. The first statement

came when the deputy was attempting to get Slininger to perform field sobriety tests, though he also informed Slininger that performance of the tests would "help me, I'll tell ya that." The second came when Slininger was in the deputy's car and upset about the impact an OWI charge would have on his life. The deputy qualified his statements both times by saying first offense OWIs "usually" result in deferred judgments.

Once at the law enforcement center, Slininger was read an accurate implied consent advisory. No mention of a deferred judgment was made at the center. Slininger was thus provided the statutorily required information necessary "to develop 'a basis for evaluation and decision-making in regard to either submitting or not submitting to the test' and the statutory purpose was therefore accomplished." *State v. Shields*, 2019 WL 3946008, at *3 (Iowa Ct. App. Aug. 21, 2019) (citation omitted).

Slininger's argument regarding the impact of the deputy's mention of a deferred judgment suggests that, had he known that he would not be eligible for a deferred judgment because of his high blood alcohol content, he would not have consented to the test. Nothing in the record supports this contention. *See Gravenish*, 511 N.W.2d at 382. At no time did the deputy state that a refusal to provide a chemical test would render Slininger ineligible for a deferred judgment or, conversely, that submitting to a chemical test would render him eligible for one. Furthermore, Slininger would have been subject to harsher sanctions, specifically a longer revocation period, had he refused to submit to a chemical test. *See* Iowa Code § 321J.9(1)(a). It is thus difficult to see how Slininger's consent to chemical testing was involuntary or coerced by misinformation regarding his eligibility for a deferred judgment.

Turning then to Slininger's claim of promissory leniency, the Court first questions whether that doctrine applies in this context of consent to a chemical test. *See, e.g.*, *State v. Kase*, 344 N.W.2d 223, 225-26 (Iowa 1984) (holding that "'*[s]tatements* are involuntary when induced by promises of leniency'" (emphasis added) (citation omitted)). In *State v. Howard*, 825 N.W.2d 32, 40 (Iowa 2012), the Iowa Supreme Court tied the rationale for the doctrine of promissory leniency to the danger of false confessions, noting that "'courts and commentators have long recognized promises of leniency can induce false confessions leading to wrongful convictions of the innocent.'" (Citation omitted.) The same concern of false confessions is not present with a consent to a chemical test.

This difference between voluntary waivers of constitutional rights and voluntary statements was recognized in *State v. Lowe*, 812 N.W.2d 554, 575 n.10 (Iowa 2012). *See also State v. Hodges*, 326 N.W.2d 345, 347 (Iowa 1982). In *Lowe*, the court stated that "[w]hen a statement is made in response to a promise of leniency, the statement's 'probative value, if any exists, is substantially outweighed by the danger of confusion of issues and would be misleading to the jury,'" resulting in a per se exclusion rule. 812 N.W.2d at 575 n.10 (Citation omitted.) But when reviewing a "suspect's consent to search the totality-of-the-circumstances test is used, and under that test, whether an officer has minimized the seriousness of possessing drugs is one factor among many that the court must consider." *Id.*

In keeping with the above, the court in *Gravenish* examined a defendant's claim that his consent to a blood test was coerced by an officer's deceptive statement under a totality-of-the-circumstances test rather than the evidentiary test employed for claims

of promissory leniency. 511 N.W.2d at 381; *see also State v. Madsen*, 813 N.W.2d 714, 725-26 (Iowa 2012) (discussing the difference between the two tests and when they should be employed). The statement at issue in *Gravenish* was an officer telling the defendant that the condition of another driver involved in the motor vehicle accident was "not good" when in fact the officer knew she had died. 511 N.W.2d at 380. The defendant argued that misleading statement about the other driver's true condition deprived him of crucial information bearing on his consent to withdrawal of blood. *Id.* at 381. In rejecting that argument, the court held "[d]eception by law officers—while never condoned—will not, standing alone, render consent involuntary as a matter of law." Such a statement is merely one factor bearing on voluntariness. *Id.* Others include "the defendant's age and prior criminal history, if any; whether he was under the influence of drugs or alcohol; whether he ably understood and responded to questions; his physical and emotional reaction to interrogation; and whether physical punishment was used or threatened." *Id.*

Upon considering these factors, the Court concludes that Slininger's consent to the chemical test was a reasoned and informed one. Slininger is a middle-aged man who is employed as a principal at a middle school. Although he was intoxicated, he was able to understand and respond to the deputy's questions. Slininger was allowed free use of his cell phone while the deputy was in and out of the room, with the deputy offering several times to call an attorney or some other individual for Slininger. After being read the full implied consent advisory, Slininger asked only one question and that question did not relate to his ability to receive a deferred judgment. For all these reasons, the Court concludes that Slininger's motion to suppress must be denied.

III. Conclusion

The Court finds the State met its burden in establishing Defendant Gregory Slininger's consent to chemical testing was voluntary and uncoerced and thus not in violation of his federal and state substantive due process rights. Slininger's motion to suppress his breath test results is accordingly **DENIED**.

CLERK TO FURNISH COPIES TO:
County Attorney
Defense Counsel

IN THE IOWA DISTRICT COURT FOR WEBSTER COUNTY

STATE OF IOWA Plaintiff, vs. **JOSHUA JAMES PENDLETON** Defendant.	No. FECR360158 **ORDER GRANTING IN PART AND DENYING PART DEFENDANT'S MOTION TO SUPPRESS**

Defendant Joshua James Pendleton seeks to suppress a number of incriminating statements he made to law enforcement officers the evening he was arrested for first-degree murder. While most of Pendleton's statements were voluntarily and spontaneously made, the Court does find that some should be suppressed as the product of custodial interrogation.

I. Background Facts and Proceedings

On the evening of October 2, 2019, Fort Dodge police officers were dispatched to St. Paul's Lutheran Church. Upon arrival, they discovered the body of Pastor Al Henderson. The officers viewed surveillance videos of the outside of the church. They saw Pendleton entering and exiting the church around the same time as the attack on Henderson was reported to have occurred.

Sergeant Evan Thompson, Detective Larry Hedlund, and two other officers went to Pendleton's apartment around 7:00 p.m. Thompson and Hedlund were in plain clothes but wearing tactical vests and gun holsters at their waists. The other two officers were in full uniform. Once they got to Pendleton's apartment, the officers noticed the door to the apartment was slightly ajar with music playing inside. After knocking and

announcing their presence, the officers went inside. They made a sweep of the apartment and found that no one was present.

As Thompson and Hedlund were exiting the apartment, an officer who was stationed outside radioed that Pendleton was walking up. Bodycam video shows Thompson walking out onto the porch and saying, "Hey Josh. Come here for a minute." Once in the front yard of Pendleton's residence, Thompson asks Pendleton to "show me your hands real quick." Pendleton is not visible on the video yet but can be heard telling Thompson that he saw a "little girl. She was screaming." Thompson responds, "Okay. Heard that." He then asks Pendleton to put his hands behind his back. Pendleton complies. Thompson tells Pendleton they are going to put him in handcuffs because he is being "detain[ed] at this point." Pendleton nods and says, "That's fine." He volunteers, "He had taser in pocket." Thompson responds, "Okay. Who's that?" Pendleton answers, "That bad man down there." Thompson clarifies, "Down by the church down there?" And Pendleton says, "Yes." While making these statements, Pendleton is talking in what seems to be a Russian accent.

During this exchange, another officer is placing Pendleton in handcuffs. Once he finishes, Pendleton tells Thompson, "I heard her crying." Thompson responds by introducing Pendleton to Detective Hedlund and asking Pendleton if he would like to talk to Hedlund about anything. Pendleton says, "Yes. He was molesting little girl. I got his phone right here" as he looks down at his pants pocket. Another officer repeats, "You got his phone right here?" and Pendleton responds, "Yes. He wouldn't give it up." Hedlund directs the other officers to take him downtown. The officers lead Pendleton to the sidewalk where they wait for a police car to transport him.

Thompson and Hedlund stand silently with Pendleton on the sidewalk while they wait. Pendleton, however, continues to talk, going in and out of his Russian accent. A few minutes later, a police vehicle pulls up, and Pendleton is placed into the back seat still in handcuffs. Once at the police station, he is led into a small interview room. The only items in the room are two chairs and a table. Pendleton's handcuffs are removed, the door is left open, and he is given a Diet Mt. Dew to drink. During this time, Pendleton continues to make statements similar to those detailed above.

After Pendleton takes a drink of his pop, Detective Hedlund asks Pendleton his name and age. Pendleton responds and then asks Hedlund some unrelated questions about whether his wedding band is white gold or gold. Hedlund answers from outside the interview room, then enters the room, closes the door, and sits down. As he does so, he tells Pendleton that he is not under arrest, though he acknowledges Pendleton got "brought down here in handcuffs." Pendleton responds, "That's fine. You have to do that just in case I'm the aggressor." Hedlund confirms that it's for safety reasons. Pendleton then says, "I had to open his phone because he got really" violent when he tried to take his phone. Hedlund again tells Pendleton, "You're not under arrest." Pendleton starts crying. Hedlund pulls up Pendleton's sleeve and asks him, "You got a cut on your hand there?" Pendleton responds by again saying he heard a little girl screaming and describes some of his actions from there. Hedlund repeats once more that Pendleton is not under arrest but explains that because Pendleton got brought to the station in a police car, he's going to read him the *Miranda* warning.

Pendleton asks if he could read the warning, and Hedlund agrees. While he is reading, Pendleton stops and questions the following phrase: "If you decide to answer

questions now with or without a lawyer, you still have the right to stop the questioning at any time" for the purpose of consulting a lawyer. Pendleton points out "that doesn't make sense" and asks why it doesn't just say "without a lawyer." Hedlund agrees that might make more sense but asks Pendleton if he understands what it means. Pendleton responds, "I don't need legal representation. I have the truth." Hedlund asks him to finish reading the warning. Pendleton does and says again, "I don't need no middle man for the truth." He then immediately says, "My arms hurt. He was big man." Hedlund redirects Pendleton and asks him to sign the waiver, which Pendleton does.

After Pendleton signs the *Miranda* waiver, he makes more statements to Hedlund about what happened earlier in the day. Hedlund is polite throughout this portion of the interview and mainly lets Pendleton talk, interjecting some clarifying questions throughout. About twenty-three minutes into the interview, after Pendleton expresses some concern with a map Hedlund gave him of the church and its parking lot, Pendleton stops and says, "I'm not going to speak anymore. Can I go?" Hedlund responds that he'll do "some checking" on that. Pendleton says, "There is no checking," and asks again if he can go. Hedlund tells him that he'll have to stay here right now. Pendleton asks why and then says, "I want lawyer." Hedlund stands up and says okay but then tells Pendleton that he's going to get some pictures of his hands. Pendleton initially says okay but immediately changes his mind and says, "No. I don't want pictures of hands until lawyer comes." Hedlund repeats that he's going to check on a few things and exits the room. Another officer in full uniform enters.

Hedlund comes back into the room a few minutes later. He asks again if he can get some pictures of Pendleton's hands, and Pendleton repeats, "Not 'til my lawyer

comes." Hedlund tells him they'll have to make arrangements for his lawyer, and Pendleton asks, "What do you mean?" Hedlund tells him that he's under arrest for first degree murder. Pendleton becomes agitated and asks, "How?" and Hedlund responds, "Cuz you killed that man." Pendleton repeatedly says, "I want my lawyer." The officers tell Pendleton to stand up, and he refuses. Other officers enter the room. Hedlund pulls back the table and starts taking pictures of Pendleton while he's still seated.

Handcuffs are placed back on Pendleton. He then asks, "What's first degree?" Hedlund responds that it means Pendleton killed someone for no reason. Pendleton corrects him and says, "No. It's premediated." Hedlund responds that he's right. Pendleton tells him that he "didn't premeditate. . . . I heard little girl screaming at bench." Hedlund says, "And I think you're lying." Pendleton asks a question about the map they reviewed earlier, and Hedlund tells him to "stop talking with your Russian bullshit accent" and to "knock that shit off." Pendleton continues to insist it wasn't premeditated, and Hedlund tells him, "Well, we'll let a jury decide." Pendleton becomes more agitated and again says he wants his lawyer. Hedlund says, "Nobody's asking you any questions, Josh. Stop talking." Pendleton says that he's not going to stop talking and insists on a lawyer. Hedlund continues to respond to Pendleton and tells him that he's a liar.

Detective Hedlund and another officer sit with Pendleton in silence for a minute or so while they wait for the jailers to come get Pendleton. Jailer Joshua Pyle, who was familiar with Pendleton from past interactions, enters the room. He asks Pendleton, "What's going on Josh?" Pendleton again repeats his claims about hearing a little girl screaming from church. Pyle eventually talks Pendleton into walking upstairs to the jail with him.

Once there, Pyle begins the booking process by asking Pendleton if he has anything in his pockets. Pendleton is mostly quiet during this process. But Hedlund, who is standing in the background, tells Pendleton: "His name is Al Henderson." Pendleton answers that he didn't know his name. Right after this, Pyle asks Pendleton if he wants to take a shower. Pendleton responds with an incriminating statement and continues to make more statements about the events of the day while Pyle attempts to finish the booking process.

Once Pendleton is in his cell, Sergeant Thompson returns to execute a search warrant for Pendleton's DNA. Thompson gives Pendleton basic instructions during this process but does not otherwise ask Pendleton any questions. Pendleton, however, continues to make statements about what he believes happened.

Pendleton seeks to suppress all of the statements he made on the evening of October 2, 2019, arguing they were obtained in violation of the Fourth, Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and article 1, sections 8, 9, and 10 of the Iowa Constitution.[1] Pendleton's motion specifies: "These statements include those made to Officer Thompson, Officer Hedlund, and Sergeant Pyle and the statements made during the course of executing the search warrant on the Defendant's person."[2] At the suppression hearing held on March 19, 2021, State's Exhibits 1, 2, 3, 4a-4d, 5a, and 5b were admitted into evidence. These exhibits are bodycam videos of

[1] Because Pendleton did not argue for a separate Iowa constitutional analysis, the Court will apply the general federal framework to these claims. *See State v. Fogg*, 936 N.W.2d 664, 667 (Iowa 2019).
[2] Pendleton's motion also sought to suppress items obtained from the search of Defendant's residence, as well as other items obtained from the execution of another residence. At the hearing on the motion to suppress, defense counsel agreed this was no longer an issue once the State clarified it would not be introducing an iPod collected from Pendleton's residence or a phone collected from a different residence.

the evening, along with a video from the interview room. The Court also considered testimony from Sergeant Thompson and Jailer Joshua Pyle.[3]

II. Analysis

"The Fifth Amendment to the United States Constitution, which the United States Supreme Court has incorporated into the Due Process Clause of the Fourteenth Amendment, provides that '[n]o person . . . shall be compelled in any criminal case to be a witness against himself." *State v. Miranda*, 672 N.W.2d 753, 758 (Iowa 2003). In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court held

> that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege.

Those procedural safeguards have become the *Miranda* warnings that are "now familiar to much of the American public." *Miranda*, 672 N.W.2d at 758. The warnings protect "a suspect's Fifth Amendment right against self-incrimination 'ensuring that a suspect knows that he may choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time.'" *State v. Ortiz*, 766 N.W.2d 244, 249 (Iowa 2009) (citation omitted).

A dual test is used in determining the admissibility of a defendant's inculpatory statements over a Fifth Amendment challenge. *State v. Countryman*, 572 N.W.2d 553, 557 (Iowa 1997). The Court must first determine "whether *Miranda* warnings were

[3] The State offered Exhibit 6, a redacted deposition of Detective Hedlund, and Exhibit 7, a redacted deposition of Captain Quinn, into evidence. Pendleton objected, arguing that although his attorney was present at those depositions and was able to cross-examine those witnesses, the depositions were not directed to the specific issues present with the motion to suppress. As a result, Pendleton asserted it was unfair to consider the depositions because his attorney might ask the witnesses different questions if they were testifying live at the hearing. The Court agrees and has not considered those exhibits in making its ruling.

required and, if so, whether they were properly given." *Id.* And second "whether the statement is voluntary and satisfies due process." *Id.* "*Miranda* warnings are not required unless there is both custody and interrogation." *Id.* "Once police give a suspect the requisite warning, the '[s]uspect[ ] may waive [his or her] *Miranda* rights as long as the suspect has done so knowingly, intelligently, and voluntarily.'" *State v. Tyler*, 867 N.W.2d 136, 171 (Iowa 2015). The burden is on the State to prove these issues beyond a preponderance of the evidence. *Ortiz*, 766 N.W.2d at 249.

Both parties have broken down the statements at issue into four parts. The first part concerns the statements Pendleton made at his apartment. The second segment encompasses those Pendleton made once at the police station but before he was read the *Miranda* warnings. The third part concerns the statements Pendleton made after the *Miranda* warnings. And the fourth set of statements are those that Pendleton made after invoking his right to remain silent and right to counsel. Overarching all of this is Pendleton's general argument that all of these statements were involuntary due to his mental illness and therefore in violation of his rights under the Fourteenth Amendment of the United States Constitution.

A. Statements Made by Pendleton at His Apartment.

The State argues that Pendleton was neither in custody nor interrogated when he made statements to the police outside his apartment. "The *Miranda* opinion provides that a suspect is in custody upon formal arrest or under *any other circumstances* where the suspect is deprived of his or her freedom of action in *any* significant way." *Ortiz*, 766 N.W.2d at 251. To determine whether a suspect is in custody at a particular time, the Court must "examine the extent of the restraints placed on the suspect during the

interrogation in light of whether 'a reasonable man in the suspect's position would have understood his situation' to be one of custody." *Id.* (citation omitted). This test is applied objectively and with consideration of the following four factors:

> (1) the language used to summon the individual;
> (2) the purpose, place, and manner of interrogation;
> (3) the extent to which the defendant is confronted with evidence of his guilt; and
> (4) whether the defendant is free to leave the place of questioning.

Id. All of these factors show that Pendleton was in custody at his apartment.

There were at least four police officers at Pendleton's residence when he came home. Two were in full uniform. The other two were in plain clothes but had tactical vests and firearms. *See In re J.A.N.*, 346 N.W.2d 495, 499 (Iowa 1984) (finding defendant in custody where numerous officers were present and many of them were armed). As Pendleton approached the apartment, Sergeant Thompson tells him to show his hands and not reach for anything, immediately taking control of his movement. *See Miranda*, 672 N.W.2d at 759. Pendleton makes a statement, and Thompson responds by asking him to place his hands behind his back. Pendleton complies, and he is placed in handcuffs. *See id.* at 760 (noting the fact the defendant "was handcuffed strongly indicates he was not free to leave").

As the court in *Miranda* noted:

> "The most obvious and effective means of demonstrating that a suspect has not been taken into custody or otherwise deprived of freedom of action is for the police to inform the suspect that an arrest is not being made and that the suspect may terminate the interview at will."

Id. (citation omitted). Rather than doing that, Sergeant Thompson told Pendleton he was being detained. And after Pendleton tells the officers that he has the pastor's phone, Detective Hedlund tells another officer to "put him in your car and take him

downtown." *Cf. Tyler*, 867 N.W.2d at 172 (finding defendant was not in custody when she was asked to accompany an officer to the police station and she agreed). The officers then wait with Pendleton on the sidewalk for a marked police car to arrive. Pendleton is patted down and placed into the back of the car once it pulls up.

While there is a general rule "that in-home interrogations are not custodial for purposes of *Miranda*," this was not the run-of-the-mill interview at a suspect's home. *Miranda*, 672 N.W.2d at 760. Like in *Miranda*, the "usual comforts of home were taken away" from Pendleton immediately upon his arrival there. *Id.* Considering the totality of the circumstances, the Court finds that Pendleton was in custody at his residence.

The Court must next decide whether Pendleton was interrogated while at his residence. "Statements made after a person is taken into custody are not automatically considered the product of interrogation." *State v. Turner*, 630 N.W.2d 601, 608 (Iowa 2001). Interrogation in the context of a *Miranda* claim

> "refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."

Id. (citation omitted). Statements "that are volunteered, spontaneous and freely made by an arrested person do not come within the scope of *Miranda*." *Id*.

The Court agrees with the State that the statements Pendleton made at his apartment were volunteered and spontaneous. Pendleton started talking almost immediately upon his arrival home and without any questions being asked by the police. Sergeant Thompson's requests for Pendleton to show him his hands, not to reach for anything, and to put his hands behind his back were of the type "normally attendant to

arrest and custody," which do not constitute interrogation. *State v. Sallis*, 574 N.W.2d 15, 18 (Iowa 1998).

Thompson did ask two follow-up questions after Pendleton referenced a "bad man" down there. But those came after Pendleton had already volunteered the information. And when Thompson asked Pendleton if he wanted to speak to Detective Hedlund "about anything," before Hedlund could even ask a question, Pendleton volunteered more information. This pattern continued for the duration of the time when Pendleton was at his residence, with Pendleton making statements without prompting by any of the officers who were present. The officers were mostly silent and did not do anything to encourage Pendleton to keep talking.

This case is similar to *State v. Brown*, 176 N.W.2d 180, 182 (Iowa 1970), which involved an investigation into the defendant brandishing a gun at a woman. Three police cars converged on defendant in an alley. After patting the defendant down, one of the officers started looking in some nearby bushes where he found a gun. The officer picked it up and said, "Look what I found." The defendant volunteered, "That's not my gun." The officer answered, "Well, it must be mine then." Another officer told the defendant they were going to the station to get it figured out. In response, the defendant said, "That's my gun." Despite the officers' statements preceding the defendant's admission, the court in *Brown* found "the utterances of defendant Brown were volunteered, spontaneous and freely made." 176 N.W.2d at 183. The same is true here.

The Court accordingly finds that while Pendleton was in custody at his apartment, the statements he made there were not the product of interrogation but instead

voluntarily and spontaneously made. As a result, those statements are admissible at trial.

B. Statements Made by Pendleton at Police Station before Miranda Warnings.

The Court turns next to the statements Pendleton made once he arrived at the police station but before he was given *Miranda* warnings. Pendleton was even more clearly in custody at the police station than he was at his home. He was brought to the police station handcuffed and in a marked police car. Pendleton was led through a sally port into the station and placed into a small interview room. Although his handcuffs were removed once there, an officer was present with him at all times. Sergeant Thompson candidly testified at the suppression hearing that if Pendleton had asked to leave, they would not have allowed him to do so. *See Ortiz*, 766 N.W.2d at 252 (finding once defendant "was transported to the police station and put in the interview room a reasonable person in" defendant's situation would have understood his situation to be one of custody). The custody question with this segment of statements is thus easily answered. The question of interrogation is more difficult.

Like he did while at his apartment, Pendleton continued volunteering statements that were not in response to any questions asked by the police. As the court in *State v. Rank*, 214 N.W.2d 136, 139 (Iowa 1974) stated,

> "There is no requirement that police stop a person who enters a police station and states he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today."

(Quoting *Miranda*, 384 U.S. at 478.)

That being said, at one point prior to being administered the *Miranda* warnings, the Court finds that an interrogation did occur. Approximately three minutes after placing Pendleton into the interview room, Detective Hedlund comes in and shuts the door. He sits down and moves his chair close to Pendleton. Hedlund tells Pendleton that he's not under arrest several times. Pendleton continues to talk and then starts to cry. While he is crying, Hedlund pulls up Pendleton's sleeve and asks, "Do you have a cut on your hand?" Pendleton then makes some additional statements, which include some details about the crime, before Hedlund moves onto the *Miranda* warnings.

The Court finds the statements Pendleton made after Hedlund asks him about the cut on his hand and before he waived his *Miranda* rights were the product of a custodial interrogation. Although Hedlund made a single inquiry, it was designed to elicit an incriminating response from Pendleton. *See Miranda*, 672 N.W.2d at 760-61 (finding a single inquiry about who owned the marijuana to qualify as an interrogation); *accord State v. Cue*, 2009 WL 3337668, at *8 (Iowa Ct. App. Oct. 7, 2009) (rejecting the State's argument that defendant's statements were voluntary and not in response to interrogation where a detective began the audio recording by asking, "I don't know, why would I have a reason to be upset?").

In light of the foregoing, the Court finds that any statements Pendleton made after Hedlund asked about the cut on his hand and before the *Miranda* waiver must be suppressed.

C. Statements Made by Pendleton after Miranda Warnings.

The next segment of statements require the Court to consider the voluntariness of Pendleton's *Miranda* waiver. "In order to execute a valid waiver of one's *Miranda* rights,

the waiver must be made 'knowingly, intelligently, and voluntarily.'" *Tyler*, 867 N.W.2d at 174 (citation omitted). Voluntariness for due process purposes and *Miranda* purposes are identical, though the two issues are analyzed separately. *See State v. Pitman*, 2014 WL 251899, at *11 (Iowa Ct. App. Jan. 23, 2014) ("Iowa courts recognize a separate issue of voluntariness distinct from the question" of whether a *Miranda* waiver was voluntary); *accord State v. Hodges*, 326 N.W.2d 345, 347 (Iowa 1982).

The court in *Tyler* explained the inquiry as it relates to a *Miranda* waiver as follows:

> For a waiver to be made voluntarily, the relinquishment of the right must have been voluntary, meaning it was the product of the suspect's free and deliberate choice rather than intimidation, coercion, or deception. The question of whether a suspect voluntarily waived his or her *Miranda* rights is to be made by inquiring into the totality of the circumstances surrounding the interrogation, to ascertain whether the suspect in fact decided to forgo his rights to remain silent and to have the assistance of counsel.

867 N.W.2d at 174-75 (internal quotations and citations omitted). Importantly, because voluntariness for due process purposes and *Miranda* purposes are identical, "'a *Miranda* waiver is involuntary only when it is shown to be the product of police misconduct or overreaching.'" *Id.* at 174 (citation omitted).

The factors to be considered in determining whether a defendant voluntarily waived their *Miranda* rights include:

> defendant's age; whether defendant had prior experience in the criminal justice system; whether defendant was under the influence of drugs; ... whether defendant was mentally "subnormal"; whether deception was used; whether defendant showed an ability to understand the questions and respond; the length of time defendant was detained and interrogated; defendant's physical and emotional reaction to interrogation; whether physical punishment, including deprivation of food and sleep, was used.

Id. at 175. In addition, while a written waiver alone is not sufficient to establish the waiver as voluntary, it is strong proof of its validity. *Id.*

Defendant was thirty-six years old on October 2, 2019. He was well-versed in the criminal system. In fact, many of the officers and jailers who dealt with Pendleton that evening were familiar with him. There was no evidence that Pendleton was under the influence of any drugs. Instead, Pendleton's primary argument as it relates to the voluntariness of his *Miranda* waiver concerns his mental health.

When questioning Sergeant Thompson, Pendleton's defense counsel asked whether Pendleton was "known throughout the law enforcement community as someone with mental health issues." Thompson agreed that he was. Later on in the cross-examination, counsel asked about the accent Pendleton used during the interview. Thompson agreed that Pendleton was "going in and out of accent," which Thompson thought violated "social norms" but did not affect Pendleton's ability to waive his *Miranda* rights. The Court agrees.

In *State v. Davidson*, 340 N.W.2d 770, 771 (Iowa 1983), the court noted: "We have often been presented with a claim that an admission or waiver was involuntary because the person making the statement was mentally subnormal or disordered." The court then highlighted two cases where a waiver or admission was found involuntary as a result of mental illness—*In re Thompson*, 241 N.W.2d 2, 7 (Iowa 1976), which involved a seventeen-year-old defendant described by the court in *Davidson* as follows: "virtually abandoned at early age, spent four previous years in mental health center, had I.Q. of seventy-one, very low practical judgment, fourth grade reading level, was frightened, insecure, frustrated, exhibited passive-aggressive behavior, significant signs of brain damage, borderline mental retardation; also deprived of sleep and consultation" with others; and *State v. Cullison*, 227 N.W.2d 121, 128-29 (Iowa 1975), where the

defendant was subjected to a physically and psychologically intensive interrogation and suffered a probable psychological reaction to a combination of drugs and the situation.

This case is not like the extreme situations in *Thompson* or *Cullison*. It is instead more like *Davidson* and the multiple other cases cited in that opinion in which the court "found a defendant's waiver or admission voluntary even though the defendant was mentally subnormal or disordered." 340 N.W.2d at 772 (listing those cases). As those cases demonstrate, mental illness itself does not deprive a waiver or confession of voluntariness. *Id.* No evidence was presented to the Court at the suppression hearing on the nature of Pendleton's mental illness, although the Court is aware from a review of the file that he was found not competent to stand trial at one point in these proceedings. That does not mean, however, that he was incapable of knowingly, voluntarily, and intelligently waiving his *Miranda* rights on October 2, 2019. Indeed, all of the other factors identified above suggest that he was capable.

Returning to those factors, the Court finds from its review of the video recording of Pendleton's interview that he showed an ability to understand the questions being asked and to respond appropriately. At one point, he asked a fairly sophisticated question about the *Miranda* waiver he was reading. No deception was used during the interview, which last only about thirty-four minutes once Pendleton arrived at the police station. Although Pendleton cried momentarily at the beginning of the interview, he was relatively calm for the rest of it until he learned that he was going to be charged with first-degree murder. No physical punishment was used. Nor was there any deprivation of food or sleep.

Considering the totality of these circumstances, the Court finds that Pendleton voluntarily waived his *Miranda* rights at the police station.

D. Statements Made by Pendleton after Invoking His Right to Remain Silent and Right to Counsel.

This brings the Court to the final segment of statements challenged by Pendleton—those made after he invoked his right to remain silent and right to counsel. In addition to the warnings *Miranda* requires to be given to a suspect who is subject to a custodial interrogation, it "provides a second level of procedural safeguards law enforcement must follow after a suspect invokes his or her Fifth Amendment privilege against self-incrimination by asserting either the right to remain silent or the right to the presence of counsel." *State v. Palmer*, 791 N.W.2d 840, 845 (Iowa 2010). "The result of a suspect's invocation of each of these rights has different implications and results." *State v. Trott*, 2015 WL 9450670, at *5 (Iowa Ct. App. Dec. 23, 2015).

When a suspect invokes his right to remain silent, the United States Supreme Court held in *Michigan v. Mosley*, 423 U.S. 96, 97 (1975) that questioning can resume "only when the suspect's right to cut off questioning was scrupulously honored." *Palmer*, 791 N.W.2d at 846. This inquiry again involves a totality of the circumstances analysis, which considers whether (1) the police immediately ceased interrogation; (2) resumed questioning only after the passage of a significant period of time; (3) provided the defendant with a fresh set of *Miranda* warnings; and (4) had a new police officer in a different location conduct the interrogation.

The procedural safeguards applicable after a suspect invokes his right to counsel are more stringent. As explained in *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981),

> when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication, exchanges, or conversations with the police*.

(Emphasis added.)

Like with the interrogation analysis, the difficulty the Court faces here is that Pendleton continues talking after he invokes his right to remain silent and right to counsel. This would bring his statements within the exception noted above in *Edwards*, except for the fact that Detective Hedlund also continues to engage with Pendleton.

The first such instance happens soon after Pendleton says that he wants a lawyer. Hedlund asks if he can get a picture of Pendleton's hands, one of which appears to be bloody. After initially agreeing, Pendleton changes his mind and says he wants his lawyer present. Hedlund exits the room for a few minutes and then returns. When he comes back in, Hedlund again asks Pendleton if he can get a picture of his hands. The Court finds this to be further police-initiated interrogation. *State v. Lint*, 2003 WL 1523545, at *1 (Iowa Ct. App. Mar. 26, 2003) ("Interrogation occurs when the police engage in express questioning *or its functional equivalent*, which is defined as any conduct reasonably likely to elicit an incriminating response.").

Pendleton continues to request a lawyer, but his requests are interspersed with questions about what's happening. Rather than remaining silent, Hedlund responds to these questions. Many of his responses are antagonizing and designed to elicit a reaction from Pendleton. For instance, at one point he tells Pendleton that he's being

arrested for first-degree murder "cuz you killed that man." Hedlund also tells Pendleton that he thinks Pendleton is lying and yells at him to "stop talking in that bullshit Russian accent." Throughout all of this, Pendleton is repeatedly stating in a loud voice that he wants a lawyer.

Considering the totality of these circumstances, the Court finds that Pendleton's statements after he invokes his right to remain silent and right to counsel should be suppressed. Having reached that conclusion, the Court must consider the State's alternate argument that Pendleton's statements once he is taken from the interview room into the jail were made as part of the routine booking process.

The State is correct that "there is a 'routine booking question' exception which exempts from *Miranda's* coverage questions to secure the 'biographical data necessary to complete booking or pretrial services.'" *Id.* (quoting *Pennsylvania v. Muniz*, 496 U.S. 582, 601 (1990)). The rule has been explained as follows:

> "A request for routine information necessary for basic identification purposes is not interrogation under *Miranda*, even if the information turns out to be incriminating. Only if the government agent should reasonably be aware that the information sought, while merely for basic identification purposes in the usual case, is directly relevant to the substantive offense charged, will the question be subject to scrutiny."

Sallis, 574 N.W.2d at 18 (citation omitted). Thus, the booking exception "'does not mean . . . that any question asked during the booking process falls within that exception. Without obtaining a waiver of the suspect's *Miranda* rights, the police may not ask questions, even during booking, that are designed to elicit incriminatory admissions.'" *State v. Cain*, 2005 WL 598791, at 5 (Iowa Ct. App. Mar. 16, 2005) (quoting *Muniz*, 496 U.S. at 601-02).

In *Sallis*, the court found that a question regarding the defendant's past residences was not "prompted by any sort of 'interrogation.' The information was requested of Sallis for administrative purposes unrelated to criminal investigation; that is, Sallis' statement about his former address was not the product of 'compulsion above and beyond that inherent in custody itself." 574 N.W.2d at 18 (citation omitted). But in *Cain*, 2005 WL 598791, at *5-6 (Iowa Ct. App. Mar. 16, 2005), the court found that booking questions regarding the defendant's usage of drugs were obtained in violation of the defendant's Fifth Amendment rights. The court reasoned that because the defendant "was arrested for possession of drug paraphernalia, . . . questions regarding defendant's drug usage were relevant to the substantive offense and the booking officer reasonably should have known this." *Id.* at *6.

Pendleton's primary challenged statement during the booking process came after Jailer Joshua Pyle asked him if he wanted to take a shower. Pyle admitted that he was not required to ask if someone wants to take a shower as part of the booking process. Although Pyle did not offer a reason for asking Pendleton that question, the Court does not find that it was related to the substantive offense or that it was designed to elicit an incriminating response when viewed from Pendleton's perspective. *Id.* The question came after Pyle asked Pendleton to remove his shoes and just before Pyle told Pendleton that he needed to do a pat-down and then have him change into a uniform. Later on in their interaction, Pyle observed that it looked like Pendleton had been out in the rain all day.

On the whole, the Court finds that Jailer Pyle's question regarding whether Pendleton wanted to take a shower was part of the booking process.[4] Pendleton's statements after that point were voluntary and spontaneous, including those that he made while Sergeant Thompson was executing the search warrant on his person. Thompson is mostly silent during this process even when Pendleton continues to make incriminating statements. Pendleton did not provide any support for his proposition that an attorney had to be provided to him before Thompson executed the search warrant. *Cf. State v. Dodson*, 195 N.W.2d 684, 686 (Iowa 1972) (rejecting a *Miranda* challenge where officers were "lawfully acting within the scope of the search warrant" but defendant volunteered information).

E. Overall Voluntariness of Statements.

Pendleton finally argues that all of his statements to police on October 2, 2019, were involuntary and therefore in violation of his due process rights under the Fourteenth Amendment to the United States Constitution. As previously noted, "'voluntariness' for due process purposes and *Miranda* purposed are identical." *Tyler*, 867 N.W.2d at 176. Therefore, the same factors outlined in section C above are relevant in determining whether Pendleton's statements were voluntarily given. *Id.*

For the same reasons noted in that section, the Court finds that all of Pendleton's statements were voluntarily given. While Pendleton was talking in an accent on and off during his interactions with the police, he was also responding coherently to their questions. He was able to relate what he had done that day and walk Detective Hedlund

[4] The Court reaches this conclusion even though Jailer Pyle's question about the shower was preceded by Detective Hedlund telling Pendleton, "His name is Al Henderson." While Hedlund's statement was improper, when Jailer Pyle asked Pendleton if he wanted to take a shower, Pendleton's response was directed to that question, not Hedlund's statement to him.

through his route to the church. As previously noted, he was cognizant enough to notice a discrepancy in the *Miranda* warning and question Hedlund about it. He also pointed out to Hedlund that first-degree murder required premeditation. While Hedlund overstepped his bounds in continuing to engage Pendleton after he invoked his right to counsel, no deceptive or coercive tactics were used during his or other officers' time with Pendleton. Nor were any threats or promises of leniency made. In sum, despite Pendleton's mental health issues, the Court finds the record does not reflect an individual whose will was overborne. *See id.* at 177. As a result, Pendleton's due process challenge is also rejected.

III. Conclusion

In conclusion, the Court finds that the statements Pendleton made at the police station after Detective Hedlund asked him about the cut on his hand and before he waived his *Miranda* rights must be suppressed. The Court further finds that the statements made by Pendleton after he invoked his right to remain silent and right to counsel until he walks out of the interview room with Jailer Pyle to go to the jail must also be suppressed. The remaining statements Pendleton made the evening of October 2, 2019, are admissible.

IT IS THEREFORE ORDERED that Defendant Joshua Pendleton's motion to suppress is **GRANTED IN PART** and **DENIED IN PART**.

IN THE IOWA DISTRICT COURT FOR GREENE COUNTY

TYSON JAMES RUTH Applicant, vs. **STATE OF IOWA** Respondent.	No. PCCV021600 **RULING ON APPLICATION FOR POSTCONVICTION RELIEF**

The issues presented by this Application for Postconviction Relief are whether trial counsel for Applicant Tyson Ruth was ineffective in (1) pressuring Ruth to accept a package plea deal with his fiancée; and (2) failing to challenge search warrants issued by a magistrate who represented Ruth's parents in a guardianship over his children. For the reasons that follow, the Court finds that both of these claims must be denied.

I. Background Facts and Proceedings

On January 30, 2016, Officer Kyle DeMoss presented a search warrant application to Greene County Magistrate Rita Pedersen for a home in Jefferson owned by Applicant Tyson Ruth. Ex. 3. Ruth lived there with his fiancée, Joey Godwin. Both Ruth and Godwin were listed as defendants in the application, which detailed a number of items alleged to have been stolen by the two. The magistrate authorized the search warrant, and it was executed on the same day it was issued. Multiple items were seized during this search, including one or two of the items listed on the application along with numerous drugs and paraphernalia.

At the time when Magistrate Pedersen signed the January 30, 2016 warrant, she was acquainted with Ruth and his family. She went to the same church as them and had taught Ruth in Sunday school. She also prepared income tax returns for Ruth's parents, Gregory and Maralie, for years in her capacity as a private attorney.

On February 28, 2016, Ruth's parents signed a petition for an involuntary guardianship over Ruth's two minor children. Ex. 5. The petition and related paperwork was prepared by Pedersen. Ruth consented to his parents' guardianship of the children. Ruth's consent stated that he was "unable to care for the children" and that "DHS has recommended a guardianship for my children, naming Gregory Ruth and Maralie Ruth as guardians." *Id*. The petition and the parents' consents were filed on March 2, 2016, and approved by the Court the same day. *Id.*

A second search warrant was presented to Pedersen on May 27, 2016. The only defendant listed in this warrant was Ruth's fiancée, Joey Godwin, although Pedersen recognized the address as Ruth's residence. Ruth's name was also listed on the second page of the application. Pedersen signed this warrant, which was executed by several Greene County law enforcement officers. During the search of Ruth's residence, some items reported as stolen were again recovered as were more drugs and paraphernalia.

Ruth was ultimately charged with (1) ongoing criminal conduct, a class B felony; (2) burglary in the third degree on a motor vehicle, an aggravated misdemeanor; (3) burglary in the third degree, a class D felony; (4) two counts of theft in the second degree, class D felonies; (5) two counts of possession of methamphetamine, serious misdemeanors; and (6) possession of marijuana, a serious misdemeanor.

On September 19, 2016, Ruth's attorney, Joel Baxter, filed a motion to suppress. The motion challenged the January 30, 2016 search warrant, arguing that although it referenced an "Attachment A" as providing supporting information for the warrant, no such attachment was attached to the application. The motion also challenged the May

27, 2016 search warrant, arguing that it relied on hearsay and an informant with no corresponding credibility determinations.

Ruth's motion to suppress was set for hearing on November 7, 2016. On the day of the hearing, the Court entered an order stating the parties had reached a plea agreement pursuant to which Ruth would plead guilty to one count of theft in the second degree with all of the remaining counts to be dismissed. The State agreed to recommend a suspended sentence, while Ruth intended to argue for a deferred judgment. The same plea offer was extended to Ruth's fiancée, Joey Godwin, with the condition that if Ruth rejected his offer, the State would withdraw the offer it had made to Godwin.

A plea hearing for both Ruth and Godwin was held on December 9, 2016. Ex. A. At the beginning of the hearing, the Court asked Ruth, "Is what you are about to do being done freely and without any duress or threats against you, Mr. Ruth?" Ruth replied, "Correct." Ruth was then informed that if he changed his mind about pleading guilty at any time during the proceeding, the Court would stop the proceedings. Following those introductory remarks, the Court asked Ruth five different times whether he wanted to proceed with his guilty plea. Each time, Ruth responded yes. After obtaining a factual basis from Ruth, the Court accepted his guilty plea to theft in the second degree and set a sentencing date.

Following the preparation of a presentence investigation report, the Court held a sentencing hearing at which Ruth was sentenced to an indeterminate term of five years in prison. Unhappy with this sentence, which was greater than that recommended by the State, Ruth began challenging the Court's decision. Ruth was successful in

removing some court costs that had been assessed to him in his direct appeal from the sentencing order. *See State v. Ruth*, 925 N.W.2d 589, 591 (Iowa 2019). His remaining claims were preserved for postconviction relief.

Ruth filed his application for postconviction relief on March 2, 2017. It was amended on February 2, 2018, with Ruth's claims ultimately whittled down to the following: (1) the guilty plea "was coerced or inappropriately pressured by trial counsel, Joel Baxter"; and (2) trial counsel was "ineffective by failing to incorporate information, provided by Applicant, into a Motion to Suppress. Specifically, Counsel was advised of a potential conflict of interest that existed with the magistrate endorsing the search warrants involved in the criminal matter." 11/25/19 App. Tr. Br.

A trial on Ruth's application was held on October 24, 2019. Ruth participated by telephone and was represented by his attorney, Marshall Orsini. The State of Iowa was represented by Greene County Attorney Thomas Laehn. The Court heard testimony from Ruth, his trial attorney Joel Baxter, and Magistrate Pedersen. The State offered Exhibit A into evidence and Ruth offered Exhibits 1-6, all of which were admitted by the Court without objection by either party. The Court additionally agreed to take judicial notice of the underlying criminal case—*State v. Ruth*, Greene Co. Case No. FECR012916. The parties submitted briefs to the Court on November 25, 2019. After considering all of the above, the Court concludes that Ruth's application must be denied for the reasons that follow.

II. Analysis

The burden on postconviction relief applicants alleging ineffective assistance of counsel claims is well-settled:

> To establish his claims of ineffective assistance of counsel, [Ruth] must prove by a preponderance of the evidence that his counsel's performance was so deficient it constituted a breach of an essential duty and that the breach of an essential duty resulted in constitutional prejudice. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." With respect to the first element, [Ruth] must prove his counsel's performance fell below the standard of a reasonably competent attorney. In assessing counsel's performance, we presume counsel acted competently. With respect to prejudice, [Ruth] must prove that but for counsel's breach of an essential duty he would have insisted on going to trial.

Ware v. State, 2018 WL 1433688, at *1 (Iowa Ct. App. Mar. 21, 2018) (internal citations omitted). With this framework in mind, the Court turns to the first of Ruth's two claims—that his trial counsel was ineffective for pressuring him to accept a package plea deal with his fiancée.

A. Package Plea Deal

A court may accept a guilty plea if it "is made voluntarily and intelligently and has a factual basis." Iowa R. Crim. P. 2.8(2)(b); *see also State v. Speed*, 573 N.W.2d 594, 597 (Iowa 1998). "To 'ensure that a plea is knowingly and voluntarily made,' trial courts must follow the colloquy set forth" in Iowa Rule of Criminal Procedure 2.8(2)(b). *Speed*, 573 N.W.2d at 597. Ruth does not claim the Court failed to follow that colloquy in his plea proceedings. Instead, like the defendant in *Speed*, Ruth asserts the statements he made to the Court when pleading guilty were false, and trial counsel did pressure him to plead guilty. Ruth alleges that one way counsel did this was by telling him the motion to suppress was going to fail.

The testimony of Ruth's attorney, Joel Baxter, disputes this allegation. According to Baxter, he did not tell Ruth the motion to suppress was going to fail. Instead, after the plea offer was made, Baxter discussed the merits of the motion with Ruth to help

him decide whether to accept the offer. Providing such advice to a client is exactly what a competent attorney should do. *See Speed*, 573 N.W.2d at 597 ("'No doubt no accused wants to be charged with [a] crime, nor would he like to enter a plea of guilty in any case. The law contemplates that he have an uncoerced election to plead not guilty or guilty, *after he has had the benefit and advice of competent counsel*." (emphasis added)). As the court in *Speed* held, even if Baxter did try to persuade Ruth that it was in his best interest to abandon the motion to suppress and plead guilty (which the record does not conclusively show) the plea can still be voluntary:

> Assuming appellant was reluctant or "unwilling" to change his plea, such state of mind is not synonymous with an involuntary act. Lawyers and other professional[s] often persuade clients to act upon advice which is unwillingly or reluctantly accepted. And the fact that such advice is unwillingly or reluctantly acted upon is not a ". . . factor overreaching defendant's free and clear judgment" of what should be done to find a means to alleviate the situation with respect to which the client seeks advice.

Id. at 597 (citation omitted).

The conditional nature of the State's plea offer also does not automatically render the plea involuntary. The Iowa Court of Appeals considered a very similar offer in *State v. Wireman*, 2016 WL 1679052, at *5 (Iowa Ct. App. Apr. 27, 2016). Like here, the prosecutor in *Wireman* refused to offer the defendant's wife a plea deal unless the defendant accepted his plea offer. *Id.* The court canvassed federal and other state cases that examined what it referred to as "package plea deals," the majority of which have "held a defendant's plea deal may be voluntary even when the state's offer of leniency to an immediate family member is contingent upon the defendant pleading guilty." *Id.*

While the State's conditional plea offer may well have been an important consideration in Ruth's decision to accept the offer and plead guilty, it was not the only consideration Ruth received. In exchange for Ruth's guilty plea to one count of theft in the second degree, the State agreed to dismiss seven other charges and recommend a suspended sentence of five years in prison. Without that offer, Ruth was facing a total indeterminate prison term of close to forty-five years in prison. These significant sentencing concessions weaken Ruth's claims of pressure. *See, e.g.*, *Ware*, 2018 WL 1433688, at *3; *Wireman*, 2016 WL 1679052, at *6.

Further weakening Ruth's claims of pressure is the record of the plea proceeding itself. "The record at a plea proceeding presumptively reflects the facts." *State v. Bringus*, 2016 WL 903161, at *2 (Iowa Ct. App. Mar. 9, 2016). "Where a defendant challenges the voluntariness of a plea, but had asserted the plea was voluntary at the plea hearing, the defendant must overcome that presumption." *Id.* Ruth has failed to do so here.

At the plea hearing, Ruth reaffirmed his willingness to plead guilty multiple times, even after being informed that "the sentencing judge . . . is not required to follow the terms of the plea agreement and [he] could be sentenced to the maximum sentence allowed under Iowa law." Ex. A at 10:12-19. Ruth confirmed that he understood the terms of the plea offer, that he was satisfied with the services of his attorney, and that he was pleading guilty because he was in fact guilty. He additionally stated that he was entering his plea "freely and without any duress or threats" against him.

Ruth attempted to discount these statements to the Court by asserting at the postconviction trial that he was still using drugs heavily at the time of the plea

proceeding. However, trial counsel Baxter testified he did not see any signs that Ruth was under the influence at the time of the plea proceeding. And the transcript from the plea proceeding shows that Ruth was lucid and answered the Court's questions appropriately.

Given all of the above, the Court finds Ruth has failed to establish that trial counsel was ineffective in pressuring him to plead guilty or in failing to challenge his guilty plea as involuntary. *See Ware*, 2018 WL 1433688, at *3; *Wireman*, 2016 WL 1679052, at *6. Ruth has further failed to establish that but for these alleged failures by trial counsel, he would have insisted on going to trial, particularly considering the significant sentencing concessions he obtained through the plea deal.

B. Neutral and Detached Magistrate

Ruth next claims Magistrate Pedersen was not neutral and detached when she signed his search warrants because she "had an existing relationship with an adverse party," namely Ruth's parents. The Fourth Amendment of the United States Constitution requires that a warrant must be issued by a "neutral and detached" magistrate. *State v. Fremont*, 749 N.W.2d 234, 237 (Iowa 2008). This requirement, which also involves considerations of due process, has evolved into a prohibition against a magistrate issuing a warrant where the magistrate has a "direct, personal, substantial, pecuniary interest" in its issuance. *Id.* at 238.

The United States Supreme Court has also suggested that "constitutional challenges to the impartiality of a judge may include nonpecuniary interests that must be evaluated in the specific factual context of a given case." *Id.* at 241. That being said, the "courts have been careful . . . to set clear limits to claims that nonpecuniary

interests defeat magistrate neutrality and detachment under the Fourth Amendment." *Id.* For instance, "mere past association or knowledge of a defendant" or "past legal representation either on behalf of or adverse to a defendant" are typically not grounds for attacking the neutrality or detachment of a magistrate. *Id.*

After reviewing the foregoing principles, the court in *Fremont* held that a magistrate who was "simultaneously representing the putative father against one of the targets of the search in a child custody proceeding" was not neutral and detached in violation of the Fourth Amendment. *Id.* at 242. The court noted a "successful search of the home, which sought to find evidence of drug offenses, could make the position of the mother more difficult in the child custody matter and advance the position of the father." *Id.* Because of that, the court concluded "the magistrate had a nonpecuniary personal interest in the matter that objectively cast doubt on his ability to hold the balance, nice, clear, and true, between the state and the accused." *Id.* at 243.

Ruth argues this case is the same as *Fremont*. The Court disagrees for several reasons. First, there is no evidence other than Ruth's testimony that he informed his trial attorney of the magistrate's alleged conflict. Baxter testified he thoroughly reviewed his file for Ruth, but it did not contain any notes or research on the issue. This suggested to Baxter that Ruth did not inform him of the conflict. Baxter further testified that if he had known about the conflict, he would have included it in the motion to suppress because his office was in the midst of multiple motions to suppress challenging the way law enforcement and the magistrate were handling things in Greene County. *See* Ex. 2. The Court finds Baxter's testimony more credible than Ruth's. *See Gram v. State*, 2018 WL 3302002, at *3 (Iowa Ct. App. July 5, 2018) (finding that because applicant

"failed to prove his claim he slept outside the residence he had registered after he left the shelter, and because his counsel was not informed of the claim," his claim of ineffective plea counsel fails).

Second, unlike the magistrate in *Fremont*, the magistrate who issued the warrants in this case was not in an adversarial position to Ruth. The first warrant was issued before the guardianship proceedings were even commenced. While the magistrate had prepared income tax returns for Ruth's parents in the past, Ruth has failed to show how that would have given her an interest in the outcome of the first search warrant. *See Fremont*, 749 N.W.2d at 241 ("Remote claims of bias . . . have little prospect of success in the Fourth Amendment context."). Although the second warrant was issued after the guardianship petition was filed, Ruth consented to that guardianship. It is thus difficult for the Court to understand how the magistrate's representation of Ruth's parents in that uncontested guardianship proceeding was adverse to Ruth.

Ruth nevertheless argues a conflict existed because a drug charge would hamper his ability to move to terminate the guardianship, which would benefit his parents and by extension the magistrate who represented them. The fatal flaw in this argument is there was no evidence that Ruth was looking to terminate the guardianship or that his parents would have resisted Ruth's request to do so. In fact, there was no evidence that anything was pending in the guardianship proceeding at the time when the second search warrant was approved. *See Fremont*, 749 N.W.2d at 241 (noting past legal representation either on behalf of or adverse to a defendant does not mean the magistrate was not neutral or detached).

For all these reasons, the Court finds that trial counsel did not breach an essential duty in failing to challenge the search warrants on the ground that the magistrate was not neutral and detached.

III. Conclusion

The Applicant, Tyson Ruth, has failed to prove by a preponderance of the evidence that his trial counsel's performance was so deficient that it constituted a breach of an essential duty and that the breach of an essential duty resulted in constitutional prejudice. The Court accordingly **DENIES** the application for postconviction relief.

CLERK TO FURNISH COPIES TO:
Greene County Attorney
Marshall Orsini
Tyson Ruth