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.**

   Tyler John Buller

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

   Assistant Attorney General, Iowa Department of Justice

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

   07/17/1988

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

   Johnston, Polk 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.**

   University of Iowa College of Law, 2009–2012. Graduated with J.D., Order of the Coif.

   Drake University, 2006–2009. Graduated with B.A. in Politics.

(Adopted May 5, 2021)

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.

Position	Address	Supervisor or Knowledgeable Colleague
Assistant Attorney General, Iowa Department of Justice (2012–Present)	1305 E. Walnut St. Des Moines, IA 50319	Kevin Cmelik (Criminal Appeals Division supervisor 2012–June 2022) Scott Brown (Area Prosecutions Division supervisor 2012–present)
Adjunct Professor, Simpson College (2016–Present)	701 N. C. Street Indianola, 50251	Spencer Waugh (Director of Speech & Debate)
Clinical Extern, Iowa Appellate Defender (Spring 2012)	321 E. 12th Street Des Moines, IA 50319	Martha Lucey (then-supervisor, now chief Appellate Defender)
Clinical Extern, United States Attorney's Office, Southern District of Iowa (Fall 2011)	31 East 4th Street, Ste. 310 Davenport, Iowa 52801	Hon. Joel Barrows (then-supervisor, now district judge)
Law Clerk, Iowa Department of Justice (Criminal Appeals Div.) (Summer 2011)	1305 E. Walnut St. Des Moines, IA 50319	Kevin Cmelik & Jean Pettinger (supervisors)
Steiger Fellow, Iowa Department of Justice (Consumer Protection Div.) (Summer 2011)	1305 E. Walnut St. Des Moines, IA 50319	Jessica Whitney (then-supervisor, now deputy attorney general)

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

   I was admitted to the Iowa Bar in 2012 and remain in good standing. I was admitted to the Supreme Court of the United States Bar in 2016 and remain in good standing.

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.**

   As an Assistant Attorney General, I have had a full-time litigation practice that includes both trial and appellate work across the state. I am the only state prosecutor in Iowa to routinely maintain a significant district- and appellate-court docket, both regularly trying criminal cases at the trial level and arguing to the Court of Appeals and Supreme Court at the appellate level. Whenever possible, I handle my own cases from the start of the investigation and charging phase to final disposition on appeal.

   Over the last ten years, I have handled more than 400 appellate matters for the State of Iowa. (A Westlaw search lists my name, with and without middle initial, in 483 Iowa appeals. This number double-counts cases heard on further review and undercounts matters resolved without opinion.) In all of these appeals but three, I was sole or chief counsel of record. In those three appeals, I delivered oral argument to the Iowa Supreme Court on behalf of the State of Iowa for cases in which a colleague had written the brief. The character of my appellate practice has been approximately 75% criminal and 25% civil (including sexually-violent-predator civil commitments and postconviction litigation).

Of these more than 400 appellate matters, more than 385 were fully briefed solely by me. The remaining cases were disposed of by motion practice without merits briefing or involved the work of student legal interns whom I directly supervised. I have orally argued a combined total of more than 50 cases to the Iowa Supreme Court and Iowa Court of Appeals. I have also authored a petition for writ of certiorari to the Supreme Court of the United States.

My district court experience includes trying first-degree murder, sexual abuse, and kidnapping cases to verdict. Over the last ten years, I have handled more than 40 matters through the Iowa Department of Justice's Area Prosecutions Division and tried approximately 13 cases to disposition, including multiple Class A felonies. In all of these matters, I was sole counsel, chief counsel, or shared responsibility equally with co-counsel. About half of these matters were tried to a jury and the remainder to the bench. The character of my district court practice has been approximately 70% criminal and 30% civil (including sexually-violent-predator civil commitments and postconviction litigation).

In both the district court and on appeal, the substantive character of my practice has focused on the prosecution of complex felonies, with emphasis on violent crime and public-corruption offenses. In the appellate briefing, these cases have included both routine issues (such as sufficiency of the evidence and evidentiary rulings) and novel issues of first impression. Some of the novel issues I have argued to the Iowa Supreme Court include the constitutionality of state statutes (Iowa's juvenile-sentencing scheme and legislative restrictions on guilty-plea appeals), substantive questions of criminal law (whether an inoperable TASER is a dangerous weapon and whether sexual consent is vitiated by impersonating an acquaintance in a dark hotel room), and trending issues in criminal procedure (searching school lockers for firearms and the use of jailhouse informants).

In 2017, while the Iowa Civil Rights Commission prosecutor was on maternity leave, I appeared in several civil rights matters, including a contested administrative proceeding. The total of these administrative matters is less than 1% of my total litigation practice.

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.**

As an Assistant Attorney General for the past 10 years, I have been prohibited by Iowa Code section 13.4 from engaging in the private practice of law, including pro bono litigation on behalf of private parties. On one occasion, I did receive supervisor approval to handle a non-litigation pro bono matter, representing a group of students in a dispute with their local school board. I devoted approximately 75 hours of my own time (and no state time) to this matter.

Because of the statutory limitation on my pro bono activities, I have endeavored to fulfill my obligations through other service activities, such as presenting at continuing legal education (CLE) events, grading the Iowa bar examination, and serving as a volunteer judge at mock trial and moot court activities.

I also volunteer my time on Bar Association and Supreme Court committees. Since 2018, I have been Chairman of the Iowa State Bar Association's Appellate Practice Committee. The Appellate Practice Committee includes a Supreme Court justice, a Court of Appeals judge, and practitioners from across the state. As leader of the Committee, I have organized and presented at CLEs related to the appellate courts and have spearheaded revision of the Appellate Practice Manual, which is a comprehensive guide to appellate litigation. I was also appointed by the Supreme Court to the Appellate Rules Task Force in 2020. On this Task Force, I have worked diligently with justices, judges, and practitioners to modernize the appellate rules and improve the appellate court system.

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

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

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.

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.

I have never held a judicial or quasi-judicial position.

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.

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.

ii. 180 days.

iii. 240 days.

iv. One year.

I have never been subject to the reporting requirements of Court Rule 22.10.

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.**

The Sauser murder litigation.

Name	Citation	Opposing Counsel	Judge(s)
Revette Sauser v. State (PCR appeal to Iowa Court of Appeals)	2018 WL 3060256 (Iowa Ct. App. 2018)	Webb Wassmer (Marion, IA)	The Hons. Robert Mahan, Thomas Bower, & Richard Doyle
Revette Sauser v. State (further review to Iowa Supreme Court)	928 N.W.2d 816 (Iowa 2019)	Webb Wassmer (Marion, IA)	Supreme Court of Iowa (McDonald, J., taking no part)
State v. Revette Sauser (criminal trial)	FECR008121 (Delaware, on change of venue to Clayton)	Nichole Watt and Aaron Hawbaker (Waterloo, IA)	The Hon. Joel Dalrymple
State. v. Revette Sauser (criminal appeal)	Sup. Ct. No. 21-0759 (pending)	Ashley Stewart (Des Moines, IA)	(Pending)

In 2011, after a breakdown in the marriage, bouts of jealousy, and weeks of verbal disagreements, Revette Sauser shot and killed her husband in rural Delaware County. Prior to my involvement, Sauser pled guilty to multiple offenses and was sentenced to a term in prison. Postconviction litigation ensued, in which the district court denied relief, the Court of Appeals divided 2–1, and the Supreme Court on further review found Sauser's criminal-defense lawyer was ineffective. I

represented the State of Iowa as chief counsel throughout these appeals, beginning in 2017.

After the Supreme Court ordered that Sauser was entitled to withdraw her plea and proceed to trial, I appeared for the State of Iowa on remand with co-counsel Assistant Attorney General Susan Krisko. I approached the case facts with fresh eyes and devised a trial strategy based on evidence Sauser killed her husband because she was jealous of the ex-wife. A Clayton County jury agreed with my theory of the case and found Sauser guilty of first-degree murder. The Hon. Joel Dalrymple sentenced Sauser to life in prison without parole.

The disagreement on the merits between the district court judges, the divided Court of Appeals panel, and the Supreme Court highlights the work of the appellate courts in resolving difficult legal questions, such as reviewing the work of defense counsel. Every defendant has guaranteed constitutional rights and I ensured Sauser received a fair trial before a jury of her peers. The trial concluded with a verdict of guilty as charged and justice was done—for both the defendant and the victim.

Because of my unique role in the Iowa Department of Justice, I am one of the only state prosecutors to argue appeals of my own trials to the appellate courts. (Ordinarily, trials are handled by county attorneys and appeals by assistant attorneys general.) Reading one's own transcripts is a humbling experience for all practitioners, including me. This trial was no exception and it highlights how my work in the appellate courts is influenced by my experience trying complex felonies in the district courts, because I have kept a foot in both worlds. To be an effective appellate practitioner or appellate judge, a strong background in the realities of trial work is crucial.

This appeal was submitted to the Court of Appeals on May 10, 2022. My appellate brief is included as a writing sample. The brief is a good example of my routine appellate work, which includes a narrative of the facts and a concise but effective analysis of a legal issue.

The Gaskins appeal and debate over interpreting the Iowa Constitution.

Name	Citation	Opposing Counsel	Judge(s)
State v. Gaskins	866 N.W.2d 1 (Iowa 2015)	Martha Lucey (Des Moines)	Supreme Court of Iowa

Following a traffic stop, Davenport police found drugs and a gun inside Jessie Gaskins's car. Gaskins moved to suppress the evidence in the district court and his motion was denied. On appeal, Gaskins argued for a novel state constitutional rule, bringing his claim at the peak of the Supreme Court's internal debate about how to interpret the Iowa Constitution.

This case is significant because my brief uses the full range of judicial decision-making tools—analysis of text, history, precedent, and more—to approach a novel legal question. The case is also significant to the development of state constitutional law. The constitutional-framework briefing spawned a 40-page special concurrence from Justice Appel and a 31-page dissent by Justice Waterman (joined by Justices Mansfield and Zager). Justice Waterman's opinion block-quoted my brief at length and embraced the neutral interpretive principles proposed for constitutional analysis. To this date, whether to employ a neutral interpretive framework for understanding the Iowa Constitution has remained a hot topic and the Supreme Court has not reached consensus on which principles to apply. However, the approach I outlined in *Gaskins* has remained part of the conversation and the concepts frequently appear in court opinions. *See, e.g., State v. Wright*, 961 N.W.2d 396, 454–55 (Iowa 2021) (Waterman, J., dissenting).

The Supreme Court's majority opinion remanded the suppression issue for further proceedings. The brief I filed on behalf of the State of Iowa is included as one of my writing samples. I was chief counsel for the State of Iowa on appeal in this matter, beginning in 2015.

The Shadlow/Tyler kidnapping and torture prosecutions.

Name	Citation	Opposing Counsel	Judge(s)
State v. Traci Tyler	FECR311202 (Hardin Co.)	Aaron Siebricht & Ted Fisher (Marshalltown, Iowa)	The Hon. James C. Ellefson
State v. Traci Tyler	FECR311662 (Hardin Co.)	Jennie Wilson-Moore (Conrad, Iowa)	The Hon. Adria Kester
State v. Alex Shadlow	FECR311203 (Hardin Co.)	John L. Sandy & John M. Sandy (Spirit Lake, Iowa)	The Hon. Adria Kester

Some cases stay in your heart for years after you try them. The Shadlow/Tyler prosecutions, and a little boy named A.S., are some of those cases for me. Shadlow and Tyler confined eight-year-old A.S. in a purpose-built enclosure under the basement stairs, smaller than an Iowa prison cell. A.S. was confined daily, for as long as 10 hours at a time. He was forced to sleep in the dark, without bedding or pillows, and to defecate in a tin can. One of his teachers testified that, because of food deprivation, A.S. "looked like a skeleton."

When I think of the human aspect of the criminal justice system, I often think of A.S. at trial, holding onto a Paw Patrol stuffed animal and Spiderman action figure, fidgeting in an adult-sized chair at the Hardin County Courthouse. It can

be easy for appellate practitioners or appellate judges to forget about the humanity at issue in our courtrooms, when trials are reviewed on appeal as black-and-white text in a transcript. I try to remember the humanity in the justice system—the deep personal stakes and impact on participants, including both offenders and victims—every day of my work.

These cases are also a significant reminder that our justice system is not perfect and neither are the participants in it. The little boy in these cases was failed by a number of institutions and systems, including his parents (one of whom was a primary offender), child-protection workers (who left A.S. in the home far too long), and in some ways the court system itself (which required A.S., at eight years old, to be retraumatized by testifying in-person and facing his abuser in open court). Yet this little boy came out the other side of his horrific circumstances, was adopted by supportive non-offending family members, and now thrives. Everyone within the system, whether prosecutor, public defender, social worker, or judge, must strive to improve and do better in each case, because we share a societal interest in ensuring that justice is done. I have tried to keep this in mind throughout my career, knowing there is no such thing as a perfect case or a perfect trial. The humility to know that one can always improve, and that our institutions can always do better, informs my thinking about judicial service and is a cornerstone of my motivation to improve the justice system.

I tried this case in 2019 with then-Assistant Attorney General Laura Roan as co-counsel. I was chief counsel after her withdrawal. Hardin County Attorney Darrell Meyer appeared as co-counsel throughout the case. Assistant Attorney General Nicole Leonard appeared as associate counsel after Ms. Roan's withdrawal.

I have included the post-trial brief from the *Tyler* case as a writing sample. The brief is my work product, written with collaborative input from Ms. Roan and Mr. Meyer. The bench trial resolved by conviction on a lesser-included offense and the other case numbers resolved with pleas by each defendant to multiple felonies.

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There are also two recent matters that are legally and personally significant to me, but which I have not included because they are pending before the appellate courts and likely to be orally argued this fall: *State v. Jerry Burns*, Sup. Ct. No. 20-1150 (the murder of Michelle Martinko at a Cedar Rapids mall in 1979) and *State v. Cristhian Rivera*, Sup. Ct. No. 21-1202 (the murder of Mollie Tibbetts in rural Poweshiek County in 2018). I am happy to discuss these matters and why they are significant, but did not believe it appropriate to do so at length in writing while oral argument was likely forthcoming.

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

My legal and academic scholarship will enhance my ability to serve as a judge. I have published seven academic works in law reviews, both in Iowa and across the country. Three of these articles include proprietary datasets—statistical research that I compiled and analyzed to improve our understanding of the court system. In recent years, my scholarship has focused on two areas: empirical study of the Iowa appellate courts and advocacy for victims of violent crime, particularly children.

My scholarship about Iowa's appellate courts has informed my perspective on how the courts review and resolve cases. My study of criminal appeals (2015 *Journal of Appellate Practice & Process*) analyzes the outcomes of Iowa appellate cases by the numbers, including how the type of lawyer and issues raised can affect disposition. My study of stare decisis at the Iowa Supreme Court (2019 *Drake Law Review*) provides a quantitative and qualitative perspective on the stability of precedent and work of the appellate courts. The Iowa Supreme Court has cited this article twice in published majority opinions, most recently in *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, 975 N.W.2d 710, 733 (Iowa 2022). This scholarship reflects my deep and wide understanding of Iowa's appellate court system. This research also reinforced my belief in stare decisis, emphasizing the importance of stability in the law and the relationship between the courts and the elected branches of government.

My scholarship and advocacy on behalf of children in the courts demonstrates my understanding of and empathy for those that come into contact with the criminal justice system. My law review articles in this area have been cited by the Iowa Court of Appeals, the Massachusetts Supreme Judicial Court, appellate briefs, and academic journals. This research has also informed my service on the Board of Directors for the Iowa Chapter of Child Advocacy Centers. Child victims are never participants in the justice system by choice and I believe all stakeholders in the system should strive to improve the treatment and minimize the re-traumatization of children, within the confines of our roles. While I would resign my membership in advocacy groups if selected for judicial office, I hope to carry with me lessons about how the courts can be sensitive to their impact on children.

Last, my experience as an adjunct professor at Simpson College has strengthened many of the important but intangible skills that are useful for judicial officers. Each year, I teach two courses focused on litigation skills and advocacy, as well as coach the College's mock trial team. I believe judges and lawyers have an obligation to invest in junior and future members of the profession, to ensure the bar retains the good features of civility and honor that we value. Unlike other courses emphasizing mock trial skills, I intentionally devote a significant portion of each semester to ethical advocacy and spend hours each year having great conversations with students about how to advocate zealously while staying true to ideals of fairness and integrity. Teaching college students is deeply rewarding

and adds meaning to my law practice, knowing that my students and interns will lead the next generation of lawyers.

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.

I won election to and served a term on the Johnston Community School District Board of Directors in Johnston, Iowa (2008–2009).

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.

I am a minority shareholder in my family business, which involves ownership and operation of a restaurant in Des Moines. The business also previously operated a sister restaurant in the Okoboji area. Currently I serve on the board of directors and am the secretary for Taco Casa, Inc. I have held these positions since 2012 and did not hold a management role before then. I also have a minority ownership interest in a related venture, Taco House Intellectual Property, LLC, but do not hold a management role. My involvement with these businesses does not involve the practice of law.

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 Supreme Court Rules of Appellate Procedure Task Force**, 2020–Present
  Member

- **Iowa State Bar Association**, 2012–Present
  Offices Held:
    - *Chair,* Appellate Practice Committee (2018–Present; Member 2013–Present)
    - *Section Council,* Criminal Law Section (2013–2019)
    - *Chair,* Criminal Legislation Subcommittee (2017–2019)

I have also occasionally purchased membership in the American Bar Association and Polk County Bar Association to attend CLE activities.

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.

- **Iowa Chapter of Child Advocacy Centers**, 2021–Present
  Office Held: Board of Directors

- **Iowa County Attorneys Association,** 2012–Present
  (No office held, but I have consistently and repeatedly been involved with this organization by lecturing at CLEs and other trainings, attending meetings, and advising on legislation)

- **American Mock Trial Association**, 2015–2016
  Office Held: National Criminal Case Committee

In approximately early 2016, a former intern asked if I would be interested in recruiting attendees for an event for the American Constitution Society, which did not have an Iowa presence. I agreed to do so. To my recollection, I have never attended an event associated with this group, but the group did list my name as an officer on an e-mail invitation recruiting attendees and announcing its founding. I have never materially participated in this organization and do not share this group's views.

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.

I have not held judicial office.

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

Please see attached:

1. Brief for the State of Iowa in *State v. Sauser*, Sup. Ct. No. 21-0759.
2. Brief for the State of Iowa in *State v. Gaskins*, Sup. Ct. No. 13-1915.
3. Post-Trial Brief for the State of Iowa in *State v. Tyler*, FECR311202 (Hardin Co.).

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.

Legal Publications:

- *Stare Decisis in Iowa*, 67 DRAKE L. REV. 317 (2019)
  Statistical analysis of cases in which the Iowa Supreme Court has overruled precedent, including comparisons across time and to other state courts of last resort (with Kelli A. Huser)
- *Fighting Rape Culture with Noncorroboration Instructions,* 53 TULSA L. REV. 1 (2017)
  Survey of multiple jurisdictions' approaches to jury instructions in sex-abuse trials and recommendations for best practices
- State v. Smith *Perpetuates Rape Myths and Should Be Formally Disavowed*, 102 IOWA L. REV. ONLINE 185 (2017)
  Essay addressing case law that perpetuated false stereotypes about child sex abuse
- *Public Defenders and Appointed Counsel in Criminal Appeals: The Iowa Experience,* 16 J. APP. PRACTICE & PROCESS 183 (2015)
  Empirical analysis of criminal appeals in Iowa courts, comparing the performance of public defenders, court-appointed counsel, and retained counsel

- *The State Response to* Hazelwood v. Kuhlmeier*,* 66 ME. L. REV. 89 (2013)
  Survey of statutory responses to limits on students' free-speech rights, including a statistical analysis comparing the content of student newspapers among states with differing free-speech rights
- *Framing the Debate: Understanding Iowa's 2010 Judicial Retention Election Through a Content Analysis of Letters to the Editor,* 97 IOWA L. REV. 1745 (2012)
  Note based on empirical analysis of arguments marshaled by forces for and against retention of Iowa Supreme Court justices
- *Subtle Censorship: The Problem of Retaliation Against High School Journalism Advisers and Three Ways to Stop It*, 40 J. L. & EDUC. 609 (2011)
  Survey of federal and state law regarding retaliation against journalism advisers

Op-Eds/Other :

- *Iowa Schools Shouldn't Be Allowed to Punish Teachers to Get Around Students' Free-Speech Protections,* DES MOINES REGISTER*,* March 11, 2020 (with Leslie Shipp, Natalie Niemeyer Lorenz, Paul Jensen, Gary Lindsay, Ann Visser, Lyle Muller)
- *Stirring the Pot: Policies that Give Your Student Journalists the Freedom to Learn Benefit the Students and the District Too,* AMERICAN SCHOOL BOARD J., June 2010, at 24
- *Journalism Teachers Need Protection, Too,* DES MOINES REGISTER*,* Sept. 1, 2009

On Sept. 23, 2019, the *Des Moines Register* published an untitled letter to the editor signed by me and 17 other current and former elected officials, endorsing a candidate for city council.

In approximately August of 2009, my fellow school board members and I submitted an untitled letter to the editor of the *Bulls Eye*, a now-defunct local weekly newspaper. The letter provided voters with information regarding the Revenue Purpose Statement (ballot issue) in the upcoming election. I have not been able to locate a copy of this letter online or otherwise.

I am also acknowledged as an editor and technical consultant for the *Iowa Sexual Assault Protocol: A Guide to Providing Medical Forensic Exams* (January 2021) and as editor and Chair of the Appellate Practice Committee in the forthcoming *Iowa Appellate Practice Manual* (2022–2023 revision).

Last, I have authored and co-authored multiple comments on the Iowa Rules of Appellate Procedure and Iowa Rules of Criminal Procedure over approximately the last five years. The comments were drafted primarily by me in collaboration with other prosecutors in the Iowa Department of Justice.

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

- *Issues of Interest from the Appellate Rules Task Force*; Iowa State Bar Ass'n (June 2022) (with the Hon. Dana Oxley, the Hon. David May, and Donna Humpal)
  Panel discussion and presentation on issues of interest under consideration by the Supreme Court's Appellate Rules Task Force
- *Testifying for the Truth: Sexual Assault Nurse Examiners at Trial*; 515 Forensics (approx. Quarterly 2018–2022)
  Presentation addressing litigation tactics and evidentiary hurdles for testimony of sexual assault nurse examiners ("SANEs")
- *What's the Verdict?: A Multidisciplinary Training for Professionals Providing Sexual Assault Care,* 515 Forensics (annually 2019–2022)
  All-day workshop highlighting forensic issues in prosecution of adult-sex-abuse cases, with focus on developing law enforcement and medical testimony
- *Dispelling Rape Myths*; Illinois Coalition Against Sexual Assault (July 2020); State Public Defender CLE (April 2019); Iowa Department of Justice State Government CLE (Nov. 2018)
  Presentation addressing common rape myths and how to address those myths in legal practice (with forensic interviewer Katie Strub)
- *Restitution After SF457*, Iowa Department of Justice (June 2020)
  Presentation regarding legislation affecting restitution for crime victims (with Asst. AG Martha Trout)
- *Iowa Sex-Crime Law: An Overview*, 515 Forensics (Mar. 2020)
  Accessible presentation to medical professionals concerning the elements of and penalties for sex crimes under Iowa law
- *PCRs: Application to Appeal to* Allison *and Beyond*, Iowa County Attys. Ass'n (Nov. 2019)
  In-depth presentation to prosecutors on legal and tactical considerations when litigating postconviction relief cases, including impact of new legislation (with the Hon. Maggie Reyes)
- *Evidentiary Issues in Sex-Abuse Trials*, Iowa County Attys. Ass'n (Oct. 2019)
  Two-hour presentation on practical approaches to evidence in adult- and child-sex-abuse prosecutions (with Chief Admin. Law Judge Denise Timmins)
- *2019 Legislative Update*, Iowa Department of Justice (June 2019)
  Specialized presentation to area prosecutors concerning recent legislation affecting felony prosecutions (with Asst. AG Kyle Hanson)

- *Stare Decisis in Iowa*, Iowa Department of Justice (Jan. 2019)
  Empirical analysis of data and trends concerning the rate of overruling decisions at the Iowa Supreme Court (with Kelli A. Huser)
- *When the* Schmidt *Hits the Fan;* Iowa County Attys. Ass'n (June 2018)
  Presentation to prosecutors on practical approaches to dealing with newly established "actual innocence" exception to statute of limitations (with Asst. AG Andrew Prosser)
- *Complex Felony Case Law Update;* Iowa Department of Justice (June 2018)
  Specialized presentation to area prosecutors concerning trends in state and federal case law, with focus on prosecution of forcible felonies
- *Ethics Jeopardy!;* Iowa Department of Justice (June 2018; Dec. 2017)
  Presentation to government lawyers on recurring ethical issues
- Varnum *in 2010 and Beyond: What Happened in Iowa*, Blackstone Inn of Court (Sept. 2017)
  Presentation to Des Moines attorneys exploring changes in Iowa's legal landscape following *Varnum v. Brien* (with Dr. Rachel Caufield)
- Varnum *and What Happened in Iowa*, Iowa Judicial Institute (Aug. 2017)
  Presentation to Iowa judges and judicial branch staff revisiting the 2010 Judicial Retention Election, including original empirical data (with Dr. Michael Nelson)
- *Appellate Motion Practice*, Iowa State Bar Ass'n (June 2017)
  Presentation to Iowa lawyers and judges concerning motion practice before the Iowa Supreme Court, including analysis of trend data
- *Domestic Violence Case Law & Evidence Update;* Iowa County Attys. Ass'n (Apr. 2017)
  Specialized presentation to domestic-violence prosecutors concerning trends in state and federal case law, with focus on evidence-based prosecutions
- *Motions, Motions, Motions;* Iowa Department of Justice (Dec. 2016)
  Presentation to prosecutors concerning appellate motion practice, including best practices, voting probabilities for individual justices, and trends
- *Prosecutorial Ethics in the Age of Social Media*; State of Iowa Prosecuting Intern Program (June 2015) & Iowa Department of Justice Ethics Workshop (Dec. 2015)
  Specialized presentation addressing emerging ethical concerns with social media, delivered separately to seasoned prosecutors and statewide assembly of law-student interns
- *Winning (at) Postconviction Relief;* Iowa Department of Justice (Sept. 2015)
  Presentation to veteran prosecutors concerning procedural and tactical issues when litigating postconviction actions (with Asst. AG Kyle Hanson)

- *Counting Crimes: Units of Prosecution*; Iowa County Attorneys Ass'n (Oct. 2014)
  Presentation to county attorneys and assistant county attorneys concerning unit-of-prosecution jurisprudence and trends at the Iowa Supreme Court

I have also led informal workshops and training discussions for law enforcement and Child Advocacy Center employees. All of the trainings with formal titles are included above and I have not maintained records with dates for any informal workshops or training discussions.

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.

LinkedIn: "Tyler Buller"

Snapchat: "Tyler B."

I previously had a Facebook account under the name "Tyler Buller." I deactivated the account some time ago.

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.

Law School:

Academics:

- Order of the Coif
- Iowa Law Merit Scholar
- Dean's Award (top grade) in Contracts, National Security Courses
- Contributing Editor, *Iowa Law Review*

Moot Court:

- Iowa College of Law Appellate Advocacy Award
- Van Oosterhout Baskerville Tournament (Best Overall Advocate)
- National Moot Court Tournament (Regional Champion, Best Oralist, Top 8 in Nation)

Mock Trial

- Director and Chairman, Iowa Trial Advocacy Board
- Iowa Academy of Trial Lawyers Award
- AAJ Regional Tournament (1st Place)
- AAJ National Championship Tournament (2nd in Nation)
- Stephenson Intramural Competition (1st Place, Top Advocate)
- Iowa Intramural Arbitration Tournament (1st place, Best Advocate)
- 2011 Outstanding Advocate Scholarship from Iowa Chapter of American Board of Trial Advocates (ABOTA)

Other:

- Steiger Fellow (scholarship-funded role in Iowa Dept. of Justice)

Undergraduate:

- **Presidential Scholar**
- **Co-President, Drake Mock Trial Program**
  (Received various awards for Outstanding Attorney, Outstanding Witness, Regional and Invitational Champion between 2006 and 2009)

Miscellaneous:

- **Kenneth Stratton Award,** 2010 (Iowa High School Press Association)
- **Friend of Scholastic Journalism,** 2010 (Journalism Education Association)

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.

Name	Relationship
The Hon. Meghan Corbin District Court Judge Seventh Judicial District Meghan.Corbin@iowacourts.gov 563.326.8783	Judge Corbin is a law school classmate and friend. She can speak to my integrity, my work ethic, and my service activities with the Iowa State Bar Association and mock trial.
Denise Timmins Chief Administrative Law Judge Iowa Dept. of Inspections & Appeals denise.timmins@dia.iowa.gov 515.281.6870	Judge Timmins is a former colleague who can speak to my knowledge of the law and willingness to assist and advise other prosecutors. We have also presented together at prosecutor trainings.
Matt Schultz Madison County Attorney mschultz@madisoncounty.iowa.gov 515.468.7050 (cell)	Mr. Schultz is familiar with my work advising and training local prosecutors, as well as my subject-matter expertise in criminal law.
Kristofer Lyons Jones County Attorney kristofer.lyons@jonescountyiowa.gov 319.481.7963 (cell)	Mr. Lyons and I prosecuted a complex child-sexual-abuse case together. He is familiar with my work ethic, temperament, and empathy for victims and survivors of crime.
Mike Martens Emmet County Sheriff mmartens@emmetcounty.iowa.gov 712.362.2639	Sheriff Martens is familiar with my work ethic and integrity through our investigation and prosecution of complex public-corruption cases in northwest Iowa.

Nathan Blake Chief Deputy Attorney General Iowa Department of Justice Nathan.Blake@ag.iowa.gov 515.281.4325	Mr. Blake can speak to my work ethic, my leadership among appellate practitioners inside the Department of Justice, and my commitment to public service.
Laura Roan Assistant United States Attorney United States Attorney's Office for the Southern District of Iowa 515.360.8342	Ms. Roan is a former colleague who is familiar with my work inside and outside the courtroom. She can also speak to my ethics and work with victims and survivors of crime. We have jointly tried multiple cases to verdict.
Scott D. Brown Division Director, Area Prosecutions Iowa Department of Justice Scott.Brown@ag.iowa.gov 515.281.3648	Mr. Brown is familiar with my work as a trial and appellate prosecutor, as well as the technical assistance I provide to other prosecutors across the state on a daily basis.
Kevin Cmelik Fmr. Division Dir., Criminal Appeals Iowa Department of Justice kcmelik@icloud.com 563.940.2502	Mr. Cmelik was my longtime supervisor in the Criminal Appeals Division until his recent retirement. He is familiar with my work as a trial and appellate prosecutor, my leadership on appellate issues, and my work ethic.
Special Agent Jim Thiele Special Agent (Retired) Iowa Division of Criminal Investigation 641.494.9677	Agent Thiele was the case agent for the Shadow/Tyler prosecutions listed above. He can speak to my work as a trial prosecutor, my collaboration with law enforcement, and my work with victims and survivors of crime.
John E. Lande Partner Dickinson, Mackaman, Tyler & Hagen, P.C. jlande@dickinsonlaw.com 515.246.4509	Mr. Lande is a longtime friend, former classmate, and law school trial team partner. He can speak to my integrity, my work ethic, my litigation experience, and my community service through mock trial and other activities.
Shannon Knudsen Sexual Assault Nurse Examiner & SANE Coordinator Mid-IA Sexual Assault Response Team 515forensicsllc@gmail.com 515.321.8027	Ms. Knudsen is a sexual assault nurse examiner (SANE) that is integrally involved with training and supporting other SANEs across the state. We have presented at many trainings together and worked together to create and compile Iowa's Sexual Assault Protocol in 2021.

27. Explain why you are seeking this judicial position.

I have devoted my entire career to public service, starting with service on my local school board in college and through my decade in the Iowa Department of Justice as a prosecutor. Serving on the Court of Appeals is a natural continuation of my work on behalf of Iowans and my interest in seeing that justice is done in the court system.

Good judges, like good prosecutors, are in the accountability and justice business. I have lived my values on this issue. The State of Iowa is not supposed to win every trial or appeal, and justice in an individual case does not always mean conviction for as many offenses or the harshest sentence possible. Serving as a judge will allow me to continue to support justice and accountability, as well as use the lessons I have learned as a practitioner to better serve Iowans in resolving disputes. For more than 90% of Iowa cases, the Court of Appeals is the last word on disputed legal issues, and Iowans deserve judges who will give cases careful attention and who understand the practical consequences of their decisions. Because of my unique vantage point as a prosecutor handling cases from trial to appeal, I am particularly sensitive to the role of the appellate courts compared to the trial courts, and how important every case is to the parties. As an appellate judge, I would give every case the attention Iowans expect and ensure the litigants feel they have been heard and treated fairly.

I am also applying because I love this state, its court system, and the law. I am a lifelong Iowan. I stayed in Iowa for college and law school and came to the Iowa Department of Justice because I am committed to serving my community and state. I have deep respect for the work done by each branch of government, as we all strive to fulfill our constitutional and statutory obligations. It is an honor to work for the people of Iowa as a prosecutor and it would be an honor to continue that work as a judge.

Last, I am applying for this job because I know I can do the work and do it well. As established by rule, "The principal role of the court of appeals is to dispose justly of a high volume of cases." Iowa Ct.. R. 21.11. In practice, this means Court of Appeals judges are expected to review and draft multiple opinions each week of the year—a pace of writing few practitioners experience. My busy appellate practice in the Criminal Appeals Division is one of the only legal positions in the state that is expected to review the record, conduct legal research, and draft longform writing on a similarly expedited basis. I am particularly well suited to transition from my fast-paced appellate docket to a fast-paced appellate bench.

28. Explain how your appointment would enhance the court.

I am a well-rounded practitioner that believes in the Iowa court system and would strive to deliver justice to Iowans fairly and effectively. My practical experience and scholarship will inform the intellectual aspects of appellate judging, ensuring I can efficiently review the record, analyze issues, and

understand the real-world implications of decisions. My work ethic and collaborative approach to decision-making will help me hit the ground running and do the important job of ensuring justice for Iowans.

I am an appellate prosecutor with practical experience. No recent appointee to the Court of Appeals has been a prosecutor, even though about 44% of the Court of Appeals caseload is criminal and postconviction cases. Nor has any recent appointee been specialized in appellate practice and procedure. My familiarity with the court's criminal caseload will be an asset for efficient decision-making, as will my expertise in appellate litigation, reflected by my appointment as Chair of the Iowa State Bar Association's Appellate Practice Committee by five different Bar Presidents. Similarly, my work on the Supreme Court's Appellate Rules Task Force has highlighted how much the Court of Appeals would benefit from the perspective of a contemporary appellate practitioner who is familiar with the issues faced by litigators in the digital era.

I am a student of the law and precedent. Many of the questions presented to appellate judges do not have easy answers. I am fluent in the tools judges need to resolve these tough cases, particularly through the text and history of the Iowa Code and Iowa Constitution. I deploy these different toolsets on a daily basis in my role as an appellate prosecutor. In the overwhelming majority of cases, the Court of Appeals operates within a confined space defined by precedent, applying established rules of law to novel facts. I do this every day as a prosecutor, am comfortable in this role, and recognize how important it is for the legitimacy of the courts that precedent matters and that litigants in similar circumstances can predict similar outcomes.

I have a strong, efficient work ethic. The Court of Appeals is the workhorse of the Iowa appellate courts and I am a workhorse lawyer. The Criminal Appeals Division of the Iowa Department of Justice is the busiest appellate shop in the state, filing as many as 600 briefs per year in cases that range from OWI to first-degree murder. As the only state prosecutor in Iowa to regularly maintain simultaneous trial and appellate dockets, I am no stranger to hard work and the pressure to write clearly under deadline. I have maintained this rapid pace of writing while also training other prosecutors to hone the craft, serving as a scholar, teaching, and mentoring law students and young lawyers. I will bring this same work ethic not only to the opinion-writing work of the Court of Appeals, but also the broader responsibilities judges have to serve the bench, bar, profession, and public.

I am a collaborator and team player. When deciding how to resolve cases as a prosecutor, I collaborate and listen seriously to the views of my entire justice-seeking team, including law enforcement and survivors of crime. I have had the distinct pleasure of working with some of the best police officers in the state, if not the country, to hold criminal offenders accountable. I have also worked closely with advocates and the victim-services community to ensure that survivors of crime obtain justice that is meaningful to them, even if that means

outcomes other than trial. At the end of the day, the decision about how to resolve cases belongs solely to me as the prosecutor, based on an exercise of my independent judgment, but I am confident all stakeholders have always felt heard and respected. In much the same way, appellate judges seek to collaboratively resolve cases by panel, but judges must exercise their independent judgment and either join their colleagues or write separately. I will approach cases as an appellate judge in the same way I work cases as a prosecutor: as a team player seeking justice, open to hearing other views, but able to make tough decisions.

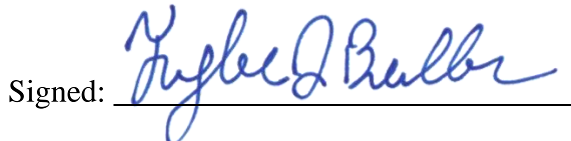
29. Provide any additional information that you believe the Commission or the Governor should know in considering your application.

I grew up in Iowa and have Iowa values. I am the first in my family to go to college, which was made possible through academic scholarships and the support and encouragement of my parents. I have worked hard to give back to my family and community, through investing time and sweat equity in my family business, volunteering, serving on my local school board, and teaching. My life's great calling is public service and I would be honored to continue serving Iowans as an appellate judge.

I have prosecuted trial and appellate matters that originate in every judicial district in Iowa, appearing in cases from 78 of Iowa's 99 counties. While most lawyers spend their entire career in a local area, my practice has taken me to all corners of the state, where I see significant regional differences in practice and procedure. This knowledge is crucial for the appellate courts, which sit in Des Moines but endeavor to do justice for citizens across Iowa.

My appointment will also bring a new perspective to the Court of Appeals. My experience as a prosecutor handling matters from initiation in the trial courts to disposition on appeal, as well as my specialization in appellate practice and procedure, is distinct from any other recent appointee. The appellate courts are at their best when members come from a variety of backgrounds and my practice-oriented background will complement the Court's current composition.

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

Signed:  Date: Sept. 12, 2022

Printed name: Tyler J. Buller

ELECTRONICALLY FILED APR 11, 2022 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA
Supreme Court No. 21-0759

STATE OF IOWA,
Plaintiff-Appellee,

vs.

REVETTE SAUSER,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR DELAWARE COUNTY
THE HONORABLE JOEL DALRYMPLE, JUDGE

APPELLEE'S BRIEF

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. None of the stories the defendant told the DCI constitute voluntary manslaughter. The district court correctly found there was no factual basis for the jury to consider that offense.

Authorities

State v. Holder, 20 N.W.2d 909 (Iowa 1945)
State v. Inger, 292 N.W.2d 119 (Iowa 1980)
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State v. Thompson, 836 N.W.2d 470 (Iowa 2013)
State v. Watkins, 126 N.W. 691 (Iowa 1910)
Iowa Model Crim. Jury Instr. No. 700.15

ROUTING STATEMENT

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

STATEMENT OF THE CASE

Nature of the Case

The defendant, Revette Sauser, appeals her conviction for murder in the first degree, a Class A felony in violation of Iowa Code section 707.2(1)(a). The defendant was convicted following trial by jury in the Delaware County District Court, on change of venue to Clayton County, the Hon. Joel A. Dalrymple presiding.

Course of Proceedings

The State generally accepts the defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3). As a point of clarification, the Supreme Court did not "overturn[]" the defendant's convictions in the prior postconviction appeal, as the defendant says in her brief. Defendant's Proof Br. at 7. Instead, the Supreme Court remanded for the State to either demonstrate a further factual basis for second-degree kidnapping or try the matter on the original first-degree murder charge. *Sauser v.*

State, 928 N.W.2d 816, 821 (Iowa 2019). The State elected to try the defendant for first-degree murder. 7/18/2019 Motion; App. 25-26.

Facts

The defendant was jealous. She shot her husband. And she killed him. Over the course of a DCI interview, the defendant told three stories about what happened, culminating in an explanation of how she was jealous and angry when she pulled the trigger. Forensics established that the gunshot wound was the cause of death and that the shooter was at least approximately four feet away from the victim when the fatal shot was fired.

The defendant was jealous of her husband's relationship with his ex-wife. In the weeks leading up to the murder, the defendant grew increasingly jealous and bought a gun.

Before he married the defendant, Terry Sauser was married to Bonnie Sauser, and they shared three children. Trial tr. vol. II, p. 13, line 22 — p. 14, line 3; p. 126, lines 14–22. Heather was the youngest child by 11 years. Trial tr. vol. II, p. 14, lines 4–8. Years before the murder, Terry and Bonnie divorced, and Terry married the defendant. Trial tr. vol. II, p. 14, lines 17–23. By 2011, Terry and the defendant lived in the town of Ryan in one home, while Bonnie and

Heather lived in another home a block and a half away. Trial tr. vol. II, p. 14, line 9 — p. 15, line 13; p. 20, line2 1–4.

Terry's brother passed away a few years before the murder and there was an altercation between Bonnie and the defendant at the funeral. Trial tr. vol. II, p. 127, lines 2–10. Bonnie tried to give Terry a "condolence hug" and the defendant "got angry," said a number of "not nice" things to Terry, and "[b]asically stomped off" after she was told her that her jealous behavior was inappropriate for a funeral. Trial tr. vol. II, p. 127, lines 7–23; p. 136, lines 11–13.

The defendant and Terry also owned and operated a convenience store in town. Trial tr. vol. II, p. 23, lines 7–12. Wendy Hellman worked part-time for the Sausers at the store and interacted with both Terry and the defendant. *See* trial tr. vol. II, p. 158, line 19 — p. 161, line 6. Wendy liked both of the Sausers and tried to stay out of the disagreements between them. *See* trial tr. vol. II, p. 158, line 19 — p. 161, line 6; p. 174, line 18 — p. 175, line 2. In Wendy's words, "I felt as though that there was a lot of jealousy with [the defendant] , especially … with the whole thing with [Terry's] ex-wife and everything. I just thought there was a lot of jealousy and there was

insecurity so I just wanted to stay pretty neutral." Trial tr. vol. II, p. 174, line 18 — p. 175, line 2.

While working at the store, Wendy heard the defendant and Terry arguing on the phone on multiple occasions. Trial tr. vol. II, p. 161, line 7 —p. 162, line 8. At least some of the arguments between the defendant and Terry were "over Terry's ex-wife Bonnie." Trial tr. vol. II, p. 162, lines 18–24. The defendant admitted this to Wendy. Trial tr. vol. II, p. 163, lines 7–13.

The frequency of these fights about Bonnie "got worse in the last three weeks" leading up to the murder. Trial tr. vol. II, p. 169, lines 9–23. The defendant bought a Ruger .380 at a pawn shop about three weeks before the murder. Trial tr. vol. III, p. 79, line 23 — p. 80, line 3.

The week before the murder, the defendant sent Wendy unsolicited messages complaining about Terry "push[ing her] out" and Terry "talking to his ex." Exhibit 25: Text Messages, p. 2; Conf. App. 8. The defendant repeatedly complained about Terry allegedly lying to her about Bonnie. *Id.*; Conf. App. 8. The defendant texted Wendy, "ive been doing this for forteen years and nothing seems to change he contuines to go to her beck n call even after i buried my

dad two weeks its just a shame.[”] *Id.*; Conf. App. 8 (spelling and grammar original). Wendy told the defendant she didn't know anything about Terry talking to Bonnie, and the defendant responded, “yes he lied to me I dont care if they talk but dont lie about it this has been going on for too long and im not taking it no more[.]” *Id.* ; Conf. App. 8.

The defendant and Terry continued to argue about Bonnie, with one particularly memorable argument just a few days before the defendant shot and killed Terry. Trial tr. vol. II, p. 169, line 24 — p. 171, line 1.

The day of the murder, the defendant was jealous that her husband was talking to his ex-wife. The defendant called the ex-wife until the phone was “ringing off the hook” and she text-messaged a friend that her gun was loaded and she might shoot her husband.

Hours before shooting and killing her husband, the defendant texted a friend, “Lol got my gun loaded he better leave me alone ill shoot.” Exhibit 24: Text Messages, p.2 ; Conf. App. 5. Also several hours before the murder, there was a “[v]erbal argument between [the defendant] and Terry” at the convenience store. Trial tr. vol. III, p. 91, line 24 — p. 94, line 1. (The argument was observed on surveillance footage, so the exact words exchanged are unknown.)

Things were strained between the defendant and Bonnie; they were not in regular contact. *See* trial tr. vol. II, p. 16, line 20 — p. 17, line 8. But the day of the murder, the defendant repeatedly called Bonnie at home. Trial tr. vol. II, p. 17, lines 9–19. Bonnie and Terry's daughter Heather had recently had surgery and Bonnie had spoken to Terry a few times about issues related to medical insurance. Trial tr. vol. II, p. 17, lines 11–19.

Bonnie passed away before trial. Trial tr. vol. II, p. 14, lines 11–16. But Heather overheard at least part of the conversation between the defendant and Bonnie, and Heather described the defendant's tone as "angry and kind of frustrated." Trial tr. vol. II, p. 18, lines 10–18. Bonnie was being "civil" and "just trying to explain" why she and Terry had been in contact. Trial tr. vol. II, p. 18, lines 10–18. After Bonnie hung up, the defendant kept calling. Trial tr. vol. II, p. 18, line 19 — p. 19, line 11. The phone was "basically ringing off the hook" and Heather eventually picked up, told the defendant, "Bitch, leave my mom alone," and hung up. Trial tr. vol. II, p. 18, line 19 — p. 19, line 11.

Heather and Bonnie went for a walk. Trial tr. vol. II, p. 19, lines 19–21. Within the next few hours, the defendant shot and killed Terry. Trial tr. vol. II, p. 21, lines 8–21.

The defendant called 911. Police responded and found the victim dying on the sofa. The defendant admitted to shooting her husband but said she "didn't mean to."

The defendant called 911 and told the dispatcher she "shot [her] husband on accident" after they were arguing. *See* Exhibit 1: 911 call; trial tr. vol. II, p. 121, line 25 — p. 122, line 9.

Police and deputy sheriffs responded. When they entered the residence, they ordered the defendant to the ground and she complied. Trial tr. vol. II, p. 33, line 24 — p. 34, line 5. Terry was "slumped over" on the couch, sweating and "fighting for air." Trial tr. vol. II, p. 34, lines 16–20; vol. III, p. 12, line 22 — p. 13, line 1. Terry's skin was "ashy," indicating poor blood flow. Trial tr. vol. II, p. 34, lines 21–25. Attempts at resuscitation failed and Terry was pronounced dead by the county medical examiner. Trial tr. vol. III, p. 206, lines 6–14.

When asked where the gun was, the defendant pointed it out to police: on the floor, "two, two and a half feet" away from the sofa where Terry was dying. Trial tr. vol. II, p. 35, lines 16–23; p. 42, lines

17–22. The defendant told the first-responding officers, "I didn't mean to do it" or "it wasn't intentional." Trial tr. vol. II, p. 47, lines 5–12; vol. III, p. 12, lines 9–19; p. 13, lines 2–8.

After the defendant was handcuffed and *Mirandized*, she alluded to being "violated" by Terry, but never made a specific statement or referred to a specific event. *See* trial tr. vol. II, p. 71, lines 7–16; p. 83, lines 19–22. The defendant later clarified that she had not been hit, sexually assaulted by, or otherwise physically "violated" by Terry, on that day or any other. *See* trial tr. vol. II, p. 48, lines 4–10; p. 84, lines 1–20. The defendant also said she was not in fear of any kind of harm from Terry. Trial tr. vol. II, p. 48, lines 4–13.

The defendant was interviewed by the DCI and gave three materially different stories about what happened. Only the third story—that she was angry and jealous when she shot her husband—was internally consistent and consistent with the facts of the crime.

Special Agent Jon Turbett with the Division of Criminal Investigation interviewed the defendant at the Delaware County Sheriff's Office. Trial tr. vol. III, p. 38, lines 13–18. The defendant told Agent Turbett that her marriage to Terry was not good and that she wanted out of the marriage, which she described as "done" or "finished." Trial tr. vol. III, p. 47, line 16 — p. 48, line 22. She said

that she and Terry were fighting a lot in the period leading up to the murder. Trial tr. vol. III, p. 47, line 16 — p. 48, line 7.

Agent Turbett and the defendant discussed Bonnie Sauser. Trial tr. vol. III, p. 48, lines 23–25. The defendant brought up Bonnie without Agent Turbett asking about her. Trial tr. vol. III, p. 49, lines 1–16. When Agent Turbett asked the defendant what she and Terry were fighting about on the phone preceding the murder, the defendant responded:

> You know we fight over the stupidest things. The nit picky. And I'm gonna, and I'm gonna be honest with you; this whole fight, this whole fight, this whole incident today, was about his ex. And the store.

Exhibit 2, Clip #1; Court's Exhibit 1: Transcript, p. 1; App. 33. Agent Turbett asked, "Can you tell me more about that?" and the defendant responded, "He isn't honest with me when he talks to his ex," and complained that Terry was lying about and spending money on Bonnie and Heather. Exhibit 2, Clip #1; Court's Exhibit 1: Transcript, p. 1; App. 33. The defendant said that she was "very upset" with Terry for calling Bonnie, because "he talked to her like he was married to her" and "listened to her health problems." Exhibit 2, Clip #1; Court's Exhibit 1: Transcript, p. 2 ; App. 34. In the defendant's words, "That's

what leads us to this," "to what happened tonight." Exhibit 2, Clip #1; Court's Exhibit 1: Transcript, p. 2; App. 34.

The defendant described for Agent Turbett how she had called Bonnie that day and explained how she thought Bonnie "always gets in the middle of [her and Terry's] relationship" and "always calls Terry." Exhibit 1, Clip #1; Court's Exhibit 1: Transcript, p. 3; App. 35. The defendant complained to Agent Turbett that Terry "wouldn't stand up and be a man," so she had to be the one to confront Bonnie. Exhibit 2, Clip #1; Court's Exhibit 1: Transcript, p. 3; App. 35.

When Agent Turbett questioned the defendant specifically about what happened when she shot the defendant, she gave three materially different "stories" or versions of events. Trial tr. vol. III, p. 84, lines 14–17; trial tr. vol. IV, p. 42, line 3 — p. 45, line 13.

First, the defendant said she returned home alone, saw arguably romantic things around the house, and went to the convenience store to confront Terry. Trial tr. vol. III, p. 54, line 19 — p. 55, line 17. The defendant described arguing with Terry at the store for about two and a half hours and then the two drove home separately. *Id.* The defendant said that she pulled the gun out from underneath the futon, held it on her lap for about 25 minutes, then Terry was shot

during a struggle over the gun. *Id.* Initially, the defendant said she was not sure whose finger was on the trigger. Trial tr. vol. III, p. 55, lines 18–21; Exhibit 2, Clip #2; Court's Exhibit 1: Transcript, p. 5; App. 37. The defendant later changed her story, within this same version of events, and admitted that she pulled the trigger. Trial tr. vol. III, p. 57, line 21 — p. 58, line 2; Exhibit 2, Clip #3; Court's Exhibit 1: Transcript, p. 6; App. 38.

During a second version of events, the defendant described a double-suicide pact, initially detailing how she and the defendant were going to shoot each other. Trial tr. vol. III, p. 58, line 10 — p. 59, line 20. The defendant claimed that Terry had Lou Zerick (her pronunciation) disease and wanted to die but was unable to successfully commit suicide. *Id.* The defendant claimed that she shot and killed Terry because that is what he wanted. *Id.*; Exhibit 2, Clip #4; Court Exhibit 1: Transcript, p. 7; App. 39. Within this second story, the details offered by the defendant were inconsistent, confusing, and hard to follow. *See* trial tr. vol. III, p. 59, line 21 — p. 60, line 4.

The third story the defendant told Agent Turbett was that, on the day of the murder, she was angry at Terry for talking to Bonnie,

she was jealous, and she shot him. Trial tr. vol. III, p. 63, lines 5–11; Exhibit 2, Clip #5; Court Exhibit 1: Transcript, pp. 8–10; App. 40-42. The defendant described screaming between her and Terry on the phone hours before the murder. Trial tr. vol. III, p. 64, lines 4–12. She described how Terry's contact with Bonnie hurt her very much. Trial tr. vol. IV, p. 54, line 20 — p. 55, line 5. And she repeatedly came back to the topic of Bonnie's relationship with Terry throughout the interview. Trial tr. vol. III, p. 64, line 23 — p. 65, line 1. When Agent Turbett asked the defendant how she was feeling when she pulled the trigger, she told him she was angry and filled with hate. Trial tr. vol. III, p. 65, lines 5–7; vol. IV, p. 55, lines 6–16.

The defendant's first two stories—about the struggle over the gun and about the suicide pact—were not internally consistent as she explained them to Agent Turbett. Trial tr. vol. IV, p. 45, line 14 — p. 47, line 21. Nor were these stories consistent with the external case facts known to police through the investigation, such as the lack of evidence indicating a struggle at the home and the lack of evidence that Terry had any form of terminal illness. Trial tr. vol. II, p. 20, lines 9–21; p. 39, line 25 — p. 40, line 9; p. 47, lines 13–25; p. 103, lines 11–13; vol. III, p. 62, lines 7–9; p. 79, lines 5–17; vol. IV, p. 47,

lines 5–10 & 20–21. The third story—about being angry and jealous—was internally consistent and consistent with the case facts. Trial tr. vol. IV, p. 49, lines 1–10.

The defendant's demeanor throughout the interview was engaging and persuasive, until it suddenly changed when Agent Turbett informed her that she was going to be arrested. Trial tr. vol. III, p. 65, line 16 — p. 66, line 5. Then, the defendant "became upset" and made statements about how she would "go insane" and pretend to be suicidal to avoid jail. Trial tr. vol. III, p. 66, line 6 — p. 67, line 20. After the defendant learned she was being charged with murder, she got angrier and threatened retaliation against people in the community. Trial tr. vol. IV, p. 53, lines 4–14.

Forensics establish that Terry was shot and killed by the defendant's gun from a distance of approximately four or more feet away.

Forensic testing at the DCI lab confirmed that the bullet recovered from Terry's body was fired by the .380 Ruger recovered from the crime scene near the defendant. *See* trial tr. vol. III, p. 130, lines 2–9. A criminalist from the firearms and toolmarks section opined, based on gunshot residue analysis, that the gun was fired from a distance of at least approximately four feet away. *See* trial tr.

vol. III, p. 145, lines 6–24. The gunshot residue was not consistent with a shot from one foot or less away. Trial tr. vol. III, p. 147, lines 1–3.

The autopsy found a single gunshot wound to Terry's chest, which was the cause of death. Trial tr. vol. III, p. 188, line 20 — p. 189, line 2; p. 196, lines 3–10. The manner of death was homicide. Trial tr. vol. III, p. 196, lines 11–16.

ARGUMENT

I. None of the stories the defendant told the DCI constitute voluntary manslaughter. The district court correctly found there was no factual basis for the jury to consider that offense.

Preservation of Error

The defense argued at trial that the accidental discharge of the firearm during an alleged struggle over the gun was a sufficient factual basis for the jury to be instructed regarding voluntary manslaughter. Trial tr. vol. IV, p. 83, line 14 — p. 86, line 2. The court ruled that none of the versions of events given by the defendant were factually sufficient to warrant a voluntary manslaughter instruction, specifically because there was no evidence "that the act here of shooting was done solely by reason of sudden, violent, and irresistible passion resulting from sudden provocation." Trial tr. vol.

IV, p. 92, lines 4–23. The State contests error preservation to the extent the defendant argues any facts, other than those urged by the defense below, were sufficient to generate a jury question on voluntary manslaughter.

Standard of Review

Review is for correction of errors at law. *State v. Thompson*, 836 N.W.2d 470, 476 (Iowa 2013).

Merits

For a jury to be instructed on the lesser-included offense of voluntary manslaughter, there must be a factual basis for each necessary element of the offense. *Thompson*, 836 N.W.2d at 477 (citing *State v. Royer*, 436 N.W.2d 637, 643 (Iowa 1989)). Voluntary manslaughter has one subjective requirement and two objective requirements:

> 1. "The subjective requirement of section 707.4 is that the defendant must act solely as a result of sudden, violent, and irresistible passion."
>
> 2. "The sudden, violent, and irresistible passion must result from serious provocation sufficient to excite such passion in a reasonable person. This is an objective requirement."
>
> 3. "It is also necessary, as a final objective requirement, that there is not an interval between the provocation and the killing in which a person of ordinary reason and

> temperament would regain his or her control and suppress the impulse to kill."

State v. Inger, 292 N.W.2d 119, 122 (Iowa 1980). Consistent with this case law, the district court correctly ruled below that there was no factual basis for submitting voluntary manslaughter to the jury on the facts developed at trial. *See* trial tr. vol. IV, p. 92, lines 4–23.

First, there was no record evidence, subjective or otherwise, that the defendant acted solely as a result of sudden, violent, and irresistible passion. No version of events provided by the defendant, or developed by other evidence, suggests she suddenly lost control and shot Terry in the heat of irresistible passion. And even if there was *some* evidence on this prong, the law requires that the defendant act *solely* as a result of the suddenly, violent, and irresistible passion, and there was overwhelming evidence of the defendant's long-running jealousy of Terry and Bonnie's relationship, dating to days, weeks, months, and years before the defendant shot and killed Terry.

Second, there was no objective evidence of serious provocation sufficient to excite sudden, violent, and irresistible passion in a reasonable person. The provocation required to establish manslaughter is especially great when the defendant arms him- or herself with a dangerous weapon, and there is no dispute here the

defendant armed herself with the Ruger .380. *See State v. Holder*, 20 N.W.2d 909, 914 (Iowa 1945); *State v. Watkins*, 126 N.W. 691, 692 (Iowa 1910). Even generously reading the record and the defendant's brief, her best argument for provocation is that she had been fighting with Terry and Terry "was telling her that she's not gonna go anywhere." *See* Defendant's Proof Br. at 15; trial tr. vol. II, p. 47, lines 6–12; vol. II, p. 55, lines 3–17. But words alone are never sufficient provocation for manslaughter. *State v. Rutledge*, 47 N.W.2d 251, 259 (Iowa 1951). And there is no record evidence that Terry's actions were sufficient to excite a reasonable person to be overwhelmed by the irresistible passion to kill. *Cf. Thompson*, 836 N.W.2d at 478 (slapping defendant and insulting him with obscene gestures held not sufficient provocation). As a matter of law and public policy, a disagreement between spouses in a bad marriage cannot be sufficient to reduce murder to manslaughter.

Third, to the extent there was any provocation, the interval between the provocation and the shooting was not so short that an ordinary person would be unable to regain control and suppress the urge to kill. Even under the defendant's best version of events for manslaughter, she retrieved the gun from some location inside the

house and held it on her lap for 25 minutes before she shot and killed Terry. Trial tr. vol. III, p. 54, line 19 — p. 55, line 17. The facts do not support this requirement, either.

Looked at from another angle, this Court can also affirm because every version of events given by defendant was insufficient to generate a jury question on voluntary manslaughter. Her first story (the gun went off accidentally) is insufficient as a matter of law, as it does not establish she acted solely due to sudden, violent, irresistible passion, or that she was provoked, or that the shooting was intentional. Her second story (the alleged double-suicide pact) is a confession to murder, with no evidence of a sudden, violent, irresistible passion or provocation. And her third story (that she was angry, jealous, and hateful), does not concern any sudden passion or serious provocation, as her jealousy of Terry and Bonnie was long-running and no reasonable person would fly into a murderous rage after learning that Terry and Bonnie had spoken on the phone.

The few sentences of the defendant's appellate brief that address the facts mischaracterize the record. For example, the defendant claims that the DCI criminalist testified that the forensic evidence was "consistent with a close-range shooting." Defendant's

Proof Br. at 14. The transcript pages cited by the defendant's brief do not actually correspond to the criminalist's testimony (the defendant cites page 118 in volume four of the transcript, but that volume ends at page 114), so it is difficult to know what she refers to. In any event, the record refutes her description. The criminalist actually testified that the gunshot residue was consistent with a distance of "approximately four feet or more" between the muzzle of the gun and the entry wound on the victim. Trial tr. vol. III, p. 146, lines 9–22. And the criminalist specifically testified that the evidence was *not* consistent with a shooting from one foot away. Trial tr. vol. III, p. 146, line 23 — p. 147, line 3. The facts thus do not say what the defendant claims. But even if they did, evidence of a struggle over a gun and an accidental discharge would not support voluntary manslaughter, as this does not establish a sudden, violent, irresistible passion, or serious provocation, or an intentional shooting.

The defendant's brief also claims that the jury's question during deliberations suggests prejudice. Defendant's Proof Br. at 14. Not so. The jury asked the court:

> "Deliberation and premeditation need not exist for any particular length of time before the act." Does this also apply to "willfully" and for "the specific intent to kill Terry Sauser?"

Trial tr. vol. V, p. 91, lines 8–13. This question has nothing to do with voluntary manslaughter. The question is about the difference between first-degree murder and second-degree murder. To determine this beyond a reasonable doubt, one need only look at the elements of the offenses: "willfully" is an element of first-degree murder but not second-degree murder. *See* Jury Instrs. Nos. 18 & 26; App. 31 & 32. The jury question does not show prejudice.

Looking beyond the jury question, the record is also sufficient to prove beyond a reasonable doubt that the defendant was not prejudiced, even if the voluntary-manslaughter instruction should have been given. The defense's theory of the case, starting with opening statement (long before the court ruled on the voluntary-manslaughter question), was that "accidents can happen" and the defendant "did not intentionally shoot her husband." Trial tr. vol. II, p. 11, lines 4–11. The defense pursued the same theory during closing argument, referring to the shooting as "accidental." Trial tr. vol. V, p. 62, lines 14–21. This is irreconcilable with voluntary manslaughter, which would have required as an element that the defendant "intentionally" shot the victim. Iowa Model Crim. Jury Instr. No. 700.15. The defense's own theory of the case did not generate a jury

question on voluntary manslaughter and thus denial of the instruction did not prejudice the defendant.

CONCLUSION

This Court should affirm the defendant's conviction for murder in the first degree.

REQUEST FOR NONORAL SUBMISSION

This case should be decided on the briefs.

Respectfully submitted,

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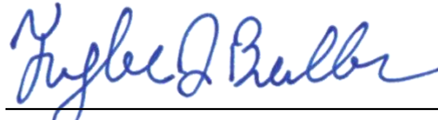

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CERTIFICATE OF COMPLIANCE

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

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IN THE SUPREME COURT OF IOWA
Supreme Court No. 13-1915

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JESSIE MICHAEL GASKINS,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY
THE HONS. HENRY W. LATHAM, II, & JOHN D. TELLEEN,
JUDGES

APPELLEE'S BRIEF & REQUEST FOR ORAL ARGUMENT

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Eastwood Mall v. Slanco, 626 N.E.2d 59 (Ohio 1994)...................... 23

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Gannon v. Delaware, 704 A.2d 272 (Del. 1998) 23

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Iowa Const. art. II, § 8 (1846) 55

Iowa Const. art. X 34

Kansas Bill of Rights § 15 65

Kansas Bill of Rights § 10 65

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Mo. Const. art. I, § 15 65

N.C. Const. art. I, § 20 56

Neb. Const. art. I, § 7 65

Ohio Const. art. I, § 14 65

R.I. Const. art. I, § 6 65

Va. Const., art. I, § 10 56

Vt. Const., ch. 1, art. 11 56

Wash Const. art. I, § 7 37

Other Authorities

Wayne R. LaFave, 1 Criminal Procedure § 2.9(a) (3d ed.) 23

George Deukmejian & Clifford K. Thompson, *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 Hastings Const. L.Q. 975 (1979) 24, 28, 33

Elizabeth Fisher, *Confusion and Inconsistencies Surrounding the Exigency Component for Warrantless Vehicle Searches Under Article I, Section 8*, 2 Duq. Crim. L.J. 123 (2011) 69

Developments in the Law—The Interpretation of State Constitutional Rights, 95 Harv. L. Rev. 1324 (1982) 38

Thomas A. Mayes & Anuradha Vaitheswaran, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice*, 55 Drake L. Rev. 39 (2006) 36

Barry Latzer, *Four Half-Truths About State Constitutional Law*, 65 Temp. L. Rev. 1123 –3 (1992) 61

Irma S. Raker, *Fourth Amendment and Independent State Grounds*, 77 Miss. L.J. 401 (2007) 38

Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 Or. L. Rev. 125 (1970) 25

Hans Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. Balt. L. Rev. 379 (1980) 25

James N.G. Cauthen, *Horizontal Federalism in the New Judicial Federalism: A Preliminary Look at Citations*, 66 Alb. L. Rev. 783 (2003) 43

Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 Va. L. Rev. 389 (1998)................................ 42

Paul W. Kahn, Comment, *Interpretation and Authority in State Constitutionalism,* 106 Harv. L. Rev. 1147 (1993)............................ 42

Lawrence Friedman, *State Constitutions in Historical Perspective*, 496 Annals Am. Acad. Pol. & Soc. Sci. 33 (1988) 37

James W. Diehm, *New Federalism and Constitutional Criminal Procedure: Are We Repeating the Mistakes of the Past?*, 55 Md. L. Rev. 223 (1996)..71

Paul S. Hudnut, *State Constitutions and Individual Rights: The Case for Judicial Restraint*, 63 Denv. U. L. Rev. 85 (1985)...... 24, 36, 44, 71

Lawrence Friedman, *Reactive and Incompletely Theorized State Constitutional Decision-Making*, 77 Miss. L.J. 265 (2007)............. 22

Kevin Stockmann, *Drawing on the Constitution: An Empirical Inquiry into the Constitutionality of Warrantless and Nonconsensual DWI Blood Draws,* 78 Mo. L. Rev. 351 (2013) 77

James A. Gardner, *Southern Character, Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study in Constitutional Argument*, 76 Tex. L. Rev. 1219 (1998) 42

Steven J. Twist & Len L. Munsil, *The Double Threat of Judicial Activism: Inventing New "Rights" in State Constitutions,* 21 Ariz. St. L.J. 1005 (1989).. 24

Thomas B. McAffee et. al., *The Automobile Exception in Nevada: A Critique of the* Harnisch *Cases*, 8 Nev. L.J. 622 (2008) 69

Earl M. Maltz, *The Dark Side of State Court Activism*, 63 Tex. L. Rev. 995 (1985)... 25

Jeff Hicks, *The* Effler *Shot Across the Bow: Developing A Novel State Constitutional Claim Under the Threat of Ineffective Assistance of Counsel*, 59 Drake L. Rev. 931 (2011) 20, 30

Barry Latzer, *The Hidden Conservatism of the State Court "Revolution,"* 74 Judicature 190, 193 (1991) 6, 59

Paul G. Cassell, *The Mysterious Creation of Search and Seizure Exclusionary Rules Under State Constitutions: The Utah Example*, 1993 Utah L. Rev. 751 (1993) 24

Robin B. Jiohansen, Note, *The New Federalism: Toward A Principled Interpretation of the State Constitution*, 29 Stan. L. Rev. 297 (1977) 25

Ronald Susswein, *The Practical Effect of the "New Federalism" on Police Conduct in New Jersey*, 7 Seton Hall Const. L.J. 859 (1997) 6, 72

Robert F. Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington's Experience*, 65 Temp. L. Rev. 1153 (1992)... 26

Glen S. Goodnough, *The Primacy Method of State Constitutional Decisionmaking: Interpreting the Maine Constitution*, 38 Maine L Rev. 491 (1986) 21, 27

Michael E. Keasler, *The Texas Experience: A Case for the Lockstep Approach*, 77 Miss. L. J. 345 (2007) 22

David E. Pozen, *What Happened in Iowa?*, 111 Colum. L. Rev. Sidebar 90 (2011)... 29

Alan G. Tarr, Understanding State Constitutions (1998)……18, 38

Earl M. Maltz, Lockstep Analysis and the Concept of Federalism, 496 Annals Acad. Pol. & Soc. Sci. 98 (March 1988)……………………………22

Barry Latzer, State Constitutions and Criminal Justice (1991)….29, 58

Ronald L. Nelson, *Welcome to the "Last Frontier," Professor Gardner: Alaska's Independent Approach to State Constitutional Interpretation*, 12 Alaska L. Rev. 1 (1995)..26

Richard S. Pierce, *Arguing* Gunwall*: The Effect of the Criteria Test on Constitutional Rights Claims*, Journal of Law and Courts, vol. 1., no. 2 (Fall 2013)...32

Hugh D. Spitzer, *New Life for the "Criteria Tests" in State Constitutional Jurisprudence: "*Gunwall *Is Dead—Long Live* Gunwall*!"* 37 Rutgers L.J. 1169 (2006)..7, 32

Peter G. Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts*, 33 Syr. L. Rev. 731 (1982)........................37, 39

Admission of Women to the Bar, 1 Chicago Law Times 76, 76 (1887)..41

H. Jefferson Powell, *The Use of State Constitutional History* in Paul Finkelman & Stephen E. Gottlieb, Toward A Usable Past: Liberty Under State Constitutions (1991)..42

Mission Statement, Iowa Judicial Branch, http://www.iowacourts.gov/For_the_Public/Overview/.................45

Jack Stark, The Iowa State Constitution: A Reference Guide (1998)...53

Semicolon Use, Grammarly Handbook, http://www.grammarly.com/handbook/punctuation/semicolon/1/semicolon-use/ (last accessed Oct. 7, 2014).......................................53

Semicolon With Conjunctions, Grammarly Handbook, http://www.grammarly.com/handbook/punctuation/semicolon/2/semicolon-with-conjunctions/ (last accessed Oct. 7, 2014)................54

Semicolon With Conjunctive Adverbs, Grammarly Handbook, http://www.grammarly.com/handbook/punctuation/semicolon/3/semicolon-with-conjunctive-adverbs/ (last accessed Oct. 7, 2014).....54

John Seely Hart, English Grammar (1873)..54

Dyer H. Sandborn, Analytical Grammar of the English Language (1848)..55

Bryan A. Garner, The Redbook: A Manual on Legal Style (2nd ed. 2006)..55

Steven C. Cross, *The Drafting of Iowa's Constitution*, http://publications.iowa.gov/135/1/history/7-6.html 56

Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 Harv. L. Rev. 476 (2011)...................................63, 76

Douglas Holden Wigdor, *What's in A Word ? A Comparative Analysis of Article I, § 12 of the New York State Constitution and the Fourth Amendment to the United States Constitution*, 14 Touro L. Rev. 757 (1998)..73

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. This Court Should Adopt Criteria to Guide State-Constitution Litigation. Based on Neutral Interpretive Criteria, this Court Should Reject the Defendant's Plea to Overturn Established State and Federal Case Law Recognizing the Automobile Exception.

Duncan v. Louisiana, 391 U.S. 145 (1968)
Arizona v. Gant, 556 U.S. 332 (2009)
California v. Acevedo, 500 U.S. 565 (1991)
Carducci v. Regan, 714 F.2d 171 (D.C. Cir. 1983)
Carroll v. United States, 267 U.S. 132 (1925)
Chambers v. Maroney, 399 U.S. 42 (1970)
Chimel v. California, 395 U.S. 725 (1969)
Davis v. United States, 131 S. Ct. 2419 (2011)
Mapp v. Ohio, 367 U.S. 643 (1961)
New York v. Belton, 453 U.S. 454 (1981)
Strickland v. Washington, 466 U.S. 668 (1984)
Thorton v. United States, 541 U.S. 615 (2004)
United States v. Ameling, 328 F.3d 443 (8th Cir. 2003)
United States v. Ross, 456 U.S. 798 (1982)
United States v. Williams, 616 F.3d 760 (8th Cir. 2010)
Weeks v. United States, 232 U.S. 383(1914)
Weeks v. United States, 323 U.S. 383 (1914)
State v. Olsen, 293 N.W.2d 216 (Iowa 1980)
State v. Maddox, 670 N.W.2d 168 (Iowa 2003)
State v. Baldon, 829 N.W.2d 785 (Iowa 2013)
Utah v. Anderson, 910 P.2d 1229 (Utah 1996)
Nebraska v. Bakewell, 730 N.W.2d 335 (Neb. 2007)
California v. Banks, 863 P.2d 769 (Cal. 1993)
Illinois v. Caballes, 851 N.E.2d 26 (Ill. 2006)
Idaho v. Charpentier, 962 P.2d 1033 (Idaho 1998)
Chavies v. Kentucky, 354 S.W.3d 103 (Ky. 2011)
City of Davenport v. Seymour, 755 N.W.2d 533 (Iowa 2008)
Clark v. Board of Directors, 24 Iowa 266 (Iowa 1868)
Coger v. North West. Union Packet Co., 37 Iowa 145 (1873)
Colorado v. Whitaker, 32 P.3d 511 (Colo. Ct. App. 2000)
New Jersey v. Cooke, 751 A.2d 92 (N.J. 2000)

Missouri v. Damask, 936 S.W.2d 565 (Mo. 1996)
Danforth, Davis & Co. v. Carter, 1 Iowa 546 (1855)
Davenport v. Garcia, 834 S.W.2d 4 (Tex. 1992)
Wisconsin v. Davison, 666 N.W.2d 1 (Wis. 2003)
California v. Disbrow, 545 P.2d 272 (Cal. 1976)
Dworkin v. L.F.P., Inc., 839 P.2d 903 (Wyo. 1992)
Eastwood Mall v. Slanco, 626 N.E.2d 59 (Ohio 1994)
Pennsylvania v. Edmunds, 586 A.2d 887 (Penn. 1991)
Friedman v. Comm'r of Pub. Safety,
473 N.W.2d 828 (Minn. 1991)
Gannon v. Delaware, 704 A.2d 272 (Del. 1998)
Pennsylvania v. Gary, 91 A.3d 102 (Pa. 2014)
New Mexico v. Gomez, 932 P.2d 1 (N.M. 1997)
Washington v. Gunwall, 720 P.2d 808 (Wash. 1986)
Arkansas v. Harmon, 113 S.W.3d 75 (Ark. 2003)
Nevada v. Harnicsh, 954 P.2d 1180 (Nev. 1998)
New Jersey v. Hempele, 576 A.2d 793 (N.J. 1990)
Hendershot v. Hendershot, 263 S.E.2d 90 (W. Va. 1980)
New Jersey v. Hunt, 450 A.2d 952 (N.J. 1982)
Immuno AG. v. Moor-Jankowski, 567 N.E.2d 1270 (N.Y. 1991)
In re Ralph, 1 Morris 1 (Iowa 1839)
Maryland v. Ireland, 706 A.2d 597 (Me. 1998)
Vermont v. Jewett, 500 A.2d 233 (Vt. 1985)
Kain v. State, 378 N.W.2d 900 (Iowa 1985)
Kansas v. Conn, 99 P.3d 1108 (Kan. 2011)
Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008)
Kiesau v. Bantz, 686 N.W.2d 164 (Iowa 2004)
Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)
Mogard v. City of Laramie, 32 P.3d 313 (Wyo. 2001)
Moore v. Mississippi, 787 So. 2d 1282 (Miss. 2001)
Michigan v. Moore, 216 N.W.2d 770 (Mich. 1974)
Kansas v. Morris, 72 P.3d 570 (Kan. 2003)
Massachusetts v. Motta, 676 N.E.2d 795 (Mass. 1997)
New Jersey v. Muhammad, 678 A.2d 164 (N.J. 1996)
Ohio v. Murrell, 764 N.E.2d 986 (Ohio 2002)
Michigan v. Nash, 341 N.W.2d 439 (Mich. 1983)
Vermont v. Platt, 574 A.2d 789 (Vt. 1990)
Vermont v. Savva, 616 A.2d 774, 782 (Vt. 1991)
California v. Ramey, 545 P.2d 1333 (Cal. 1976)
Robbins v. Kentucky, 336 S.W.3d 60 (Ky. 2011)

Kansas v. Schultz, 850 P.2d 818 (Kan. 1993)
Maine v. Sklar, 317 A.2d 160 (Me. 1974)
Illinois v. Smith, 447 N.E.2d 809 (Ill. 1983)
Oregon v. Smith, 725 P.2d 894 (Or. 1986)
Snethen v. State, 308 N.W.2d 11 (Iowa 1981)
South Dakota v. Schwartz, 689 N.W.2d 430 (S.D. 2004)
State v. Breuer, 577 N.W.2d 41 (Iowa 1998)
State v. Brown, 721 P.2d 1357 (Or. 1986)
State v. Cline, 617 N.W.2d 277 (Iowa 2000)
State v. Davis, 304 N.W.2d 432 (Iowa 1981)
State v. Derifield, 467 N.W.2d 297 (Iowa Ct. App. 1991)
State v. Eubanks, 355 N.W.2d 57 (Iowa 1984)
State v. Groff, 323 N.W.2d 204 (Iowa 1982)
State v. Lindell, 828 N.W.2d 1(Iowa 2013)
State v. Merrill, 538 N.W.2d 300 (Iowa 1995)
State v. Moriarty, 566 N.W.2d 866 (Iowa 1997)
State v. Ochoa, 792 N.W.2d 260 (Iowa 2010)
State v. Olsen, 293 N.W.2d 216 (Iowa 1980)
State v. Ringer, 674 P.2d 1240 (Wash. 1983)
State v. Rutledge, 600 N.W.2d 324 (Iowa 1999)
State v. Sanders, 312 N.W.2d 534 (Iowa 1981)
State v. Short, 851 N.W.2d 474 (Iowa 2014)
State v. Showalter, 427 N.W.2d 166 (Iowa 1988)
State v. Spooner, 2005 WL 1630530 (Iowa Ct. App. 2005)
State v. Tidwell, 2013 WL 6405367 (Iowa Ct. App. 2013)
State v. Tonn, 191 N.W. 530 (Iowa 1923)
State v. Vance, 790 N.W.2d 775 (Iowa 2010)
State v. Watts, 801 N.W.2d 845 (Iowa 2011)
State, ex rel. Rear Door Bookstore v. Tenth Dist. Ct. of Appeals,
588 N.E.2d 116 (Ohio 1992)
New Hampshire v. Sterndale, 656 A.2d 409 (N.H. 1995)
Stout v. Arkansas, 898 S.W.2d 457 (Ark. 1995)
Colorado v. Taylor, 296 P.3d 317 (Colo. 2013)
Rhode Island v. Taylor, 621 A.2d 1252 (R.I. 1993)
Illinois v. Tisler, 469 N.E.2d 147 (Ill. 1984)
Wisconsin v. Tompkins, 423 N.W.2d 823 (Wis. 1988)
Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009)
Rhode Island v. Werner, 615 A.2d 1010 (R.I. 1992)
Connecticut v. Winfrey, 24 A.3d 1218 (Conn. 2011)
North Dakota v. Zwicke, 767 N.W.2d 869 (N.D. 2009)

Arizona v. Bolt, 689 P.2d 519 (Ariz. 1984)
U.S. Const. amend IV
Ark. Const. art. II § 15
Cal. Const. art. I, § 28
Iowa Const. Art. V, § 4
Cal. Const. art. I, § 16
Colo. Const. art. II, §7
Fla. Const. art. I, §§ 12, 17
Iowa Code § 602.4102 (2013)
Iowa Code § 602.4107 (2009)
Iowa Const. art. I, § 8
Iowa Const. art. II § 8
Iowa Const. art. II, § 7 (1844)
Iowa Const. art. X
Md. Const. art. 26
Mich. Const. art. 1, § 11 (1963)
Mo. Const. art. I, § 15
N.C. Const. art. I, § 20
Neb. Const. art. I, § 7
Ohio Const. art. I, § 14
R.I. Const. art. I, § 6
Va. Const., art. I, § 10
Vt. Const., ch. 1, art. 11
Wash Const. art. I, § 7
Kan. Bill of Rights § 15
Kan. Bill of Rights § 10
Wayne R. LaFave, 1 Criminal Procedure § 2.9(a) (3d ed.)
George Deukmejian & Clifford K. Thompson, *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 Hastings Const. L.Q. 975, 987–96 (1979)
Elizabeth Fisher, *Confusion and Inconsistencies Surrounding the Exigency Component for Warrantless Vehicle Searches Under Article I, Section 8*, 2 Duq. Crim. L.J. 123 (2011)
Developments in the Law—The Interpretation of State Constitutional Rights, 95 Harv. L. Rev. 1324 (1982)
Thomas A. Mayes & Anuradha Vaitheswaran, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice*, 55 Drake L. Rev. 39 (2006)

Barry Latzer, *Four Half-Truths About State Constitutional Law*, 65 Temp. L. Rev. 1123 –3 (1992)
Irma S. Raker, *Fourth Amendment and Independent State Grounds*, 77 Miss. L.J. 401 (2007)
Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 Or. L. Rev. 125 (1970)
Hans Linde, First Things First: Rediscovering the States' Bills of Rights, 9 U. Balt. L. Rev. 379 (1980)
James N.G. Cauthen, *Horizontal Federalism in the New Judicial Federalism: A Preliminary Look at Citations*, 66 Alb. L. Rev. 783 (2003)
Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 Va. L. Rev. 389 (1998)
Paul W. Kahn, Comment, *Interpretation and Authority in State Constitutionalism*, 106 Harv. L. Rev. 1147 (1993)
Interpreting the Maine Constitution, 38 Maine L Rev. at 540
Lawrence Friedman, *State Constitutions in Historical Perspective*, 496 Annals Am. Acad. Pol. & Soc. Sci. 33 (1988)
James W. Diehm, *New Federalism and Constitutional Criminal Procedure: Are We Repeating the Mistakes of the Past?*, 55 Md. L. Rev. 223 (1996)
Paul S. Hudnut, *State Constitutions and Individual Rights: The Case for Judicial Restraint*, 63 Denv. U. L. Rev. 85 (1985)
Lawrence Friedman, *Reactive and Incompletely Theorized State Constitutional Decision-Making*, 77 Miss. L.J. 265 (2007)
Kevin Stockmann, *Drawing on the Constitution: An Empirical Inquiry into the Constitutionality of Warrantless and Nonconsensual DWI Blood Draws*, 78 Mo. L. Rev. 351 (2013)
James A. Gardner, *Southern Character, Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study in Constitutional Argument*, 76 Tex. L. Rev. 1219 (1998)
Steven J. Twist & Len L. Munsil, *The Double Threat of Judicial Activism: Inventing New "Rights" in State Constitutions*, 21 Ariz. St. L.J. 1005 (1989)

Thomas B. McAffee et. al., *The Automobile Exception in Nevada: A Critique of the Harnisch Cases*, 8 Nev. L.J. 622 (2008)

Earl M. Maltz, *The Dark Side of State Court Activism*, 63 Tex. L. Rev. 995 (1985)

Jeff Hicks, *The Effler Shot Across the Bow: Developing A Novel State Constitutional Claim Under the Threat of Ineffective Assistance of Counsel*, 59 Drake L. Rev. 931 (2011)

Barry Latzer, *The Hidden Conservatism of the State Court "Revolution,"* 74 Judicature 190, 193 (1991)

Paul G. Cassell, *The Mysterious Creation of Search and Seizure Exclusionary Rules Under State Constitutions: The Utah Example*, 1993 Utah L. Rev. 751 (1993)

Robin B. Jiohansen, Note, *The New Federalism: Toward A Principled Interpretation of the State Constitution*, 29 Stan. L. Rev. 297 (1977)

Ronald Susswein, *The Practical Effect of the "New Federalism" on Police Conduct in New Jersey*, 7 Seton Hall Const. L.J. 859 (1997)

Robert F. Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington's Experience*, 65 Temp. L. Rev. 1153 (1992)

The Primacy Method of State Constitutional Decisionmaking: Interpreting the Maine Constitution, 38 Maine L Rev. 491 (1986)

Michael E. Keasler, *The Texas Experience: A Case for the Lockstep Approach*, 77 Miss. L. J. 345 (2007)

David E. Pozen*, What Happened in Iowa?*, 111 Colum. L. Rev. Sidebar 90

Alan G. Tarr, Understanding State Constitutions (1998)

Earl M. Maltz, *Lockstep Analysis and the Concept of Federalism*, 496 Annals Acad. Pol. & Soc. Sci. 98 (March 1988)

Barry Latzer, State Constitutions and Criminal Justice 2 (1991)

Ronald L. Nelson, *Welcome to the "Last Frontier," Professor Gardner: Alaska's Independent Approach to State Constitutional Interpretation*, 12 Alaska L. Rev. 1 (1995)

Richard S. Pierce, *Arguing* Gunwall*: The Effect of the Criteria Test on Constitutional Rights Claims*, Journal of Law and Courts, vol. 1., no. 2 (Fall 2013)

Hugh D. Spitzer, *New Life for the "Criteria Tests" in State Constitutional Jurisprudence: "Gunwall Is Dead—Long Live Gunwall!"* 37 Rutgers L.J. 1169 (2006)

The Case for Judicial Restraint, 63 Denv. U. L. Rev. at 104–05

Peter G. Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts*, 33 Syr. L. Rev. 731 (1982)

Admission of Women to the Bar, 1 Chicago Law Times 76 (1887)

H. Jefferson Powell, *The Use of State Constitutional History* in Paul Finkelman & Stephen E. Gottlieb, Toward A Usable Past: Liberty Under State Constitutions (1991).

Mission Statement, Iowa Judicial Branch, http://www.iowacourts.gov/For_the_Public/Overview/.

Jack Stark, The Iowa State Constitution: A Reference Guide 43 (1998)

Semicolon Use, Grammarly Handbook, http://www.grammarly.com/handbook/punctuation/semicolon/1/semicolon-use/ (last accessed Oct. 7, 2014)

Semicolon With Conjunctions, Grammarly Handbook, http://www.grammarly.com/handbook/punctuation/semicolon/2/semicolon-with-conjunctions/ (last accessed Oct. 7, 2014)

Semicolon With Conjunctive Adverbs, Grammarly Handbook, http://www.grammarly.com/handbook/punctuation/semicolon/3/semicolon-with-conjunctive-adverbs/ (last accessed Oct. 7, 2014)

John Seely Hart, English Grammar (1873)

Dyer H. Sandborn, Analytical Grammar of the English Language (1848)

Bryan A. Garner, The Redbook: A Manual on Legal Style (2nd ed. 2006)

Steven C. Cross, *The Drafting of Iowa's Constitution*, http://publications.iowa.gov/135/1/history/7-6.html

Orin S. Kerr *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 Harv. L. Rev. 476 (2011)

Douglas Holden Wigdor, *What's in A Word ? A Comparative Analysis of Article I, § 12 of the New York State Constitution and the Fourth Amendment to the United States Constitution*, 14 Touro L. Rev. 757, 837 (1998)

ROUTING STATEMENT

The Supreme Court should retain this case because it involves changing legal principles and because the defendant asks for a change in the law. Iowa R. App. P. 6.1101(2)(c), (f).

First, this case involves an important question of changing legal principles related to this Court's interpretation of the state constitution. In *State v. Short*, this Court's majority opinion moved toward a mode of state constitutional analysis that affords no deference to federal case law and turns on "persuasiveness" instead of concrete criteria or interpretive principles. *State v. Short*, 851 N.W.2d 474 (Iowa 2014). In this appeal, the State asks this Court to adopt five criteria that will ensure Iowa's state-constitution jurisprudence is principled and will allow litigants to effectively address state-constitution claims. As explained in this brief, decisions under the state constitution that lack a principled basis risk being seen as illegitimate, blur distinctions between the branches of government, and undermine the predictability and stability of the law. This Court should join the nearly unanimous body of state appellate courts that use a criteria- or principle-based approach to assessing state constitutional questions.

Second, this case is also appropriate for retention because the defendant asks for a change in the law. In his brief, the defendant asks this Court to abolish the automobile exception—something that would require this Court to depart from both federal case law and existing precedent interpreting Article I, section 8 of the Iowa Constitution. The Supreme Court should evaluate this claim because it implicates the need for clear criteria and interpretive principles; if transferred to the Court of Appeals, *Short* gives that court no guidance for evaluating a state-constitution challenge.

STATEMENT OF THE CASE

Nature of the Case

The defendant, Jessie Michael Gaskins, appeals his convictions for possession of marijuana with intent to deliver, carrying weapons, and failure to affix a tax stamp. The defendant was convicted following a stipulated trial in the Scott County District Court.

Course of Proceedings/Facts

The State generally accepts the defendant's explanation of the course of proceedings and facts. Iowa R. App. P. 6.903(3).

Davenport police stopped the defendant's van due to an expired vehicle registration. *See* Supp. Ruling, p. 1; App. 60. A police officer approached the van and immediately noticed the "very strong" odor

of burnt marijuana emanating from the vehicle. Supp. Ruling, p. 1; App. 30; Supp. tr. p. 5, lines 18–22; App. 32. The officer asked the defendant if there were drugs in the van and the defendant said no. Supp. Ruling, p. 1; App. 60. After the officer said he could call a K-9 unit, the defendant admitted there was a marijuana "blunt" in the van. Supp. Ruling, p. 1; App. 60. The defendant turned to his side, opened up the ashtray, retrieved a partially smoked marijuana blunt, and gave it to the officer. Supp. hrg. tr. p. 6, line 16 — p. 7, line 4; App. 33–34. The defendant was arrested and he and his underage passenger were secured in the squad car. Supp. Ruling, pp. 1–2; App. 60–61.

After the arrest, police officers searched the defendant's van. Supp. Ruling, p. 2; App. 61. They recovered a locked safe from the van's passenger area and found the safe key on the van's ignition keychain. Supp. Ruling, p. 2; App. 61. Officers opened the safe and found a loaded .22 caliber revolver with a scratched-off serial number, a scale with marijuana residue, multiple baggies and freezer bags containing suspected marijuana, and various pipes, including "one-hitters." Supp. Ruling, p. 2; App. 61; Supp. hrg. tr. p. 8, line 18 — p. 9, line 3; App. 36.

The defendant filed a motion to suppress the fruits of the search and the State resisted, arguing that the search was incident to arrest and conducted pursuant to *State v. Vance* and *Arizona v. Gant*. State's Resistance, ¶¶ 4–5; App. 26.

ARGUMENT

I. This Court Should Adopt Criteria to Guide State-Constitution Litigation. Based on Neutral Interpretive Criteria, this Court Should Reject the Defendant's Plea to Overturn Established State and Federal Case Law Recognizing the Automobile Exception.

Preservation of Error

In the district court, the defendant cited Article I, section 8 of the Iowa Constitution and the Fourth Amendment to the United States Constitution. Supp. Motion; App. 24–25. One might argue that the defendant has, at least minimally, preserved error by citing the correct constitutional provision. However, under *Lamasters*, the defendant did not preserve error because the district court never ruled on the state-constitution issue—impliedly or otherwise. *Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

If this Court finds error was preserved, it should decline to interpret the state constitution differently for the reasons set forth in this brief. If this Court finds error was not preserved, it should reject the defendant's ineffective-assistance claim for the reasons set forth

in this brief (showing the defendant's alleged error, even if preserved, would not have changed the outcome), and the added reason that counsel could not have predicted the state constitutional change the defendant urges on appeal. *See generally Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Snethen v. State*, 308 N.W.2d 11, 16 (Iowa 1981) ("[I]t is not necessary to know what the law will become in the future to provide effective assistance of counsel.").

Standard of Review

Review of constitutional questions is de novo. *State v. Ochoa*, 792 N.W.2d 260, 264 (Iowa 2010).

Merits

This appeal concerns both a narrow issue, specifically related to the search of the defendant's vehicle, and a broad issue, concerning this Court's interpretive approach to the Iowa Constitution. Longstanding precedent establishes that the search of the defendant's vehicle was lawful pursuant to both Article I, section 8 of the Iowa Constitution and the Fourth Amendment of the United States Constitution. *See* Division I.A. If this Court considers whether to reinterpret the Iowa Constitution, as the defendant requests, the *Short* decision has left no clear criteria or interpretive principles to

guide state constitutional advocacy. This Court should adopt five neutral interpretive criteria: whether the claim was fully litigated below, constitutional text, constitutional history, the decisions of sister states, and practical consequences. *See* Division I.B. Applying those criteria shows that Article I, section 8 should be interpreted in line with the Fourth Amendment and that the Iowa Constitution is compatible with the automobile exception. *See* Division I.C.

A. The district court should be affirmed based on existing federal law interpreting the Fourth Amendment, and existing state law interpreting Article I, section 8.

The Supreme Court of the United States has recognized that searches incident to arrest present inherent exigencies that justify an exception to the warrant requirement. *See Weeks v. United States*, 323 U.S. 383 (1914); *Carroll v. United States*, 267 U.S. 132 (1925); *Chimel v. California*, 395 U.S. 725 (1969). When the arrestee is an occupant of an automobile, the law authorizes a warrantless search of the vehicle's passenger compartment and all containers therein, provided there is a reasonable belief the defendant can still access a weapon (e.g., the defendant is not secured) or it is reasonable to believe that evidence of the crime of arrest might be found in the vehicle. *See Arizona v. Gant*, 556 U.S. 332 (2009); *Thorton v. United*

States, 541 U.S. 615 (2004); *California v. Acevedo*, 500 U.S. 565 (1991); *United States v. Ross*, 456 U.S. 798 (1982); *New York v. Belton*, 453 U.S. 454 (1981); *Chambers v. Maroney*, 399 U.S. 42 (1970).

This Court has also adopted these rules related to searches of automobiles, and searches incident to arrest for automobile occupants, under Article I, section 8 of the Iowa Constitution. In *State v. Olsen*, this Court unanimously held that it was "persuaded that the state constitution should be given the same interpretation as the Federal" and adopted the *Carroll–Chambers* rationale for warrantless automobile searches. 293 N.W.2d 216, 220 (Iowa 1980) ("We conclude that we will apply the *Carroll-Chambers* doctrine under Iowa Const. art. I, § 8"). A year later in *Sanders*, this Court expressly adopted the automobile exception, and the reasoning of *Belton* for searches incident to arrest, under Article I, section 8. *See State v. Sanders*, 312 N.W.2d 534, 537–38 (Iowa 1981) (adopting *Belton*, 453 U.S. 454). This Court recognized that it was free to provide greater constitutional protection than the Fourth Amendment, but declined to do so because it "believe[d] *Belton*

strikes a reasonably fair balance between the rights of the individual and those of society." *Id.* at 539.

The district court correctly applied these cases and rules when it denied the defendant's motion to suppress because the police had probable cause to believe evidence related to the defendant's arrest for possession of marijuana would be found in the vehicle.

The smell of marijuana, standing alone or combined with virtually any other suspicious behavior, establishes probable cause. *See, e.g.*, *State v. Moriarty*, 566 N.W.2d 866, 869 (Iowa 1997) (holding that marijuana odor plus an "unused alligator clip" provided probable cause); *State v. Merrill*, 538 N.W.2d 300, 301 (Iowa 1995) (marijuana odor plus furtive movements); *State v. Eubanks*, 355 N.W.2d 57, 59 (Iowa 1984) (marijuana odor alone); *State v. Spooner*, 2005 WL 1630530, at *3 (Iowa Ct. App. 2005) (marijuana odor plus nervousness); *see also State v. Watts*, 801 N.W.2d 845, 854–55 (Iowa 2011) (collecting cases that "have found that the odor of raw or growing marijuana by itself can provide sufficient probable cause for a search").

Police here had probable cause to believe the defendant's van contained evidence related to the crime for which he was arrested.

The defendant was arrested for both expired registration and for possession of marijuana. *See* Supp. hrg. tr. p. 11, lines 1–6; App. 39. Police had probable cause to believe the defendant's vehicle contained evidence related to possessing a controlled substance based on the odor of marijuana, plus the defendant's admission, plus the recovery of one marijuana "blunt," plus the defendant providing false information to police concerning the drugs. This meets or exceeds the level of probable cause provided by the furtive movements in *Merrill* and the alligator-clip in *Moriarty*, and the search was proper.

While this Court need not adopt a per se rule that every arrest for possession of drugs gives probable cause to search the defendant's vehicle, a strong inference links possession of one controlled substance to additional substances in the vehicle. "People that purchase or sell drugs, they have a tendency not to carry them on their person, they usually hide them in specific places." Supp. hrg. tr. p. 9, lines 4–13; App. 36–37. This principle was recognized by the Supreme Court of the United States in *Gant*, when it noted that in cases like *Belton* (initial arrest for possession of marijuana) and *Thornton* (initial arrest for possession of marijuana and cocaine), "the offense of arrest will supply a basis for searching the passenger

compartment of an arrestee's vehicle and any containers therein." 556 U.S. at 344. The same is true here. The offense of possessing marijuana provided a valid basis for searching the vehicle and any containers therein, particularly when viewed in conjunction with other incriminating evidence.

The search of the defendant's vehicle was proper under existing state and federal constitutional law. However, the defendant also asks to change the law in his brief, asking this Court to abolish the automobile exception under the state constitution. Below, the State urges this Court to establish a framework for litigating state constitutional claims. This Court should then apply that framework and reject the defendant's claim.

B. *Short* has left the bench and bar without guidance for litigating state-constitution claims. This Court should adopt five criteria to guide state constitutional advocacy.

An appellate court acts at its best, and is viewed as most legitimate, when its decisions rest on neutral interpretive principles. *E.g.,* Alan G. Tarr, Understanding State Constitutions 175 (1998) [Hereinafter, "Understanding State Constitutions"] ("[T]he concern underlying the legitimacy controversy in both federal and state constitutional law is the same: to ensure that judgments are grounded

in law rather than in the judges' policy preferences.").[1] Our system of constitutional governance makes the bargain with unelected judges that they may invalidate the popular will of the people's elected branches, so long as they remain faithful to constitutional principles and respect the distinction between jurist and legislator. One gauge of faithfulness and judicial legitimacy involves consistence or divergence between state and federal constitutional law.

When more than one court interprets analogous or identical constitutional provisions, and the courts arrive at the same constitutional understanding, the public has increased confidence that the decision is "rooted in law rather than in will." *Id.* at 175–76. If a later court diverges from the understanding of an earlier interpretation, those who believe in judicial restraint seek "persuasive arguments that an earlier interpretation was mistaken" to ensure that

[1] The majority in *Short* quotes another chapter of Tarr's book where he says that legitimacy concerns have "largely been put to rest." *Short*, 851 N.W.2d 486. The State does not dispute that this Court *can* interpret the state constitution differently than the federal constitution; in that sense, perhaps, the "legitimacy" debate is over. But the debate persists in a different, more important sense. The State urges here that only measured and principled divergences from federal law are legitimate under our constitutional structure, and that result-oriented decisions are illegitimate and should be avoided.

the later court is engaged in the judicial function, rather than applying "illegitimate judicial policy preferences." *Id.* at 176.

This Court, until recently, recognized this principle and held that "[s]pecial respect and deference is accorded United States Supreme Court interpretations of similar language in the federal constitution." *State v. Davis*, 304 N.W.2d 432, 434 (Iowa 1981). Also until recently, this Court's state-constitution decisions were grounded in neutral criteria and interpretive principles. *See* Jeff Hicks, Note, *The* Effler *Shot Across the Bow: Developing A Novel State Constitutional Claim Under the Threat of Ineffective Assistance of Counsel*, 59 Drake L. Rev. 931, 943 (2011) [Hereinafter, "*The* Effler *Shot Across the Bow*"] (noting that this Court, at least until 2009, had essentially followed the criteria approach); *id.* at 957–58 (noting seven criteria and that they were the basis of this Court's decisions in *Cline*, *RACI II*, and other state-constitution decisions). On the last day of the 2013–2014 Term, this Court changed course.

In *Short v. State*, a bare majority of this Court announced that federal precedent is entitled to no weight and that decisions under the Iowa Constitution going forward will be based solely on what policy analysis is most "persuasive" to a majority of the Court. *State v.*

Short, 851 N.W.2d at 481. In that decision, this Court parted ways not only with the federal courts, but also with virtually every other state supreme court in the country and this Court's own history.

In *State v. Baldon*, Justice Appel wrote: "To date, we have yet to adopt the primacy approach to state constitutional law." 829 N.W.2d 785, 821 (Iowa 2013) (Appel, J., specially concurring). Whether labeled as such or not, *Short* embraces some form of the "primacy" approach, where a state supreme court looks first and only to its state constitution to decide a legal question. At its core, the "primacy" model involves the judicial fiction that questions involving identical constitutional provisions can be decided in a vacuum. This mode of constitutional analysis, particularly when done without clear guiding principles, lies at the radical fringe of state constitutional law. In our nation's history, it was "only adopted by a few courts, and then perhaps honored in the breach more than followed." *Id.* at 822; *see* Glen S. Goodnough*, The Primacy Method of State Constitutional Decisionmaking: Interpreting the Maine Constitution*, 38 Maine L Rev. 491, 540–44 (1986) [Hereinafter, "*Interpreting the Maine Constitution*"] (criticizing the Maine Supreme Judicial Court's inconsistent application of the "primacy" model).

The very notion that state courts can interpret state provisions different from their federal counterparts is subject to criticism. *E.g.,* Michael E. Keasler, *The Texas Experience: A Case for the Lockstep Approach*, 77 Miss. L. J. 345, 367 (2007) ("To say that there is a historical basis for state constitutions being more protective than the Federal Constitution is ridiculous. [...] This 'second bite at the apple' approach to state constitutional interpretation is nothing more than a thinly disguised pretext for exercising "judicial creativity."); Lawrence Friedman, *Reactive and Incompletely Theorized State Constitutional Decision-Making*, 77 Miss. L.J. 265, 268 (2007) (criticizing many state-constitution departures); *see also Earl M. Maltz, Lockstep Analysis and the Concept of Federalism*, 496 Annals Acad. Pol. & Soc. Sci. 98, 99 (March 1988) (advocating for lockstep). That said, the State does not dispute that *some* state-constitution provisions may provide different protection than their federal counterparts. The question is when such a divergent interpretation is legitimate.

Contrary to this Court's statement in *Short*, nearly all state supreme courts recognize that there must be neutral criteria and sound reasons for a different decision under the state constitution—not just because judges dislike or disagree with the federal courts'

case law. *See, e.g.*, *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 421 (Conn. 2008); *Arkansas v. Harmon*, 113 S.W.3d 75, 78 (Ark. 2003); *Mogard v. City of Laramie*, 32 P.3d 313, 315 (Wyo. 2001); *Gannon v. Delaware*, 704 A.2d 272, 276 (Del. 1998); *Pennsylvania v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991); *New Jersey v. Muhammad*, 678 A.2d 164, 173 (N.J. 1996) (citing *New Jersey v. Hunt*, 450 A.2d 952 (N.J. 1982)); *Washington v. Gunwall*, 720 P.2d 808, 813 (Wash. 1986); *Vermont v. Jewett,* 500 A.2d 233, 235 (Vt. 1985); *Illinois v. Tisler*, 469 N.E.2d 147, 157 (Ill. 1984) (requiring "substantial grounds" for departure, including text or history); *Michigan v. Nash*, 341 N.W.2d 439, 446 (Mich. 1983) (requiring a "compelling reason" to depart); *accord* Wayne R. LaFave, 1 Criminal Procedure § 2.9(a) (3d ed.) (listing seven guideposts for interpreting the federal constitution);[2] *but see New Mexico v. Gomez*, 932 P.2d 1, 8 (N.M. 1997) (declining to adopt criteria; noting counsel "might profitably

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[2] Some courts go further than the "criteria" approach and prospectively lockstep their law to the U.S. Supreme Court. *E.g.*, *Wisconsin v. Davison*, 666 N.W.2d 1, 6–7 (Wis. 2003) (double jeopardy); *Kansas v. Morris*, 72 P.3d 570, 576 (Kan. 2003) (search and seizure); *Eastwood Mall v. Slanco*, 626 N.E.2d 59, 61 (Ohio 1994) (free speech). Although this Court has been critical of lockstep, the combined number of lockstep states and "criteria" states highlights how far the *Short* majority opinion has gone from the mainstream.

consult" from consulting criteria-based decisions "in framing state constitutional arguments").

Commentators also speak to the need for criteria to guide state constitutional litigation. *See, e.g.*, Paul G. Cassell, *The Mysterious Creation of Search and Seizure Exclusionary Rules Under State Constitutions: The Utah Example*, 1993 Utah L. Rev. 751, 796 (1993) (identifying four criteria, criticizing unprincipled state-constitution decisions); Steven J. Twist & Len L. Munsil, *The Double Threat of Judicial Activism: Inventing New "Rights" in State Constitutions*, 21 Ariz. St. L.J. 1005 (1989) (advocating for state-constitution decisions "firmly grounded in text and original meaning"); Paul S. Hudnut, *State Constitutions and Individual Rights: The Case for Judicial Restraint*, 63 Denv. U. L. Rev. 85, 103 (1985) [Hereinafter, "*The Case for Judicial Restraint*"] (suggesting criteria are necessary for a principled body of state constitutional law, arguing courts should also consider whether the issue presented concerns national or purely local interests); George Deukmejian & Clifford K. Thompson, *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 Hastings Const. L.Q. 975, 987–96 (1979) [Hereinafter, "*All Sail and No Anchor*"] (noting commentators consider state-constitution

departures without criteria to be "results-oriented" and advocating for analysis based on constitutional text, history, and a need for uniformity); Robin B. Johansen, Note, *The New Federalism: Toward A Principled Interpretation of the State Constitution*, 29 Stan. L. Rev. 297, 318–19 (1977) (setting forth factors); *see generally* Earl M. Maltz, *The Dark Side of State Court Activism*, 63 Tex. L. Rev. 995 (1985) (criticizing the "noninterpretive" approach, noting approaches based on criteria are more legitimate).

Even Justice Hans Linde, perhaps the nation's most outspoken commentator in favor of primacy, has warned that courts may act illegitimately when they seek "to evolve an independent jurisprudence under the state constitution … by searching ad hoc for some plausible premise in the state constitution only when federal precedents will not support the desired result[.]" Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 Or. L. Rev. 125, 146 (1970); *accord* Hans Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. Balt. L. Rev. 379, 392 (1980) ("[T]o make an independent argument under the state clause takes homework—in texts, in history, in alternative approaches to analysis. It is not enough to ask the state court to reject a Supreme Court opinion on

the comparable federal clause merely because one prefers the opposite result.”). Another outspoken advocate for state constitutional law, Justice Robert F. Utter of Washington, has said: “Without neutral criteria to aid in developing or selecting a state constitutional standard, courts relying on the state constitution [...] create the impression that reliance on the state constitution is merely result-oriented—that is, not dictated by sound reasoning.” Robert F. Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington's Experience*, 65 Temp. L. Rev. 1153, 1157 (1992).

While many other state supreme courts explicitly adopt a list of criteria (as the State suggests this Court should), even the courts that do not enunciate criteria frequently enlist clear interpretive principles, rather than mere disagreement with the policy rationales of federal law, to justify a divergent interpretation of similar constitutional provisions. *See, e.g.*, Ronald L. Nelson, *Welcome to the "Last Frontier," Professor Gardner: Alaska's Independent Approach to State Constitutional Interpretation*, 12 Alaska L. Rev. 1, 5–8 (1995) (defending Alaska’s state-constitution decisions on the bases of “customized” constitutional text and a unique constitutional history);

Davenport v. Garcia, 834 S.W.2d 4, 17 (Tex. 1992) (basing state constitutional decision on Texas' "independence" from federal authority, unique constitutional text, and unique constitutional history and values); *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 836 (Minn. 1991) (clearly basing a state-constitution decision on Minnesota's constitutional history, including an "ancient statute" and state culture); *Immuno AG. v. Moor-Jankowski,* 567 N.E.2d 1270, 1278 (N.Y. 1991) (justifying state-constitution departure based on constitutional text, constitutional history, traditions, and public policy); *see also Interpreting the Maine Constitution*, 38 Maine L Rev. at 540–44, 544–546 & n.213 (noting that Maine, a "primacy" state, has clearly enunciated interpretive rules).

Among the many states with neutral interpretive criteria, stinging dissents or special concurrences point out when majorities have gone too far. *E.g.*, *New Jersey v. Hempele*, 576 A.2d 793, 817 (N.J. 1990) (Garibaldi, J., dissenting); *Friedman*, 473 N.W.2d at 838–47 (Coyne, J., dissenting); *California v. Disbrow*, 545 P.2d 272, 284 (Cal. 1976) (Richardson, J., dissenting); *California v. Ramey*, 545 P.2d 1333, 1341 (Cal. 1976) (Clark, J., dissenting). These dissents reflect the importance of neutral interpretive criteria. They fortify

state constitutional decisions. They blunt criticism that the opinion is driven by an agenda. And they reduce legal error—which is particularly important for state-constitution decisions that necessarily avoid review by another court.

State-constitution decisions made without neutral principles or criteria risk being seen as—or actually are—result oriented. Regardless of ideological bent, result-oriented judicial outcomes should be avoided. Today's court may favor expansive protection for criminal offenders, while tomorrow's favors the property rights of the ultra-rich or elevates capitalist concerns above environmental interests. The "persuasiveness" approach taken by this Court in *Short* will allow judges to "mistake personal preferences for constitutional compulsion" and should be abandoned. *All Sail and No Anchor*, 6 Hastings Const. L.Q. at 1001.

The *Short* majority's approach is explicitly called into question by the constitutional consequences in three of the states that previously made a habit of state-constitution departures without clear guiding principles—all were expressly and unequivocally rebuked by the voters and the elected branches. *See, e.g., California v. Banks*, 863 P.2d 769, 771 (Cal. 1993) ("Pursuant to article I, section 28, of the

California Constitution, a trial court may exclude evidence under Penal Code section 1538.5 only if exclusion is mandated by the federal Constitution.");[3] *Michigan v. Moore*, 216 N.W.2d 770 (Mich. 1974) (applying Mich. Const. art. 1, § 11 (1963) and finding that constitutional amendment bars state-constitution rules in excess of federal constitution, in context of evidence in three enumerated areas); Fla. Const. art. I, §§ 12, 17 (requiring Florida courts to construe state-constitution search-and-seizure and punishment clauses "in conformity with" federal-constitution cases from the United States Supreme Court). These amendments came about because voters were "undoubtedly mistrustful of their courts" and opposed judicial attempts to expand the exclusionary rule beyond the requirements of the federal constitution. Barry Latzer, State Constitutions and Criminal Justice 2 (1991).

To aid in developing a principled body of state constitutional law, other state supreme courts have written so-called "teaching

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[3] Three California Supreme Court justices were also denied retention based in part on the voters' response to their state-constitution decisions. *See* David E. Pozen, *What Happened in Iowa?*, 111 Colum. L. Rev. Sidebar 90, 90–91 (2011) (comparing the 2010 Iowa Judicial Retention election with the 1986 election in California).

opinions" that establish criteria or principles the court believes establish compelling arguments. *See*, *e.g.*, *South Dakota v. Schwartz*, 689 N.W.2d 430, 439–40 (S.D. 2004); *Davenport v. Garcia*, 834 S.W.2d 4, 19–20 (Tex. 1992); *Dworkin v. L.F.P., Inc.*, 839 P.2d 903, 912 (Wyo. 1992); *Edmunds*, 586 A.2d at 895; *Friedman*, 473 N.W.2d 828;*Gunwall*, 720 P.2d 808; *Jewett*, 500 A.2d at 236–37.

This Court has not issued a teaching opinion.[4] Instead, in a 4–3 decision, a majority of this Court in *Short* announced it will not be bound by federal precedent and has not given any guidance, other than a reference to "persuasiveness," for how an advocate can advance (or defend against) a state-constitution claim. *Short*, 851

[4] A student note seems to ascribe this role to a special concurrence to an affirmance by operation of law. *See The* Effler *Shot Across The Bow*, 59 Drake L. Rev. at 939. This special concurrence—as well as the affirmance by operation of law—is, by statute, "of no further force or authority." Iowa Code § 602.4107 (2009). Unless and until the *Effler* concurrence is adopted by a majority of this Court, it is of no relevance to litigants.

N.W.2d at 481, 490.[5] The *Short* majority's subheading calls criteria "a solution in search of a problem." *Id.* at 490.

The problem is this: interpreting the state constitution without reference to federal decisions or any interpretive criteria is like playing a sport where only the referee knows the rules. The players can walk onto the field with a bat and ball, but they don't have any idea how the equipment is to be used, which points count and which don't, or even how to win. At the end of the game, the referee declares a winner, but the players are left unsatisfied and spectators question the game's legitimacy. So too for this Court after *Short*.

Short's "persuasiveness" rule turns constitutional law into a guessing game—and neither the State nor a defense attorney can fairly guess what will be found most "persuasive" to this Court or predict what constitutional rules will result from litigation. No doubt this will be reflected in briefing that comes before this Court, where

[5] *Short* was a significant departure from this Court's existing case law. While the majority maintained that this "approach … was thoroughly explored" in past decisions, Justice Mansfield correctly points out that this approach, at best, dates back four years and flows from no more than two decisions and a special concurrence. *Short*, 851 N.W.2d at 519–20 (Mansfield, J., dissenting). As stressed in Division I.C.3, our constitutional history is one of conformity to federal law, not of divergence and wholesale rejection.

state-constitution claims will continue to be inadequately briefed and underdeveloped. An empirical study, published in a peer-reviewed multidisciplinary journal, found that Washington's adoption of criteria had a strong impact on advocacy and substantially reduced the number of illegitimate pleas to eschew federal law on a result-oriented basis. Richard S. Pierce, *Arguing* Gunwall*: The Effect of the Criteria Test on Constitutional Rights Claims*, Journal of Law and Courts, vol. 1., no. 2 (Fall 2013), at pp. 355–60. The same study also included a comparative component. It found that briefing before the Washington courts focuses on court-identified criteria, while litigants in other states continued to argue for state-constitution departures solely to evade disliked federal law. *See id.* at 356–57; *accord* Hugh D. Spitzer, *New Life for the "Criteria Tests" in State Constitutional Jurisprudence: "*Gunwall *Is Dead—Long Live* Gunwall*!"* 37 Rutgers L.J. 1169, 1200 (2006) (also arguing criteria are useful to advocates and jurists). Based on these findings, this Court should adopt criteria for the added reason that it will improve advocacy seen by the Court and aid in resolution of complex constitutional questions on a principled basis.

Interpreting the state constitution differently than the federal constitution without clear guideposts is rightly subject to wide criticism. *See, e.g.*, *Gunwall*, 720 P.2d at 813 (noting the court uses "criteria to the end that [its] decision will be made for well founded legal reasons and not by merely substituting our notion of justice for that of duly elected legislative bodies or the United States Supreme Court."); *Jewett,* 500 A.2d at 235 ("Our [state-constitution] decisions must be principled, not result-oriented."). Absent clear criteria, state supreme courts will "fail[] to impose upon themselves constraints on the exercise of their powers." *All Sail and No Anchor*, 6 Hastings Const. L.Q. at 982.

Proceeding down the road of state-constitution divergence without clear criteria or guideposts will mean that all that is required for constitutional change is a change in appellate-court membership. This is inconsistent with the American separation of law and politics, eliminates any distinction between the courts and the elected branches, and injects substantial uncertainty that undermines *stare decisis*. Like a boat without a rudder, the lack of clear interpretive criteria will leave this Court's jurisprudence subject to shifting winds and changing tides, rather than providing the measured stability

contemplated by our constitutional framers. *See* Iowa Const. art. X (detailing an arduous amendment process).

Of course, adopting criteria does not necessarily remove subjective evaluations of legal policy from the equation. Litigants, including the State, may still be surprised by changing constitutional rules, but at least they will have a framework in which to make their claims. Flexible criteria that help orient claims are undoubtedly better than no criteria at all. The State respectfully submits that this Court should adopt the five criteria set forth below as valid considerations for interpreting the state constitution differently than its federal counterpart. This Court should reject state constitutional interpretations that are not supported by neutral principles.[6]

1. Development of the claim in lower courts.

"The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir.

[6] The majority opinion in *Short* noted the State did not ask the Court to revisit decisions such as *Pals* and *Baldon*. *Short*, 851 N.W.2d at 480 n.3. To be clear, the State maintains those decisions were wrongly decided under the Iowa Constitution because they were not based on neutral interpretive criteria.

1983); *accord City of Davenport v. Seymour*, 755 N.W.2d 533, 545 (Iowa 2008). To that end, this Court should not interpret state constitutional provisions differently than their federal counterparts when such a claim has not been developed and fully litigated in the district court.

In a case where a state-constitution claim is not developed below, and only minimally preserved by an unexplained reference to a provision, Iowa's unusual deflective-routing system results in state-constitution questions being litigated exactly once: before this Court. The law does better when error is preserved adequately, district courts fully weigh in on the issues, and additional legal minds consider a question.

Requiring a party to develop state-constitution claims in the lower courts also fittingly furthers our unique constitutional traditions. Article V, section 4 of the Iowa Constitution establishes this Court as one "for the correction of errors at law, under such restrictions as the general assembly may, by law, prescribe[.]" Iowa Const. art. V, § 4. "If a litigant fails to present an issue to the district court and obtain a ruling on the same, it cannot be said that [the appellate courts] are correcting an error at law." *State v. Tidwell*,

2013 WL 6405367, at *2 (Iowa Ct. App. 2013); *accord* Thomas A. Mayes & Anuradha Vaitheswaran, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice*, 55 Drake L. Rev. 39, 43 (2006). These principles date back to the founding of our state. *See Danforth, Davis & Co. v. Carter*, 1 Iowa 546, 553 (1855). And they have been consistently and repeatedly reaffirmed by this Court. *E.g., State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999). It would be anomalous to brush these rules aside—or lessen their effect—when facing state constitutional questions. This Court should not diverge from federal constitutional principles without a developed record from the district court.

2. Constitutional text.

Other state supreme courts recognize that substantial textual differences may be a legitimate basis for a state-constitution departure. *E.g.*, *Vermont v. Jewett*, 500 A.2d 233, 237 (Vt. 1985) (on the differences between Vermont's self-incrimination and search-and-seizure provisions, compared to the federal constitution); *see The Case for Judicial Restraint*, 63 Denv. U. L. Rev. at 104–05 (collecting cases).

It seems fair to argue that materially different text may be interpreted differently. For example, "Unlike some other constitutional provisions, Iowa's double jeopardy provision is distinct from the Federal Double Jeopardy Clause." *State v. Lindell*, 828 N.W.2d 1, 4 (Iowa 2013) *cert. denied,* 134 S. Ct. 249 (U.S. 2013). The same can be said of California's constitutional requirement of twelve-member juries (unlike the federal Sixth Amendment). *See* Cal. Const. art. I, § 16. Or of the Washington Constitution's provision regulating searches and seizures. *See* Wash Const. art. I, § 7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law."); *see* Peter G. Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts*, 33 Syr. L. Rev. 731, 763 (1982) [Hereinafter, "*The Other Supreme Courts*"] (noting the Washington framers explicitly rejected a proposal identical to the Fourth Amendment in favor of Article I, section 7).

In the same vein, it is difficult to accept that similar text should not be interpreted similarly, given the rampant "borrowing" of constitutional text by later-admitted states from their earlier counterparts. *See* Lawrence Friedman, *State Constitutions in Historical Perspective*, 496 Annals Am. Acad. Pol. & Soc. Sci. 33, 37

(1988) ("States sometimes copied material blindly. It is hard to imagine, for example, that Iowa in 1857 really needed a clause on quartering of soldiers in private homes in time of peace."); Understanding State Constitutions 75 (noting similarities among state constitutions' bills of rights and that they all "protect the same set of basic rights"). As Maryland's appellate courts have put it, materially identical provisions are *in pari materia* with their federal analogues and should generally face the same interpretation. *See generally* Irma S. Raker, *Fourth Amendment and Independent State Grounds*, 77 Miss. L.J. 401 (2007) (detailing the Maryland experience with search-and-seizure provisions).

Between materially different and identical texts lies a more difficult question. As a Harvard Law Review report points out, "When nontextual evidence is unavailable … minor linguistic variation has seldom played a decisive role [in interpreting state-constitution rights]." *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 Harv. L. Rev. 1324, 1387 (1982). In other words, absent strong evidence a provision was intended to have a different effect, minor differences in language should not be dispositive of a court's constitutional interpretation.

For advocates, applying this criterion is relatively straightforward: constitutional provisions materially similar to federal provisions should be interpreted similarly, while materially different language may justify a different interpretation.

3. Constitutional history, including reports of state constitutional debates and state precedent.

"Each state has its own legal history, including case law, and its own peculiar socio-economic and geographic characteristics. Courts in a number of states have used these unique characteristics to justify taking positions independent of and more demanding than federal constitutional law." *The Other Supreme Courts*, 33 Syr. L. Rev. at 764.

One area in which state-constitution interpretations have legitimately diverged based on history concerns whether a defendant charged with a petty offense must be afforded a trial by jury. In *Duncan v. Louisiana*, the United States Supreme Court relied on two premises to find the Sixth Amendment did not require a trial by jury for petty offenses: (1) the historical practice of both England and the Colonies "always" exempted petty-offense trials from the requirement of a jury; and (2) there is no evidence the founders intended to depart from this "established common-law practice" when framing the

constitution. 391 U.S. 145, 160 (1968). The Maine Supreme Judicial Court concluded otherwise because Maine's citizens had been entitled to jury trials for petty offenses dating back to the colonial era (pre-dating the federal constitution) and there was no evidence the framers of the Maine Constitution intended to depart from that practice. *Maine v. Sklar*, 317 A.2d 160, 165–67 (Me. 1974) (noting the federal Supreme Court's reasoning was "basically contradicted by the special historical experience in Maine").

The Supreme Court of Appeals of West Virginia used a similar approach to constitutional history, finding that "from the time this State was formed, the framers of the West Virginia Constitutions, the Legislature and this Court have been unanimous in the belief that [the state constitution guaranteed a petty-offense jury]." *Hendershot v. Hendershot*, 263 S.E.2d 90, 95 (W. Va. 1980). The decision turned on West Virginia's unique "historical roots, which are embedded in such clear and unequivocal constitutional, statutory and judicial language." *Id.* at 95. In short, the Maine and West Virginia explorations of constitutional history establish that a state's unique cultural make-up—found in statutes, primary sources, and historical

practice—may warrant a unique interpretation of the state constitution in some circumstances.

This principle animates perhaps the best known of this Court's state-constitution decisions: *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009). There, this Court devoted significant space to the unique constitutional history of Iowa—how the first reported decision of the territorial supreme court rejected slavery, how our case law rejected public-school segregation and "separate but equal" nearly a century ahead of the federal courts, and how Iowa was the first state to admit a woman to the practice of law. *Id.* at 877 (citing *In re Ralph*, 1 Morris 1 (Iowa 1839); *Clark v. Board of Directors*, 24 Iowa 266 (1868), *Coger v. North West. Union Packet Co.*, 37 Iowa 145 (1873); and *Admission of Women to the Bar,* 1 Chicago Law Times 76, 76 (1887)). As Justice Cady wrote, "In each of those [cases], our state approached a fork in the road toward fulfillment of our constitution's ideals and reaffirmed the 'absolute equality of all' persons before the law as 'the very foundation principle of our government.'" *Varnum*, 763 N.W.2d at 877. A footnote points out that "[t]he path we have taken as a state has not been by accident, but has been navigated with the compass of equality firmly in hand[.]" *Id.* at 877 n.4. Put

differently, our longstanding constitutional history of equality supported the decision to find the one-man, one-woman marriage statute incompatible with the Iowa Constitution. *See generally id.* at 906.

As a cautionary tale, not all claims about a state's constitutional history or traditions should be treated as equal. As one writer has noted, "Ransacking the past for isolated 'good quotes' is bad history and bad law[.]" H. Jefferson Powell, *The Use of State Constitutional History* in Paul Finkelman & Stephen E. Gottlieb, Toward A Usable Past: Liberty Under State Constitutions (1991). Even the notion that cultural traditions are captured in state constitutions has been subject to significant criticism. *See generally* Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 Va. L. Rev. 389 (1998); James A. Gardner, *Southern Character, Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study in Constitutional Argument*, 76 Tex. L. Rev. 1219, 1290 (1998); Paul W. Kahn, Comment, *Interpretation and Authority in State Constitutionalism,* 106 Harv. L. Rev. 1147, 1160–61 (1993). For these reasons, an analysis of constitutional history is best limited to a review of existing constitutional decisions and primary sources

related to the convention, such as rejected amendments or reports of debates.

4. Decisions of sister states, particularly when interpreting similar constitutional text.

State supreme courts can also explore how other state appellate courts have interpreted their similar constitutional provisions. This "horizontal federalism" allows a state supreme court to look to what its sister courts are doing in regard to constitutional language, in addition to the federal supreme court. *See* James N.G. Cauthen, *Horizontal Federalism in the New Judicial Federalism: A Preliminary Look at Citations*, 66 Alb. L. Rev. 783, 790 (2003) (noting that state supreme courts look to their sister courts in roughly a third of cases where interpretation of a state constitutional provision is at issue). An exploration of other states' appellate decisions will likely prove most useful when the states have identical or similar constitutional provisions. *See Jewett*, 500 A.2d at 237 (discussing similarities between the New Hampshire and Rhode Island constitution and decisions involving the same). Of course, as Ohio's appellate court has recognized, "decisions from […] sister states can be cited to support almost any point of view." *State, ex rel. Rear Door Bookstore v. Tenth Dist. Ct. of Appeals*, 588 N.E.2d 116,

121 (Ohio 1992). Much like how consistency among state and federal decisions interpreting similar provisions breeds legitimacy, the same is true when multiple state supreme courts come to similar conclusions, rather than one or two courts striking a course contrary to all their constitutional counterparts.

5. Practical consequences, including the need for national uniformity.

Fifth and finally, this Court and advocates can fairly consider the practical policy consequences of particular constitutional rules, including a need for national uniformity.

National uniformity is a particularly important practical consideration for criminal justice issues. This Court has explicitly recognized that uniformity is beneficial. *State v. Olsen*, 293 N.W.2d 216, 219-20 (Iowa 1980) ("We have an interest in harmonizing our constitutional decisions with those of the [federal] Supreme Court when reasonably possible[…]."). Commentators have also recognized that a patchwork of constitutional rules "may create difficult problems for law enforcement officials and an appearance of unfairness where different results occurs in similar situations." *The Case for Judicial Restraint*, 63 Denv. U. L. Rev. at 86. Having different rules in different states fuels distrust of the courts and

reinforces "the popular perception of the legal system being capricious, hyper-technical, and unfair." *Id.* at 92. Criminal justice is an increasingly national issue and, at least when it comes to judge-made constitutional rules, should be governed by national—not local—standards. *See id.* at 103.

Uniformity also fosters equality under the law, the first core value in the Iowa Judicial Branch's Mission Statement.[7] Unnecessary departures from federal law cause inequity and unfairness. The public is rightly confounded when prosecutions on identical facts face a different fate in Nebraska or Illinois than Iowa. Even more difficult to rationalize is the defendant arrested in Des Moines who cannot be prosecuted in the Polk County District Court, but can be prosecuted up the street in the United States District Court for the Southern District of Iowa.

It should be unusual to depart from established national rules—particularly in the context of criminal procedure. If this Court's focus is to be on the "persuasiveness" of judicial rules, one valid measure of persuasion is to follow the rule taken by the Supreme Court of the

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[7] Available at http://www.iowacourts.gov/For_the_Public/Overview/.

United States and the overwhelming majority of state courts who have not departed from the federal rule. It should be unusual, not routine, to disregard the measured consideration of hundreds of jurists on other state and federal courts. Granting increased protection to criminals under the state constitution should be done only rarely and with exceedingly good reason.

C. This Court should reject the defendant's attempt to radically redefine Iowa search-and-seizure law. The Iowa Constitution does not support a divergent interpretation of Article I, section 8 and the Iowa Constitution is compatible with the automobile exception.

The defendant's brief urges this Court to depart significantly from established state and federal law. He asks this Court to hold that police may not search an automobile after arresting its driver without (1) a warrant, unless there is an independent showing of exigency unrelated to the vehicle's transitory nature, and (2) probable cause. Defendant's Br. at 62. In other words, the defendant believes

this Court should find the "automobile exception … incompatible with the Iowa Constitution." Defendant's Br. at 62.[8]

In this appeal, the State does not dispute that a search incident to arrest that involves an automobile requires probable cause when grounded in the evidentiary rationale,[9] even though some federal courts have interpreted language in *Gant* to require a lesser standard. This is not a concession to the strength of the defendant's advocacy; rather, the State does not dispute this point because it has been the settled law in Iowa for decades that a warrantless search for evidence, conducted pursuant to the automobile exception, must be supported by probable cause. *See, e.g., State v. Sanders*, 312 N.W.2d 534, 539 (Iowa 1981)*; State v. Derifield*, 467 N.W.2d 297, 300 (Iowa Ct. App. 1991). This also appears to be the position of the Eighth Circuit Court of Appeals. *United States v. Williams*, 616 F.3d 760, 765–66 (8th Cir.

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[8] Understandably, the defendant's brief conflates the general automobile exception with *Gant* searches based on the evidentiary rationale. Both are searches supported by probable cause and identical exigencies, and the State addresses both in this brief.

[9] The State leaves open the question of whether an automobile search, conducted incident to arrest, may be justified by a lower standard when the rationale for the search is officer safety. The officer-safety rationale is not at issue in this appeal, nor is it inherently linked to disposition of the issue presented, and the State asks this Court to make that clear in its opinion.

2010) (equating the *Gant* language with probable cause); *United States v. Ameling*, 328 F.3d 443, 448 (8th Cir. 2003) ("Law enforcement officials may search a vehicle without a warrant so long as they have probable cause."). The assistant county attorney in this case, relying on *Vance*, also took the position that the search was supported by probable cause. Supp. hrg. tr. p. 21, line 23 — p. 22, line 13; App. 53. Requiring probable cause to search a vehicle incident to arrest furthers the stability and predictability of the law and promotes uniformity between state and federal actors—the exact rationales championed throughout this brief.

The fighting issue in this appeal is whether the Iowa Constitution requires the State to offer some independent exigency, beyond the mobility of an automobile, in support of a warrantless search incident to arrest. The defendant suggests searches incident to arrest of an automobile driver should require a warrant absent a "separate showing of exigency." Defendant's Br. at 62. This Court should reject the defendant's request to reinterpret the Iowa Constitution as hostile to automobile searches, and should adhere to established constitutional precedent.

Not all state-constitution departures are created equal; some are more legitimate than others. On the one hand, the state-constitution departure in *Varnum v. Brien* came in a unanimous opinion justified by Iowa's unique constitutional history and longstanding equal-protection jurisprudence. 763 N.W.2d 862, 877–78 (Iowa 2009). It involved an expansion of rights in an area traditionally regulated by the states (rather than the federal government), where there was no pressing need for national uniformity and no material downside to serving as a constitutional laboratory. On the other hand, *Ochoa* and *Short* diverged from decades of case law and seem to be based on a semicolon and the policy preferences of a bare majority of judges. *State v. Short*, 851 N.W.2d 474, 482–83 (Iowa 2014); *State v. Ochoa*, 792 N.W.2d 260, 268–69 (Iowa 2010). These abrupt departures set aside sound national rules of criminal procedure and will have severe consequences for law enforcement officers and the ability of the State to combat crime.

"It would be a serious mistake for this Court to use its state constitution chiefly to evade the impact of the decisions of the United States Supreme Court. Our decisions must be principled, not result-

oriented." *Vermont v. Jewett*, 500 A.2d 233, 235 (Vt. 1985). Yet that is precisely what the defendant asks this Court to do—he does not like results reached under existing state and federal law, so he pleads on appeal to evade *Carroll*, *Chambers*, *Belton* and *Gant*, and create a new rule for the benefit of those who commit crimes by way of automobile.

This Court should reject the defendant's argument because it is not supported by Iowa's constitutional text or constitutional history. Nor is it supported by decisions of our sister states or compelling practical policy concerns. Existing precedent supports the automobile exception and should be affirmed.

1. Development of the claim in lower courts.

The defendant's claim in this case was not developed or litigated below. In his motion to suppress, the defendant did not cite any case law or explain any constitutional rationales. *See* Defendant's Motion to Suppress; App. 24–25. The State's resistance cited *Vance* and *Gant* and did not address a state-constitution issue. State's Resistance; App. 26–27. The district court's ruling does not reference Article I, section 8 or any state-constitution issues or cases. Supp. Ruling; App. 60–65. It is not clear that any actors—the State, the

district court judge, or defense counsel—even considered the Iowa Constitution beyond its brief mention, without explanation, in the motion to suppress.

The State does not dispute that the defendant's appellate brief spends many pages discussing the Iowa Constitution. But this comes too late. If the district court erred by not addressing a state constitutional claim that was marginally raised, it should have had the opportunity to correct the error below. Similarly, if the defendant's argument is that *Gant* should be abandoned because there was not a sufficienct exigency, the State should have had the opportunity to develop alternate legal theories or develop a record concerning exigencies at the scene. Instead, the defendant has blindsided the State on appeal with a claim that, in all likelihood, no one in the district court anticipated.

The law does better when claims are fully litigated below and reviewed for correction of legal error on appeal. Iowa's constitution and statutes require as much. Iowa Const. art. V, § 4; Iowa Code § 602.4102 (2013). The defendant's failure to litigate this claim below weighs heavily against imparting any independent meaning to the Iowa Constitution beyond the Fourth Amendment.

2. Constitutional text.

Article I, section 8 is materially identical to the Fourth Amendment and should be interpreted the same. Nothing about the text of this provision supports abolishing the established automobile exception.

a. There is no material difference between the text of the Fourth Amendment and Article I, section 8 of the Iowa Constitution.

For decades, this Court explicitly recognized "that the search and seizure clauses of the Iowa and United States Constitutions contain identical language." *State v. Groff*, 323 N.W.2d 204, 207 (Iowa 1982); *see State v. Showalter*, 427 N.W.2d 166, 168 (Iowa 1988); *Kain v. State*, 378 N.W.2d 900, 902 (Iowa 1985) ("[O]ur interpretation of article I, section 8 has quite consistently tracked with prevailing federal interpretations of the fourteenth amendment in deciding similar issues."); *accord State v. Breuer*, 577 N.W.2d 41, 44 (Iowa 1998) (reaffirming *Showalter*); *State v. Tonn*, 191 N.W. 530, 534 (Iowa 1923). This is objectively and materially true, with the exception of a semicolon that appears in place of the federal constitution's comma. *Compare* U.S. Const. amend IV *with* Iowa Const. art. I, § 8. A reference book on the Iowa Constitution refers to

this difference as "trivial"—and with good reason. *See* Jack Stark, The Iowa State Constitution: A Reference Guide 43 (1998). One expects that, if the semicolon in Article I, section 8 fundamentally altered the meaning of that provision, this argument would have emerged at some point within the first 150 years this Court interpreted the Iowa Constitution—not for the first time in 2010.

The argument that the semicolon in Article I, section 8 shows some special concern for separating "reasonableness" and the warrant requirement cannot withstand any serious scrutiny—even of the grammatical variety. The plain language of that provision does not contain any positive evidence that the Iowa framers intended to codify a different right than the Fourth Amendment, and a semicolon would be an unusual way to make that showing. A more likely explanation for the choice of punctuation mark is that semicolons are properly used to separate a list that contains internal commas—and Article I, section 8 includes just such a list. *Compare* Iowa Const. art. I, § 8 (internal commas as part of a list in "persons, houses, papers and effects") *with Semicolon Use*, Grammarly Handbook, http://www.grammarly.com/handbook/punctuation/semicolon/1/semicolon-use/ (last accessed Oct. 7, 2014). Further, using a semicolon

before a conjunction like "and" to show a causal relationship between two clauses—as the majorities in *Ochoa* and *Short* seemingly suggest[10]— is grammatically unusual and improper. *See Semicolon With Conjunctions,* Grammarly Handbook, http://www.grammarly.com/handbook/punctuation/semicolon/2/semicolon-with-conjunctions/ (last accessed Oct. 7, 2014). If the Iowa Constitution's framers had intended to show the close relationship of "cause and consequence" suggested by the *Ochoa* majority, they would have used a conjunctive adverb like "moreover" or "therefore." *Semicolon With Conjunctive Adverbs*, Grammarly Handbook, http://www.grammarly.com/handbook/punctuation/semicolon/3/semicolon-with-conjunctive-adverbs/ (last accessed Oct. 7, 2014). *Compare id. with Ochoa*, 792 N.W.2d at 269 (suggesting the semicolon showed a relationship of "cause and consequence"). These fundamental rules of grammar are supported not only by the modern sources cited in the preceding sentences, but also by 19th century sources contemporary with the adoption of the 1857 Constitution. *See, e.g.,* John Seely Hart, English Grammar 152 (1873) (noting uses for the semicolon, including lists with internal commas and not

[10] *Short*, 851 N.W.2d at 483; *Ochoa*, 792 N.W.2d at 268–69.

including a causal relationship); Dyer H. Sandborn, Analytical Grammar of the English Language 263 (1848) (listing seven appropriate uses for a semicolon, none of which include a relationship of "cause and consequence"); *see also* Bryan A. Garner, The Redbook: A Manual on Legal Style 12–15 (2nd ed. 2006) [rules 1.14–1.19]. Reading distinctive meaning into the semicolon, as done in *Ochoa* and *Short*, runs counter to the rules of grammar and the historical record. Another reason this Court should not read anything into this grammatical afterthought is that the framers apparently saw no difference between a semicolon and comma in that provision—the semicolon was present in the Iowa Constitution of 1844, was replaced by a comma in the 1846 Constitution, and re-emerged as a semicolon in 1857—all without explanation or contemporary comment. *See* Iowa Const. art. I, § 8 (1857); Iowa Const. art. II, § 8 (1846); Iowa Const. art. II, § 7 (1844). The text of Article I, section 8 does not support an interpretation divergent from the Fourth Amendment.

b. Nothing about the constitutional text of Article I, section 8 supports gutting the automobile exception.

Any argument that the text of Article I, section 8 compels a different approach to automobiles than federal law is undermined by a comparison with other states' constitutional provisions. Part of the

defendant's argument is that federal law is too favorable to "reasonableness" and this Court should require clear exigencies related to automobiles before permitting warrantless searches. Defendant's Br. 76–78. If this argument has force anywhere, it is in the four states that lack the "reasonable" language found in both the Fourth Amendment and Article I, section 8. *Compare* U.S. Const. amend IV (prohibiting "unreasonable searches and seizures"); Iowa Const. art. I, § 8 (also prohibiting "unreasonable seizures and searches") *with* Md. Const. art. 26 (no reference to reasonable searches); N.C. Const. art. I, § 20 (same); Vt. Const., ch. 1, art. 11 (same); Va. Const., art. I, § 10 (same). Our constitutional text, like the Fourth Amendment, enshrines reasonableness as its guiding principle. No doubt this is because our constitution's bill of rights is "clearly modeled after the first 10 amendments to the U.S. Constitution." *See* Steven C. Cross, *The Drafting of Iowa's Constitution*, http://publications.iowa.gov/135/1/history/7-6.html.

The original understanding of our constitutional text also supports the automobile exception. The Iowa Constitution guards searches of "persons, houses, papers and effects[.]" Iowa Const. art. I, § 8. This provision has a "particular" focus on protecting the

intimate affairs of the "home." *E.g.*, *State v. Ochoa*, 792 N.W.2d 260, 272–73, 284–85 (Iowa 2010). Less protection is afforded to an "effect," such as a vehicle, because far fewer of men's intimate affairs are exposed in the automobile than in his dwelling. Although there were no automobiles for the framers to contemplate in 1857, a rough historical analogue would be a ship: both ships and cars are means of transport for passengers and cargo, often including containers. From 1789 through the 20th century, ships could be searched without a warrant. *See Carroll v. United States*, 267 U.S. 132, 149–53 (1925). The same reasoning supports the warrantless search of a vehicle, including a van or car.

3. Constitutional history.

Iowa's constitutional history supports interpreting Article I, section 8 in line with the Fourth Amendment. Our state's constitutional history, including established precedent, already recognizes the automobile exception and those cases should not be overturned.

a. The constitutional history surrounding Article I, section 8 is identical to the Fourth Amendment.

Given our constitutional history, there is no basis to believe Article I, section 8 was intended to materially differ from the

protection provided by the Fourth Amendment. One expert in state constitutional law has said that the evidence "strongly supports the conclusion that the state bills were intended to provide the same rights as the federal [bill of rights], but against state governments." Barry Latzer, State Constitutions and Criminal Justice 2 (1991). This makes sense because, at the time the Iowa Constitution was adopted, the federal bill of rights did not apply to the states. *See Weeks v. United States*, 232 U.S. 383, 398 (1914) (holding exclusionary rule only applies in federal court) *overruled by Mapp v. Ohio*, 367 U.S. 643 (1961). This is also why, until a sudden and radical recent departure, this Court has "consistently interpreted the scope and purpose of article I, section 8, of the Iowa Constitution to track with federal interpretations of the Fourth Amendment." *Showalter*, 427 N.W.2d at 168; *see Breuer*, 577 at, 44; *Kain*, 378 N.W.2d at 902. Our constitutional history is one consistent with, rather than divergent from, federal search-and-seizure law.

In contrast, look at Pennsylvania. The Pennsylvania Constitution existed more than a decade before the federal Constitution, and more than 15 years before the federal bill of rights. *Pennsylvania. v. Edmunds*, 586 A.2d 887, 896 (Pa. 1991). It has a

different history and serves a different purpose. *See id.* at 896–900. It thus makes sense that, despite similar language, there is reason to think Pennsylvania's provision should be interpreted differently than the Fourth Amendment, which came later.

The same cannot be said of Article I, section 8 of the Iowa Constitution. "Our state did not come before the United States. We became a state over fifty years after the Federal Bill of Rights was ratified." *Short*, 851 N.W.2d at 520 (Mansfield, J., dissenting). Like our neighbors across the Mississippi have said, "the drafters of the [state] constitution and the delegates to the constitutional convention intended the phrase 'search and seizure' in the state document to mean, in general, what the same phrase means in the federal constitution." *Illinois v. Caballes*, 851 N.E.2d 26, 45 (Ill. 2006). Empirical data supports this position. Iowa's constitutional history from the 1960s through 1989 was one of adopting federal criminal-procedure law, not rejecting it. During that period, this Court departed from federal case law only once—and adhered to it 17 times. Barry Latzer, *The Hidden Conservatism of the State Court "Revolution,"* 74 Judicature 190, 193 (1991) (noting a 6% rejection of federal case law and 94% adoption of the same). This put Iowa in the

top ranks of states most likely to adopt federal law for state-constitution claims—second only to two states that had never rejected a federal approach. *Id.* at 193. This Court should adhere to Iowa's constitutional history and interpret Article I, section 8 in line with the Fourth Amendment.

b. Iowa's constitutional history, including state constitutional precedent, supports the automobile exception.

"It nearly goes without saying that the doctrine of *stare decisis* is one of the bedrock principles on which this court is built." *Kiesau v. Bantz,* 686 N.W.2d 164, 180 (Iowa 2004) (Cady, J., dissenting). *Stare decisis* supports adhering to the automobile exception under the Iowa Constitution.

In the 1980 case of *State v. Olsen*, this Court unanimously held that it was "persuaded that the state constitution should be given the same interpretation as the Federal" and adopted the *Carroll–Chambers* rationale for warrantless automobile searches. 293 N.W.2d 216, 220 (Iowa 1980) ("We conclude that we will apply the *Carroll-Chambers* doctrine under Iowa Const. art. I, § 8[.]"). One year later, this Court in *Sanders* expressly adopted the automobile exception and the reasoning of *Belton* for searches incident to arrest of

automobile occupants, under Article I, section 8. *See State v. Sanders*, 312 N.W.2d 534, 537–39 (Iowa 1981) (adopting *Belton*, 453 U.S. 454). This Court recognized that it was free to provide greater constitutional protection than the Fourth Amendment, but declined to do so because it "believe[d] *Belton* strikes a reasonably fair balance between the rights of the individual and those of society." *Sanders*, 312 N.W.2d at 539. More recently, in *State v. Maddox*, this Court—in a case addressing Article I, section 8—held that the automobile exception applied and that a semi-truck, "because of its inherent mobility, presents an exigent circumstance." 670 N.W.2d 168, 171 (Iowa 2003). To accept the defendant's argument, this Court would have to overturn *Olsen*, *Sanders*, and *Maddox*; diverge from *Gant*; and break new ground inconsistent with our history.

Importantly, *Sanders* is doubly harmful to the defendant's request for a state-constitution departure. If this Court intends to follow a "primacy" approach to state constitutional questions, this Court must also be open to the possibility that the state constitution occasionally provides less—not more—protection than its federal counterpart. *See* Barry Latzer, *Four Half-Truths About State Constitutional Law*, 65 Temp. L. Rev. 1123, 1125–3 (1992) (collecting

authorities that hold a state constitution may provide less protection than federal law); *e.g.*, *Oregon v. Smith*, 725 P.2d 894 (Or. 1986) (finding *Miranda* warnings not requiring by state constitution). That appears to be the case with *Sanders*, where this Court adopted the broad *Belton* rule. *Sanders*, 312 N.W.2d at 539. It is thus the federal constitution as interpreted in *Gant* that provides defendants protection from a broad reading of *Belton*, not state constitutional law.

More recently, this Court also discussed the automobile exception in *State v. Vance*, 790 N.W.2d 775, 786 (Iowa 2010). In that case, a majority of this Court preserved for postconviction relief an allegation that counsel was ineffective for not making a *Gant* challenge to a search. *Id.* 786–91. Two members of this Court, Justices Cady and Streit, dissented and would have denied the defendant's ineffective-assistance claim outright because the facts in that case "unquestionably made the search permissible under the automobile exception." *Id.* at 791 (Iowa 2010) (Cady, J., dissenting). The dissenters found that the "well-reasoned" automobile exception was "firmly planted in our Iowa jurisprudence for over twenty years." *Id.* at 791. The dissenters' view is supported by our case law. *See*

Maddox, 670 N.W.2d at 171; *Sanders*, 312 N.W.2d at 539; *Olsen*, 293 N.W.2d at 220. This weighs heavily against the reinterpretation of Article I, section 8 that the defendant pleads for.

The rationale and application of the automobile exception is also just as rooted in Iowa's history as it is elsewhere in the country. "Before the automobile, there appear to have been few limits on the police power to stop carriages and buggies to investigate crimes." Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 Harv. L. Rev. 476, 507 (2011). In other words, the rules for searches of cars today are generally in sync with the rules for searches of carriages and wagons in our historical past. *See id.* at 507–08. This includes a search that extends to containers found in the interior of a vehicle. *See Ross*, 456 U.S. at 820 ("During virtually the entire history of our country—whether contraband was transported in a horse-drawn carriage, a 1921 roadster, or a modern automobile—it has been assumed that a lawful search of a vehicle would include a search of any container that might conceal the object of the search.").

This Court should not overturn *Olsen*, *Sanders,* and *Maddox* and should adhere to the *Belton-Gant* rule because our constitutional history supports the automobile exception.

4. Decisions of sister states.

Many of Iowa's sister states have grammatically identical search-and-seizure provisions. The overwhelming majority of these states interpret their provisions in line with the Fourth Amendment and separately recognize the automobile exception under their state constitutions.

a. Iowa's sister states have interpreted provisions identical or similar to Article I, section 8 in line with the Fourth Amendment.

A comparative analysis of other state constitutions with grammatically similar provisions to Article I, section 8 (including the use of a semicolon) reveals that many of these states have found their search-and-seizure provisions should be interpreted in line with the Fourth Amendment, including:

- Arkansas. *See* Ark. Const. art. II, § 15; *Stout v. Arkansas*, 898 S.W.2d 457, 460 (Ark. 1995).
- Colorado. *See* Colo. Const. art. II, §7; *Colorado v. Taylor*, 296 P.3d 317, 321 n.3, *cert. denied,* 12 Sup. Ct. 542 (Colo. 2013); *Colorado v. Whitaker*, 32 P.3d 511, 514 (Colo. Ct. App. 2000) *aff'd,* 48 P.3d 555 (Colo. 2002).

- Kansas. *See* Kan. Bill of Rights § 15; *Kansas v. Schultz*, 850 P.2d 818, 823–25 (Kan. 1993).

- Kentucky. *See* Ky. Bill of Rights § 10; *Robbins v. Kentucky*, 336 S.W.3d 60, 63 (Ky. 2011).

- Missouri. *See* Mo. Const. art. I, § 15; *Missouri v. Damask*, 936 S.W.2d 565, 570 (Mo. 1996).

- Nebraska. Neb. Const. art. I, § 7; *Nebraska v. Bakewell*, 273 Neb. 372, 375, 730 N.W.2d 335, 338 (2007) ("The Nebraska Constitution provides similar protection [to the Fourth Amendment].").

- Ohio. *See* Ohio Const. art. I, § 14; *Ohio v. Murrell*, 764 N.E.2d 986, 993 (Ohio 2002).

- Rhode Island. *See* R.I. Const. art. I, § 6; *Rhode Island v. Taylor*, 621 A.2d 1252, 1254 (R.I. 1993) ("As a general rule this court … interprets article I, section 6, of the Rhode Island Constitution as identical to the Fourth Amendment[.]").

These decisions, made by a wide array of jurists, rebut any notion that the minor textual differences between Article I, section 8 and the Fourth Amendment provide a principled basis for an alternative interpretation.

b. Most of Iowa's sister courts have also found the automobile exception compatible with their state constitutions' search-and-seizure provisions.

Many of Iowa's sister courts have expressly adopted the federal automobile exception under their respective state constitutional provisions. *See, e.g, Pennsylvania. v. Gary*, 91 A.3d 102, 137–38 (Pa.

2014); *Connecticut v. Winfrey*, 24 A.3d 1218, 1224 (Conn. 2011);[11] *Kansas v. Conn*, 99 P.3d 1108, 1114 (Kan. 2011); *Chavies v. Kentucky*, 354 S.W.3d 103, 110–11 (Ky. 2011); *North Dakota v. Zwicke*, 767 N.w.2d 869, 873 (N.D. 2009); *Moore v. Mississippi*, 787 So. 2d 1282, 1288 (Miss. 2001); *Idaho v. Charpentier*, 962 P.2d 1033, 1036 (Idaho 1998) (adopting *Belton*); *Maryland v. Ireland*, 706 A.2d 597, 599 (Me. 1998); *Massachusetts v. Motta*, 676 N.E.2d 795, 800 (Mass. 1997); *Utah v. Anderson*, 910 P.2d 1229, 1238 (Utah 1996); *Rhode Island v. Werner*, 615 A.2d 1010, 1014 (R.I. 1992); *Wisconsin v. Tompkins*, 423 N.W.2d 823, 829 (Wis. 1988); *State v. Brown*, 721 P.2d 1357, 1361 (Or. 1986);[12] *Illinois v. Smith*, 447 N.E.2d 809, 813 (Ill. 1983). In short, the automobile is compatible with a substantial majority of other states' constitutional provisions.

The defendant points to a handful of decisions in other states that come out the other way. Defendant's Br. at 70–71. These are not persuasive. Vermont's search-and-seizure provision is materially

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[11] In his brief, the defendant notes that Connecticut distinguishes between on-the-scene and at-the-station searches. Defendant's Br. at 68. That distinction is immaterial to this appeal.

[12] As with the Connecticut cases, any distinction Oregon recognizes regarding the automobile exception is not material.

different from Iowa's provision, as well as the Fourth Amendment. *Compare* Iowa Const. art. I, § 8; U.S. Const. amend. IV *with* Vt. Const. art. 11.[13] Further, the Vermont courts disfavor the warrantless search of containers in vehicles because Vermont's constitutional history and longstanding precedent require officers conduct the least intrusive warrantless seizure possible, followed by a warrant application. *Vermont v. Savva*, 616 A.2d 774, 782 (Vt. 1991) (citing *Vermont v. Platt*, 574 A.2d 789, 794 (Vt. 1990)). Iowa has never had such a rule, let alone one ingrained in our constitutional history.

The defendant runs into similar problems with the New Hampshire cases. The New Hampshire Constitution is materially different from the Fourth Amendment and Iowa's Article I, section 8.

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[13] Vermont's search-and-seizure clause is about 50% longer than Iowa's. It provides detailed restrictions on the warrant process and specifically imposes an exclusionary rule. It reads:

> That the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure; and therefore warrants, without oath or affirmation first made, affording sufficient foundation for them, and whereby by any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her or their property, not particularly described, are contrary to that right, and ought not to be granted.

Vt. Const. art. 11.

Compare N.H. Const., art. 19[14] *with* U.S. Const. amend. IV; Iowa Const. art. I, § 8. Similarly, New Hampshire case law (for decades) has differed from federal search-and-seizure law, leading to the rejection of the automobile exception. *See New Hampshire v. Sterndale*, 656 A.2d 409, 411 (N.H. 1995) (basing rejection of the automobile exception in part on how the New Hampshire courts have not adopted the *Katz* expectation-of-privacy test). As discussed throughout this brief, Iowa's jurisprudence (at least until the last few

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[14] The New Hampshire search-and-seizure provision is more than twice as long as Iowa's and includes specific restrictions on the types of warrants, the foundation for warrants, who may search, and to what extent. It reads:

> Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. Therefore, all warrants to search suspected places, or arrest a person for examination or trial in prosecutions for criminal matters, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order, in a warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued; but in cases and with the formalities, prescribed by law.

N.H. Const. art. 11.

years) has overwhelmingly found federal case law persuasive and adhered to interpretations of the federal Fourth Amendment.

The defendant also points to the *Harnisch* decision in Nevada and *Cooke* from New Jersey. Defendant's Br. at 71 (citing *Nevada v. Harnicsh*, 954 P.2d 1180 (Nev. 1998); *New Jersey v. Cooke*, 751 A.2d 92, 99 (N.J. 2000)). *Harnisch* has been subject to stinging and lengthy criticism, for many of the same reasons set forth in this brief. *See generally* Thomas B. McAffee et. al., *The Automobile Exception in Nevada: A Critique of the* Harnisch *Cases*, 8 Nev. L.J. 622 (2008). Other scholars have more generally criticized the exigency requirement in cases like *Cooke*. *See* Elizabeth Fischer, *Confusion and Inconsistencies Surrounding the Exigency Component for Warrantless Vehicle Searches Under Article I, Section 8*, 2 Duq. Crim. L.J. 123, 138–40 (2011).

This Court should follow the commanding majority of states and adhere to its view in *Maddox*, *Sanders*, and *Olsen* that the automobile exception is compatible with the Iowa Constitution.

5. Practical consequences.

Practical concerns about officer safety and strong public policy support both a consistent state–federal interpretation of search-and-seizure law and adhering to Iowa's existing automobile exception.

a. Practical and policy concerns favor interpreting Article I, section 8 in line with the Fourth Amendment.

At least three compelling policy reasons support interpreting Article I, section 8 in line with the Fourth Amendment.

i. Interpreting materially similar language differently based on courts' policy preferences undermines trust in the courts. The public expects compelling reasons behind different legal results under identical facts.

As discussed throughout Division I.B, state-constitution decisions made without clear guideposts undermine public trust of the courts and damage the legitimacy of the judicial branch. This is especially true in the context of criminal procedure. "A citizen becomes confused when he or she finds that under virtually identical constitutional provisions, it is permissible for a federal agent, but not a New Jersey law-enforcement officer, to search his or her garbage. [...]. Different treatment of such an ordinary commodity appears illogical to the public and hence breeds a fundamental distrust of the legal system that develops such distinctions." *New Jersey v. Hempele*, 576 A.2d 793, 817 (N.J. 1990) (Garibaldi, J., dissenting).

Absent a compelling and principled rationale, public policy favors interpreting the state constitution in line with the Fourth Amendment.

ii. Police need dependable bright-line rules to guide their interactions with suspects. Unexpected state-constitution departures harm legitimate law enforcement efforts and can endanger police in the field.

Another societal harm that that flows from "[r]evisting settled precedent whenever four justices of this court find prior cases 'unpersuasive'" is that it renders the training of police virtually impossible. *See Short*, 851 N.W.2d 515 (Waterman, J., dissenting). "Prosecutors and police need to know the rules of the game"— especially in the common circumstance where state and federal authorities jointly investigate crime. *See The Case for Judicial Restraint*, 63 Denv. U. L. Rev. at 93. & n. 37 (and cases cited therein); *see generally* James W. Diehm, *New Federalism and Constitutional Criminal Procedure: Are We Repeating the Mistakes of the Past?*, 55 Md. L. Rev. 223, 248 (1996) (discussing how officers frequently do not know if a prosecution will be in state or federal court until after a search or seizure is completed).

Unpredictable state-constitution decisions are the antithesis of the guidance needed by police. The practical result of this Court's

recent reinterpretation of Article I, section 8 is that "many long-settled rules are put back into play"—frequently and without warning. *Short*, 851 N.W.2d at 515 (Waterman, J., dissenting). As a jurist in Washington has noted, "picking and choosing between state and federal constitutions" will "confound the constabulary" and unfairly "change the rules after the game has been played in good faith." *Washington v. Ringer*, 674 P.2d 1240, 1250 (Wash. 1983) (Dimmick, J., dissenting).

The *Short* majority passes over this criticism with a reference to how officers can learn the most restrictive rules and reasons that, because other jurisdictions have departed, Iowa can too. *State v. Short*, 851 N.W.2d at 489. The *Short* majority does not acknowledge that, in fact, other jurisdictions' police forces have faced great difficulty enforcing rules that diverge from national standards. For example, a New Jersey prosecutor has made the case that "efforts to interpret the state constitution more expansively will serve unwittingly to put police officers at greater risk of harm and to undermine the protections against criminal attack for law abiding citizens." Ronald Susswein, *The Practical Effect of the "New Federalism" on Police Conduct in New Jersey*, 7 Seton Hall Const.

L.J. 859, 862, 867–72 (1997). A New York prosecutor has similarly said that state-constitution departures are "antithetical to the United States Government [and] undoubtedly decrease the prospect criminals will be caught and successfully prosecuted." Douglas Holden Wigdor, *What's in A Word ? A Comparative Analysis of Article I, § 12 of the New York State Constitution and the Fourth Amendment to the United States Constitution*, 14 Touro L. Rev. 757, 837 (1998).

It is easy to re-write search-and-seizure rules on ad-hoc basis from the comfort of a computer screen or a law library. Particularly on appeal, we are free to dig into the meat of weighty constitutional issues, think about competing concerns, and ponder the meaning of words written by men centuries ago. Police do not have that luxury.

Law enforcement officers have to depend on easy-to-enforce, bright-line rules to make split-second decisions in the field. These rules have been established in well-known, slow-to-change decisions set forth by the United States Supreme Court. Across the country, police officers know it is settled law that they can stop a vehicle based on reasonable suspicion and they can search a vehicle based on probable cause. Departing, yet again, under Article I, section 8 will

upend these well-known rules and replace them with rapidly changing alternatives. Police have enough to worry about when they put their lives on the line to investigate dangerous suspects in a roadside stop. This Court should resist the urge to add yet more peril and complication to police interactions with suspected criminals.

iii. Interpreting Article I, section 8 differently than the Fourth Amendment does not further the purpose of the exclusionary rule.

This Court's untethered approach to search-and-seizure law also undermines—and possibly eliminates—the function of the exclusionary rule. The "sole purpose" of the exclusionary rule is to deter constitutional violations. *Davis v. United States*, 131 S. Ct. 2419, 2426 (2011); *but see State v. Cline*, 617 N.W.2d 277, 289 (Iowa 2000) (suggesting other purposes). This Court's recent state constitutional jurisprudence fails to further any legitimate purpose behind the exclusionary rule.

After *Short*, experienced criminal-law attorneys in Iowa cannot know what changes this Court will make to search-and-seizure law. And without criteria or interpretive guidelines, even wise prognosticators can offer little more than a guess as to where this Court is headed. We cannot expect police officers to comply with

unpredictable search-and-seizure developments and we cannot expect them to refrain from constitutional violations without knowing where the lines exist and what conduct would cross one. As a consequence, excluding evidence under newfound state constitutional rights manages to hamstring the State's prosecution of crime with no corresponding social benefit in deterring constitutional violations.

Even in a particular prosecution involving specific evidence, this Court's decisions will be ineffectual when they depart from federal law. When evidence is suppressed under the state constitution, police officers need only "step across the street" to the United States Attorney, who will not be bound by this Court's recent case law. *Mapp*, 367 U.S. at 657–58. In other words, prosecutions will be moved, not prevented. "It is poor judicial policy for rules governing the suppression of evidence to differ depending upon whether the defendant is arrested by federal or state officers." *Arizona v. Bolt*, 689 P.2d 519, 528 (Ariz. 1984).

b. The automobile exception is good public policy because automobiles facilitate mobile crime, warrantless searches of vehicles comport with traditional notions of exigency, and little would be gained by abolishing the automobile exception.

Warrantless automobile searches make good policy sense. Few other modern inventions have facilitated crime the way the automobile has—it provides a fast-moving, easily accessible, and almost universally available mechanism by which criminal offenders can transport contraband with limited risk of detection. *See* Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 Harv. L. Rev. 476, 503–08 (2011). Destroying the automobile exception runs counter to the original intent of the framers for both the Iowa and federal constitutions because it would dramatically alter the relationship between police and the criminal enterprise, contrary to the respective constitutions' mandate of reasonableness. *See id.* at 504–06 (2011). In other words, the automobile exception is necessary to maintaining the balance originally contemplated by the Fourth Amendment and Article I, section 8.

The mobile nature of vehicles also directly supports the automobile exception because it is consistent with traditional notions of exigency. In no other routine police action can the evidence

literally drive away. One might ask: if it costs nothing, why not require a warrant in these circumstances? Because there *is* a cost to abandoning the automobile exception—to the State and to public safety. Obtaining a warrant in the field is not an instantaneous proposition. *See* Kevin Stockmann, *Drawing on the Constitution: An Empirical Inquiry into the Constitutionality of Warrantless and Nonconsensual DWI Blood Draws,* 78 Mo. L. Rev. 351, 373–75 (2013) (even boilerplate warrants take between two and four hours to obtain). And leaving a vehicle containing weapons and narcotics in the community is unacceptable; it is not difficult to envision a child gaining access to the marijuana and gun in this defendant's vehicle, had it been left unattended on a Davenport street. Even setting aside public-safety concerns, police must worry about the chain of custody for prosecution when a vehicle is left unsecured. Without the automobile exception, one police officer would have to maintain a constant vigil over a vehicle while another officer travels to a magistrate, obtains a warrant, and returns hours later. Magistrates would also have to be available to approve warrant applications 24/7, 365 days of the year. This unnecessary and wasteful expansion of

police and judicial staffing is not constitutionally required or desirable.

In the end, abolishing the automobile exception buys little at great expense. If police have probable cause to search a vehicle, the public sees no benefit in exchanging an immediate warrantless search for the police seizing the car for hours while they chase down a magistrate, or instead impound the vehicle at the scene for a subsequent inventory at the police station. Rather, when a search is supported by probable cause, either a warrantless search of a vehicle or its subsequent seizure until a warrant can be obtained "is reasonable." *Chambers*, 399 U.S. at 52. The touchstone of Article I, section 8—just like the Fourth Amendment—is reasonableness and the automobile exception represents a reasonable balancing of interests.

CONCLUSION

This Court should affirm the defendant's convictions.

REQUEST FOR ORAL ARGUMENT

This case should be set for oral argument. The State urges this Court to lay down criteria to guide state constitutional litigation and the defendant asks this Court to overturning existing precedent.

Respectfully submitted,

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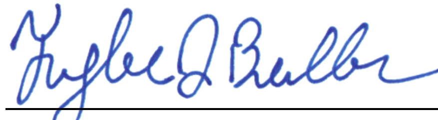

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IN THE IOWA DISTRICT COURT FOR HARDIN COUNTY

STATE OF IOWA, Plaintiff,	)	FECR 311202
vs.	)	**STATE'S POST-TRIAL BRIEF**
	)	
TRACI LYNN TYLER, Defendant.	)	

COMES NOW the State of Iowa and states as follows, in its post-trial brief:

INTRODUCTION

Behind closed doors, the defendant confined, tortured, and tormented eight-year-old A.S.[1] between July and September of 2017. The defendant did not want this child in the house. She confined him with the specific intent to inflict serious mental or physical injury, and she knew that she did not have the child's consent or the legal authority to do so. This is a case of criminal conduct—not bad parenting.

Under controlling case law, these facts are kidnapping in the first degree. In *Siemer*, as here, a live-in paramour confined a child in an unlit basement compartment with a small container for a bathroom. *State v. Siemer*, 454 N.W.2d 857, 858 (Iowa 1990). In *Siemer*, as here, the elementary-school age child was permitted to go to school during the week, but confined at some point after returning home. *Id.* at 864–65. And in *Siemer*, as here, the defendant is guilty of first-degree kidnapping because *in loco parentis* is not a defense to the confinement and torture of a small child. *Id.* at 864.

[1] The State uses "A.S." to refer to the minor-child victim, also known as "E.S."

FACTS

When eight-year-old A.S. started third grade, three career educators (Sue Brandt, Cam Schipper, and Teresa Keninger) were all alarmed at his appearance. Mrs. Schipper, A.S.'s third-grade teacher, thought he "looked like a skeleton"—pale, thin, and gaunt, with blotchy hair and dark rings around his eyes. Mrs. Brandt, who taught A.S. the previous year, found A.S.'s appearance was so dramatically changed that she "couldn't believe that that was the little boy that [she] knew the year before"—he was pale, very thin, and missing hair. Mrs. Keninger, the elementary-school principal, observed that A.S used to be excited and talkative, but now he was quiet, with yellowish skin, sunken cheeks, dull eyes, and missing hair.

A.S.'s appearance was so concerning that Mrs. Schipper kept notes about it. *See* Exhibit 66: Schipper Notes. While she usually kept notes about how kids were doing with their spelling or arithmetic, Mrs. Schipper's notes about A.S. document his poor physical health and hunger: she wrote he was "thin & frail," that his head was "shaved," and that he frequently told her that he was hungry. *See* Exhibit 66: Schipper Notes. A.S. would tell Mrs. Schipper that he was hungry at least twice a week, and sometimes more often than that. On one occasion, he took 79 M&Ms as part of a classroom activity, more than any student ever had before.

All three educators—Mrs. Brandt, Mrs. Schipper, and Mrs. Keninger—testified that A.S. was a typical elementary-age student, without any abnormal behavior problems. He was timid, obedient, and mostly kept to himself. He was an average or above-average student. His only arguable "problem" at school was

that he was frequently hungry and sought out food. Mrs. Brandt observed that A.S. was one of the only students she had ever seen take heaping piles of food from the salad bar and finish it every time. A.S.'s worst behavior in Mrs. Brandt's class was that, one time, he took a cupcake from a locker because he was a hungry.

Mrs. Keninger was so concerned about A.S. being fed that, after the defendant told Keninger that A.S. was not permitted to eat breakfast at school (despite breakfast being free), Keninger arranged to have granola bars available for A.S. in her office. A.S. took at least one a day—more frequently than any other student ever had.

A.S. discloses to his teacher that he was locked in a cage under the stairs. The teacher calls DHS.

After an incident when A.S. sought out food at school, Mrs. Schipper asked A.S. why he was always hungry and inquired into what was going on at home. A.S., upset, told her that he had to sleep on the floor of a bare room in the basement. He told Mrs. Schipper that he was put in that room for punishment when he stole food. And he told her that he had to go to the bathroom in a tin can. The vocabulary A.S. used indicated that this confinement in the basement was ongoing, not just something that had happened in the past.

For the first time in her 20+ years of teaching, Cam Schipper called the Department of Human Services to report child abuse on September 21, 2017.

A.S. "couldn't get out" of the enclosure. The defendant and Alex Shadlow took away his blanket and pillow, leaving him to sleep on concrete. He had to use a tin can for a bathroom.

Although no agency or institution knew it until September 21, A.S. was confined and tortured at home throughout the late summer and early fall of 2017. He explained at trial that he was locked in the enclosure under the stairs "a lot," for extended periods of time. He was given a blanket and pillow at first, but eventually those were taken away, and he was forced to sleep on the concrete floor. The cell was dark and, in A.S.'s words, "super cold." A.S. described and demonstrated for the Court how he slept with his knees tucked up to his chest, nearly in the fetal position. He also explained that the door was locked and, although he was able to escape the enclosure early on, the defendant and Alex Shadlow (A.S.'s biological father) eventually modified the cage door so that A.S. could not climb out. In A.S.'s words: "I couldn't get out."

A.S. was tormented and scared by the confinement for a number of reasons, but one specific reason related to a spot of uneven concrete in the enclosure. A.S. has a fear of graves. And he was told that a dog was buried in the enclosure where the defendant made him sleep.

A.S. was embarrassed by having accidents, but there were times when no one let him out of the basement pen to use the bathroom. When that happened, A.S. had to defecate in his pants.

DHS finds a pen in the basement where A.S. had been confined. A DHS worker tells the defendant: "This is abuse."

DHS worker Carol Allen went to the Tyler/Shadlow residence on September 22, the day after A.S. told his teacher about the confinement. The defendant led Carol Allen to the basement and showed her the pen where the defendant and Alex Shadlow confined A.S. under the stairs. Carol Allen asked if there was a light in the enclosure, and the defendant told her no. Carol Allen asked what A.S. slept on, where the pillows and blankets were; the defendant told her, "He just ruins those things, so he doesn't get those things." Carol Allen asked the defendant if she would sleep in the enclosure; the defendant responded: "I would behave."

Carol Allen took photos of the enclosure and told the defendant plainly: "This is abuse." After that, the defendant and Alex Shadlow signed papers requesting A.S. be removed from the house and placed in foster care. Carol Allen also made the defendant sign and complete a DHS safety plan in which the defendant agreed to not confine A.S. while the requested foster-care placement was pending. But the defendant did not live up to her agreement with DHS: the next day, A.S. was back in the basement and the defendant restricted his access to the bathroom.

On September 23, the defendant sent Tony Miller a photo of a child's defecation-soiled underpants in the basement enclosure area. The defendant text-messaged Miller that A.S. had "shit himself" and sent Miller a photo of the enclosure with the comment, "so[] much room...... for activities." *See* State's Exhibit 24: Text Message; State's Exhibit 26: Text Message & Photo. The next

Monday, the defendant told Carol Allen that A.S. had defecated in the basement and made a mess. Carol Allen asked A.S. why he did this; A.S. told her that the defendant wouldn't let him use the bathroom at night and he couldn't hold it any longer. When Carol Allen asked the defendant if this was true, the defendant told Carol that she wasn't going to get up at midnight to let A.S. out to use the bathroom. When asked why she wouldn't let A.S. go to bathroom on his own, the defendant said she couldn't trust him.

Later that week, Mrs. Schipper spoke with the defendant by phone. The defendant told Mrs. Schipper that A.S. was going to foster care and then laughed out loud. A.S. reported to Mrs. Schipper on his last day that the defendant told him he was being sent away to an institution because of his bad behavior.

The defendant destroys evidence by tearing down the enclosure and remodelling the basement.

The defendant, in concert with Alex Shadlow, began modifying the structure of the enclosure the day after Carol Allen visited, destroying evidence and altering the crime scene. *See* State's Exhibits 25, 27, 29: Text Messages & Photos of Renovation; State's Exhibit 31: Text Message & Photo of Alex Shadlow Painting; Exhibit 64R: Transcript, pp. 124–25. The defendant sent photos of the modified enclosure to Tony Miller, who explained that the defendant had obtained the red plywood depicted in the photos from his bar.

Even at this date—after Carol Allen told the defendant it was "abuse" to confine A.S.—A.S. can be seen standing in a corner of the enclosure in State's Exhibit 25 (a photo sent to Tony Miller): A.S. is standing in the pen under the basement stairs, facing a wooden barrier.

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The defendant confesses to DCI Agents Jim Thiele and Matt Schalk. The agents measure the enclosure and find torture videos on the defendant's cell-phone.

DCI agents interviewed the defendant on November 14, 2017, at her home and a nearby church in Ackley. When Agent Schalk pivoted the conversation toward the basement pen where A.S. was confined, the defendant initially blamed Alex Shadlow. *See* State's Exhibit 64R: Transcript, p. 61, lines 2650–2662. Nonetheless, the defendant confessed to confining (or aiding abetting the confinement of) A.S. multiple times:

- The defendant told Agent Schalk that A.S. was confined "[f]rom whenever the time he went to bed" at night until she would "get him up for school" in the morning. Exhibit 64R: Transcript, p. 66, lines 2847–2863. The defendant said this was from 8 p.m. or 9 p.m. until 6 a.m.—as long as 10 hours. Exhibit 64R: Transcript, p. 188, lines 8328–8339.

- She said A.S. was confined "[e]very night" "[f]or about a month [o]r something like that." Exhibit 64R: Transcript, p. 70, lines 3050–3055.

- She told Agent Schalk that the room had a lock that A.S. "really couldn't open." Exhibit 64R: Transcript, p. 67, lines 2905–2912.

- She told Agent Schalk that A.S. was confined in the basement when she was still working, which would have been before August 1, 2017.[2] *See* Exhibit 64R: Transcript, p. 68, lines 2939–2972; p. 69, lines 3018–3026.

- She admitted there was no bathroom in the pen under the stairs, and that A.S. would have to use a "can." Exhibit 64R: Transcript, p. 70, lines 3028–3035.

- She admitted the window was blacked out or blocked. Exhibit 64R: Transcript, p. 71, line 3110 — p. 72, line 3131.

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[2] Although the defendant told Agent Schalk that she worked at the bar until the "end of August," Tony Miller (the bar owner) testified that he closed the bar at the end of July.

- And although she attributed some of the confinement to Alex Shadlow, the defendant admitted to personally confining A.S. multiple times. Exhibit 64R: Transcript, p. 157, lines 6855–6958; *see also* p. 195, lines 8660–9661 ("… when I put [A.S.] down there…").

The agents measure the enclosure, which was modified after Carol Allen took photos and began removing A.S. from the home.

As part of their investigation, DCI agents took measurements of the enclosure under the stairs: it was around six feet wide, six and a half feet long, and (at different points) between 4.7 and 7.3 feet tall.

By the time DCI agents executed a search warrant on the Tyler/Shadlow residence in November, the basement enclosure looked significantly different than when Carol Allen took photos in September. *See* State's Exhibits 8, 9, 10: DHS Photos. The defendant and Alex Shadlow had removed the door from the pen, painted the floor, added red plywood, and removed the tin can where A.S. was told to urinate and defecate. Agents found the removed door elsewhere in the residence and were able to determine where it had been originally: they found it matched the hasp and remaining studs, and the defendant admitted that the agents put the door in the right location to seal off the enclosure.

The agents find videos of A.S. screaming and begging to use the bathroom on the defendant's phone.

Agents also executed a search warrant on the defendant's phone, eventually recovering five videos taken by the defendant of A.S. inside the house:

- The first video is seven minutes long and depicts A.S. writhing in pain, desperate to use the bathroom. A.S. is wearing pajamas and the same Angry Birds backpack depicted in various photo exhibits and described as filled with rocks. A.S. is standing in the corner of the kitchen, near a doll of a little boy facing the wall. A.S. screams in agony for the duration of the video, clutching his genitals, crying,

and shuffling his feet in pain. At various points, the defendant's dog nips at A.S. A.S. repeatedly looks at the camera-operator, identified by Agent Thiele as the defendant based on her voice. Near the end of the video, A.S. cries out, "I need to pee."

- The second video is 21 seconds and depicts A.S. in different clothes, again wearing the same backpack filled with rocks. A.S. is standing in the kitchen, again clutching his genitals, crying, and screaming in pain.

- The third video is 27 seconds and depicts A.S. in yet another set of clothes, standing on the stairs, clutching his genitals, and crying in pain.

- The fourth video is also 27 seconds and shows A.S. in the same clothes as the third video, now at the bottom of the stairs, still clutching his genitals and crying. He looks at the camera operator with tears in his eyes.

- The fifth video is 38 seconds and depicts A.S. shirtless, wearing different shorts than the previous videos, in the basement. A.S. is silent in the video, but again clutches his genitals and shuffles his feet, this time on a concrete floor. A.S. appears to urinate in the last five seconds of the video.

At the Child Protection Center, A.S. made consistent statements regarding the abuse. Photos corroborated A.S.'s statements.

Ann Swisher, a pediatric nurse practitioner, examined A.S. on November 6, 2017 at the Allen Child Protection Center. During the examination, A.S. made numerous statements consistent with both what he told Mrs. Schipper and what he testified to at trial:

- He said he slept in a "closet-sized room in the basement" on a "cement floor." He said the room was "dark" and there was "no pillow or bed."

- He said that both the defendant and Alex Shadlow locked him in the closet-sized room.

- He said that he would bang on the door and ask to be let out to use the bathroom, but they did not always come, and he had an accident while locked in the pen.

- He said that he would be sent under the stairs when he got home from school, and that he would sometimes be allowed supper or water, but then he was sent back to the enclosure.
- He said that he frequently did not get enough food and felt like he "was starving to death."
- He said that the defendant hit him with a fly swatter so hard that it left scabs. When asked, he said that the defendant hit him with the fly swatter more than once.

Swisher's physical examination of A.S. corroborated his statements: there were healed lesions on A.S.'s his buttocks in a "u" or "loop" shape. *See* State's Exhibit 4: CPC Photo of Right Buttock.

The defendant's relationship with A.S.

The day before school started, the defendant took A.S. to see Principal Keninger. The defendant was so aggressive and demeaning to A.S. that it made Keninger uncomfortable. The way the defendant talked to A.S. was perhaps worse than any other parent or guardian that Keninger had encountered in 20+ years as an educator.

When Mrs. Schipper spoke with the defendant during the 2017–2018 school, even Mrs. Schipper was intimidated. The defendant raised her voice, called A.S. a liar, and spoke very negatively about A.S. A.S., who was visibly afraid, did not say a word, and instead stared at the defendant while she berated him.

On occasions when the defendant and A.S. were both at the bar, Tony Miller saw the defendant make A.S. sweep the floor while A.S. wore a backpack full of rocks. When Miller would offer A.S. food at the bar, A.S. would always have to ask the defendant for permission to eat. On one occasion, Miller saw the

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defendant punish A.S. for (in the defendant's words) "stealing" crackers. On another occasion, Miller saw the defendant and Alex Shadlow leave A.S. alone in a car for hours at night, while the defendant and Alex Shadlow drank at a campground. Miller testified that he eventually grew so concerned about A.S. that he also called DHS.

The defendant's campaign of misinformation about A.S.

Throughout the spring and summer of 2017, the defendant waged a campaign of deception and misinformation, seeking to cast A.S. as a troublesome kid, a monster who would not behave despite her best efforts. No evidence corroborating the defendant's claims was presented at trial. To the contrary, Laura Robinson (who is intimately familiar with the conduct of a child with behavioral problems) testified that A.S. did not exhibit any disordered behavior and would seek out Robinson when Robinson's son acted out.

None of the many statements the defendant made to others about A.S. revealed that she was confining him in a cage-like enclosure under the basement stairs—until Carol Allen came to the home and asked to see the cell under the stairs, following A.S. disclosing the abuse to Mrs. Schipper. The defendant did not admit to the crime until she was caught.

THE ELEMENTS

To prove kidnapping in the first degree, the State had to prove all of the followings elements beyond a reasonable doubt:

> 1. Between July 2017 and September 2017, in Hardin County, Iowa, the defendant confined A.S.
>
> 2. The defendant did so with specific intent to inflict serious injury upon A.S.

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> 3. The defendant knew she did not have the consent or authority of A.S. to do so.
>
> 4. As a result of the confinement, A.S. was intentionally subjected to torture.

Iowa Model Criminal Jury Instr. No. 1000.1; Iowa Code §§ 710.1, 710.2 (2017).

Element #1: The defendant confined A.S.

> ~~ The defendant: "I wouldn't wanna be down there. I'm being honest with ya. I wouldn't, well, I wouldn't wanna fucking be down there. … I would have got out. I probably would have ran away …. I wouldn't wanna fucking be down there."[3] ~~

"A person is 'confined' when his freedom to move about is substantially restricted by force, threat or deception." Iowa Model Crim. Jury Instr. No. 100.5.[4] "No minimum time of confinement is required. It must be more than slight." *Id.* (omitting the removal alternative).

In determining whether confinement exists, the Court may consider the following non-exclusive factors:

> 1. The risk of harm to A.S. was substantially increased.
>
> 2. The risk of detection was significantly reduced.
>
> 3. Escape was made significantly easier.

Iowa Model Crim. Jury Instr. No. 1000.5.

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[3] Exhibit 64R: Transcript, p. 188, lines 8343–8363.

[4] The model instruction sometimes uses brackets for an "underlying offense." The way this case is charged and marshaled, there is no "underlying offense" (such as sexual abuse) because "torture" is not an independent crime in Iowa. As a result, the bracketed language is not appropriate. *Cf. State v. Misner*, 410 N.W.2d 216, 223 (Iowa 1987) (noting, under analogous circumstances, that independent significance is not required if the kidnapping involves ransom or secret confinement, as those are not underlying offenses).

The State proved two different types of confinement in this case. First, the defendant confined A.S. for an ongoing period of time, from July through September of 2017. Second, each time the defendant locked A.S. in the basement enclosure for an extended period of time, she confined him.

There is no question A.S.'s freedom to move was substantially restricted. He told the Court: "I couldn't get out." There was a lock on the door. And when A.S. was able to occasionally escape the enclosure, the defendant and Alex Shadlow modified the cell so that A.S. could no longer climb over the top.

The confinement also substantially increased the risk of harm to A.S. By confining him near what he believed to be a dog "grave," the defendant was able to maximize the infliction of mental injury. The character of the cell as the locus of confinement also maximized the risk of harm: there was no bed or bedding, and only a concrete floor, which made it difficult to sleep; there was only a tin can for the bathroom, which made humanely urinating or defecating impossible; there was no light, which deprived A.S. of basic sensory functions; and there was no food, which maximized the chronic hunger A.S. was already experiencing. *Cf. State v. Siemer*, 454 N.W.2d 857, 864 (Iowa 1990) (finding relevant in the confinement-sufficiency analysis that the victim "was unable to fulfill any of his most basic human needs such as relieving himself in a sanitary way or reaching food or water"). As recognized in *Siemer*, this confinement also prevented A.S. from leaving the residence, which increased the risk of harm because A.S. was "unable to escape in case of fire or other calamity." *Id.* at 864. Finally, any time a child is confined in the home of his or her abuser, and thus unable to flee or seek help, it necessarily increases the risk of harm because the child is captive and "an

easy target for ... torture." *Id.* at 864. Locking a child in a pen under the stairs for 10+ hours at a time is confinement.

The confinement also significantly reduced the risk of detection. Until A.S. told Mrs. Schipper about the basement enclosure, no one outside the Tyler/Shadlow family knew it was there. Locking someone under the stairs in the basement is a textbook example of reducing the risk of detection. But this prong was also met in a less-direct way, because the confinement was ongoing and included intervals when A.S. was let out of the cell to attend school. Just as in this case, the victim in *Siemer* was released and permitted to attend school. *Siemer*, 454 N.W.2d at 858. In *Siemer*, the Supreme Court correctly recognized this is strong evidence for the risk-of-detection analysis: "The fact that [the defendant] allowed [the victim] to attend school actually minimized, rather than enhanced, the discovery of the confinement for it gave authorities less reason to suspect that crime was occurring." *Id.* at 864–65. As a *Drake Law Review* note by now-Judge Jeanie Vaudt puts it, "These conspicuous weekday brushes with freedom helped insure no one from the outside would suspect what was really happening to [the victim]." Jeanie Kunkle Vaudt, *Criminal Law--Parents or Persons Standing in Loco Parentis to A Child or Minor Victim Are Not Beyond the Reach of the Iowa Kidnapping Statute*, 41 Drake L. Rev. 237, 243 (1992). *Siemer* is controlling and the Supreme Court's logic applies with full force to the facts here. By allowing A.S. to attend school, the defendant and Alex Shadlow reduced the risk their nighttime confinement and torture would be detected. And their plan almost worked, as A.S. attended school for nearly a month before he broke down and told Mrs. Schipper what was happening at home. Locking A.S.

under the stairs, while permitting him to attend school, reduced the risk of detection and establishes confinement.

Whether this Court believes there was one period of confinement (stretching from July of 2017 to September of 2017) or multiple recurring periods of confinement during that same timeframe, there is overwhelming—essentially undisputed—evidence that A.S. was confined in the enclosure under the basement stairs.

Element #2: The defendant confined A.S. with the specific intent to inflict serious injury.

"'Specific intent' means not only being aware of doing an act and doing it voluntarily, but in addition, doing it with a specific purpose in mind." Iowa Model Crim. Jury Instr. No. 2002. "Because determining the defendant's specific intent requires you to decide what she was thinking when an act was done, it is seldom capable of direct proof." *Id.* "Therefore, you should consider the facts and circumstances surrounding the act to determine the defendant's specific intent. You may, but are not required to, conclude a person intends the natural results of her acts." *Id.*

A defendant is "not entitled to have the [fact-finder] determine her guilt or innocence on a false presentation that her and the victim's relationship … w[as] peaceful and friendly." *State v. Taylor*, 689 N.W.2d 116, 130 (Iowa 2004) (*quoting People v. Zack*, 184 Cal.App.3d 409, 229 Cal. Rptr. 317, 320 (1986) (gender pronouns modified)). "[E]vidence of the abusive and controlling nature of the relationship between the defendant and the victim … [is] strong evidence of the defendant's mental and emotional state [at the time of the crime], as well as

her motive for [the crime].” *State v. Newell*, 710 N.W.2d 6, 22 (Iowa 2006) (proper names replaced with “the defendant” and “the victim,” gender pronoun modified). “In other words, the defendant’s prior conduct directed to the victim of a crime, whether loving or violent, reveals the emotional relationship between the defendant and the victim and is highly probative of the defendant’s probable motivation and intent in subsequent situations.” *Taylor*, 689 N.W.2d at 125.

“A serious injury is a disabling mental illness or a condition which cripples, incapacitates, weakens or destroys a person’s normal mental functions.” Iowa Model Crim. Jury Instr. No. 200.22 (unnecessary alternatives omitted); Iowa Code § 702.18. A serious injury can also be “extended loss or impairment of the function of any bodily part or organ.” *Id.* For this crime, the State must prove that the defendant intended to inflict a serious injury, but need not prove that a serious injury actually resulted. Iowa Code § 710.1(3) (2017).

The defendant’s specific intent was to break A.S.—to either cause a disabling mental illness or a condition which crippled, incapacitated, weakened, or destroyed A.S.’s normal mental functions—and get him out of the home. Despite the somewhat indirect nature of the inquiry, the intent question in this case is not that complicated. The Court need only ask: What is the natural and probable consequence of locking an eight-year-old child in a cell under the basement stairs for hours on end, with no light, no bed, and no bathroom? There should be little hesitation in answering the question, as the natural and probable consequence of confining an elementary-school student in this manner is a disabling mental illness or crippled, incapacitated, weakened, or destroyed mental functions.

Although the dimensions and description of the basement enclosure were sometimes abstract at trial, the character of the cell is crucial to evaluating the defendant's intent. By way of comparison, confinement in a cell of this size and character fails the minimum standards promulgated by the Department of Corrections for jail inmates:[5]

- Jail cells for single occupancy must have 70 square feet of floor space for confinement exceeding 10 hours. A.S.'s cell had less than 40.
- Jail cells must have at least 7 feet of space between the floor and ceiling. A.S.'s cell, in part, had 4.7 feet of clearance between floor and ceiling.
- Jail cells must have "[a] bunk of adequate size." A.S. did not have a bed, pillow, blankets, or anything of the sort.
- Jail cells must have a "functional toilet." A.S. had a tin can to urinate and defecate in.
- Jail cells are to be "designed to admit natural lighting … where practical." A.S.'s cell had no light, natural or otherwise.

Confinement in this cell under the stairs—in conditions worse than the bare minimum for jailed criminal offenders—was intended to inflict serious emotional distress that manifests as a disabling mental illness or a condition that cripples, incapacitates, weakens, or destroys a person's normal mental functions. And there is no question the defendant knew this. That's why she told Agent Schalk, "I wouldn't wanna fucking be down there … I probably would have ran away." Exhibit 64R: Transcript, p. 188, lines 8343–8350.

[5] Requirements for modern jail facilities are found in Iowa Administrative Rule 201-50.8.

But the analysis this Court conducts regarding the defendant's intent should not be limited to how an adult would perceive the basement enclosure. An eight-year-old child is not a miniature adult. Children deal with their surroundings differently than adults do, particularly when it comes to darkness and isolation. While other children are permitted to sleep in a bed with a night-light, the defendant confined A.S. in a pitch-black cell where he had to sleep on the concrete floor and urinate in a can. The defendant's specific intent in confining A.S. in that dark, "super cold," cramped space was intended to weaken or destroy A.S.'s normal mental functions.

The relationship between the defendant and A.S. is also strong circumstantial evidence of her intent. The defendant's months-long campaign of degrading, undermining, and lying about A.S. reflects her desire to break him, to do so much damage that he was no longer an inconvenience to her life either because he was incapacitated or because he was removed from the home. That the defendant let the dog bite A.S. and that she beat him with a metal flyswatter informs the intent inquiry, removing any potentially innocent explanation for confining A.S. under the stairs other than to inflict a serious mental injury. That she deprived A.S. of food reinforces that her goal was to weaken and incapacitate A.S.—mentally and physically—until he was no longer a part of her life. The torture videos—for that is what State's Exhibit 62 contains—add still more context to the defendant's relationship with A.S. The defendant wanted A.S. to suffer, to be psychologically broken, to be as compliant as the little-boy doll that shamefully hung his head in the corner of the room while she recorded A.S. wailing, crying, and screaming that he needed "to pee." That the defendant

videotaped the suffering caused by depriving A.S. of access to the bathroom evinces a callousness that gives important context to her relationship with him. The defendant intended to cause a serious mental injury.

Finally, even if the Court finds there was no intent to inflict a serious mental injury, the defendant also intended to inflict a serious physical injury by confining A.S. in a location where he could not use the bathroom. She admitted, due to her professional training as a CNA, that she knew depriving access to the bathroom would damage A.S.'s kidneys:

> **[The defendant]:** [A.S.] was holding his pee. … [H]e started complaining of his stomach, which is probably his kidneys holding the pee, and I told him like being a CNA, I worked at the hospital you can't do that … That's hurting your body. … Well, it's not good on, on your kidneys. Your kidneys help keep basically your body healthy.

Exhibit 64R: Transcript, p. 205, lines 9104–9124. The confinement was intended to cause a serious physical injury, in addition to mental.

Although the defendant did not testify at trial, her attorneys suggested in closing argument that her intent in taking these actions was not to inflict injury, but rather to discipline A.S. for his alleged misbehavior. Not only does the record evidence contradict this claim, so do the defendant's own words. The record contradicts this claim because all witnesses testified that A.S.'s behavior was that of a typical elementary-school-age kid—Teresa Keninger, Sue Brandt, Cam Schipper, Tony Miller, and Laura Robinson all agreed on this point. The defendant herself disagrees with this claim, telling Agent Schalk that she confined A.S. for "safety reasons. State's Exhibit 64R: p. 77, lines 3348–3367; p. 181, line

At one point, the defendant even says explicitly: "He [A.S.] never went in there [the enclosure] for discipline." State's Exhibit 64R: p. 77, line 3355. Her own testimony does not support the defense theory of the case. No alternate explanation for the defendant's intent is credible; the evidence proves she intended to inflict a serious injury.

Element #3: The defendant knew she did not have the consent or authority of A.S. to confine him.

"[P]arents may not hide behind the guise of authority to escape punishment for conduct that is proscribed for all others by the kidnaping statute." *State v. Siemer*, 454 N.W.2d 857, 863 (Iowa 1990). In other words, "parents, or persons standing *in loco parentis,* are not beyond the reach of the kidnapping statutes as a matter of law." *Id* at 864.

"Abusive punishment 'annuls the parental privilege and subjects the parent to applicable criminal statutes.'" *Id.* at 862 (citing and quoting *State v. Bell*, 223 N.W.2d 181, 184 (Iowa 1974). "[A] parent's right to chastise a child does not extend to 'cruelty or inhumanity,' for if punishment 'goes beyond the line of reasonable correction, [the parent's] conduct becomes more or less criminal.'" *Siemer*, 454 N.W.2d at 862 (citing and quoting *State v. Bitman*, 13 Iowa 485, 486 (1862), brackets original)

No competent evidence was admitted in this trial to suggest that the defendant believed she had the consent of A.S. or the legal authority of the State of Iowa to confine A.S. in the locked cell under the basement stairs. And even if there was, the defendant's actions belie her guilty knowledge that she knew she had no authority to confine A.S. in this manner. Despite telling anyone who

would listen that A.S. was a bad kid with behavioral problems, she never once told anyone that she was locking him under the stairs without access to light, a bed, food, or a bathroom. She knew what she was doing was wrong and she knew she had no authority to so.

Element #4: As a result of the confinement, A.S. was intentionally subjected to torture.

"'Torture' means the intentional infliction of severe physical or mental pain." Iowa Model Crim. Jury Instr. No. 1000.6; *accord State v. Cross*, 308 N.W.2d 25, 27 (Iowa 1981). "Torture" does not require an element of physical injury: mental anguish is sufficient. *State v. White*, 668 N.W.2d 850, 857 (Iowa 2003).

A.S. was intentionally subjected to severe mental pain or anguish by the confinement for many of the same reasons discussed in the specific-intent analysis of the second element. The confinement here was ongoing for at least a month, and likely as long as three months. A.S. was locked in the basement enclosure for as long as 10 hours each night, required to urinate and defecate in a can, and forced to sleep on a "super cold" concrete floor without a bed, blankets, or pillows. As depicted in State's Exhibit 62, the defendant repeatedly deprived A.S. of access to the bathroom, causing him to wail in anguish until he finally lost control of his bodily functions and urinated in his clothes.

Just as in *White*, "[t]he record shows repeated acts of terror" perpetrated by the defendant against A.S. *White*, 668 N.W.2d at 857. As in *White*, "[t]hese were not impulsive or out of control acts." *Id.* at 858. "Rather, everything [the defendant] did and said bespeaks of purposeful behavior." *Id.* Also like *White*,

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the defendant's past use of physical violence against A.S. granted her "additional power to control [the victim] in a nonphysical manner," as "there is an implied threat in [her] verbally abusive statements made to [A.S.]" at later dates. *Id.* at 859. The defendant's goal was to torment and torture A.S. until he broke. A.S. was intentionally subjected to torture.

Even if the defendant was not guilty as a principal, she is guilty as an aider-and-abettor.

The State has offered compelling evidence for the defendant's guilt on each and every element to prove her culpability as a principal. But if this Court disagrees, that does not end the inquiry. The defendant is guilty as an aider-and-abettor, even if not as a principal.

"All persons involved in the commission of a crime, whether they directly commit the crime or knowingly 'aid and abet' its commission, shall be treated in the same way." Iowa Model Criminal Jury Instr. No. 200.8. "'Aid and abet' means to knowingly approve and agree to the commission of a crime, either by active participation in it or by knowingly advising or encouraging the act in some way before or when it is committed." *Id.* "Mere nearness to, or presence at, the scene of the crime, without more evidence, is not 'aiding and abetting.'" *Id.* "Likewise, mere knowledge of the crime is not enough to prove 'aiding and abetting.'" *Id.* To be found guilty of aiding and abetting, the defendant need not personally possess the specific intent required by the elements, so long as the defendant has knowledge that others who directly committed the crime had the requisite intent. *See id.*

The defendant did not act alone in her confinement and torture of A.S. The boy's father, Alex Shadlow, was also complicit. Although the defendant's attempt to blame Alex Shadlow for the confinement during her interview with Agent Schalk was not credible, even her words taken at face value do not absolve her of criminal culpability. Under the defendant's version of events, she admits to repeatedly confining and assisting in the confinement of A.S. *See* Exhibit 64R: Transcript, p. 157, lines 6855–6958; *see also* p. 195, lines 8660–9661 ("... when I put [A.S.] down there..."). Even narrowly interpreting the defendant's admissions, she assented and lent countenance to Alex Shadlow in confining A.S., acting as a willing participant. Perhaps most damning, the defendant told Agent Schalk that, as a mandatory reporter, she should have reported Alex Shadlow for child abuse. Exhibit 64R: Transcript, p. 189, lines 8383–8384. Instead, she helped him to lock A.S. in the pen under the stairs, week after week. The defendant is guilty as an aider-and-abettor, even if not as a principal.

The defense's theory of the case—that this was "bad parenting" and not a crime—is unavailable as a matter of law and not supported by the record.

The defendant's theory of the case, as advanced during closing argument, did not dispute the material facts of the case. Instead, the defense made the legal argument that the conduct described at trial—confining A.S. in the enclosure under the stairs, giving him a can to urinate and defecate in, filming the torturous deprivation of access to the bathroom, etc.—are not criminalized by Iowa law because the defendant was engaged in what her attorneys call "bad parenting." Putting the lack of merit behind that claim briefly aside, it was not raised properly in this case.

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A legal challenge to whether the facts as alleged by the State constitute a crime must be raised in a motion to dismiss, and that is how it should have been raised here. *See* Iowa R. Crim. P. 2.11(6)(a) (providing motion to dismiss is vehicle to challenge whether the information and minutes "do not constitute the offense charged in the … information"). That is how the claim was raised in *Simmons*, the case involving Siemer's co-defendant. *State v. Simmons*, 454 N.W.2d 866, 867 (Iowa 1990). The failure to raise this purely legal argument in the correct manner is not a mere triviality. If the defendant had raised this argument in a pre-trial motion to dismiss and succeeded, jeopardy had not attached, and the State could appeal an adverse ruling. Iowa Code § 814.5(1)(a) (2017). The same does not hold true for a ruling on sufficiency after jeopardy has attached.

If this Court nonetheless considers the merits of the defendant's legal argument—that she was legally permitted to abuse A.S. as described at trial—the claim is without merit, as the Supreme Court foreclosed such a defense in *Siemer* and *Simmons,* both of which control this Court's resolution of the question. *See Siemer*, 454 N.W.2d at 864–65; *Simmons*, 454 N.W.2d at 867. "[P]arents may not hide behind the guise of authority to escape punishment for conduct that is proscribed for all others by the kidnapping statute." *Siemer*, 454 N.W.2d at 863; *accord Simmons*, 454 N.W.2d at 867. "[P]arents, or persons standing *in loco parentis,* are not beyond the reach of the kidnapping statutes as a matter of law." *Siemer*, 454 N.W.2d at 864. In other words, as Vaudt put it in her *Drake Law Review* note, "The Iowa legislature, in drafting section 710, did not intend parenthood or *in loco parentis* status to be a license to harm children or minors

in one's care." Vaudt, *supra*, 41 Drake L. Rev. at 244. This should end the inquiry.

But even setting aside that the law bars the defense advanced in closing argument, the assertion that this case involves "bad parenting" comparable to mild corporal punishment is so contrary to the facts it is offensive. Reasonable parents can agree or disagree over spanking to correct misbehavior. This case is about confining a third-grader in a locked enclosure smaller than a jail cell for 10+ hours, without food, light, or bedding, with nothing but a tin can to urinate and defecate in. There is no colorable argument that this confinement and torture was reasonably corrective; instead, it was unlawful abuse. *See State v. Benson*, 919 N.W.2d 237, 242 (Iowa 2018) (citing *State v. Arnold*, 543 N.W.2d 600, 603 (Iowa 1996)).

In the end, the defendant's theory advanced in closing argument is no different than what was advanced by Siemer in 1990—a claim that the Legislature intended to "to immunize parents from the crime of kidnapping." *Siemer*, 454 N.W.2d at 862. The Iowa Supreme Court unanimously rejected the argument, and this Court must too. *See id.* at 864. Being *in loco parentis* is not a license to confine and torture small children. *See id.*

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Behind closed doors, the defendant confined, tormented, and tortured A.S. There is overwhelming evidence—from the defendant's own statements, the compelling testimony of A.S., the photographs of the enclosure, and the torture videos—that the defendant intended to inflict serious injury upon A.S. She is guilty of kidnapping in the first degree. The defense's only argument—that this
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was "bad parenting" and not criminal—is foreclosed by controlling case law. *Siemer*, 454 N.W.2d at 864–65; *Simmons*, 454 N.W.2d at 867. The defendant is guilty of kidnapping in the first degree.

Respectfully submitted,

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