CRIMINAL LAW NEWSLETTER

Drake Legal Clinic Criminal Defense Program
Drake University Law School
2012 – 2013
Preface

The Criminal Law Newsletter is a concise compilation of cases and legislative developments affecting the Iowa criminal law practitioner. As with past editions, the 2012 – 2013 edition focuses exclusively on criminal law and procedure, Iowa criminal law legislation, and Iowa professional conduct decisions. The Newsletter is comprised of nineteen sections. Within each section, cases are listed alphabetically. Each case is categorized by its salient issue. Cases decided between July 1, 2012 and June 30, 2013 are covered herein.

The Newsletter is a user-friendly resource that makes the issues and holdings of recent case law readily apparent to the reader. The issue and holding of each case are set forth at the outset of each case summary. The facts are then briefly summarized. Each summary concludes with an examination of the court’s reasoning and/or analysis. Thus, the busy practitioner, professor, or law student simply needs to glance at one or two sentences to see precisely how a given case advances an area of the law. Then, if the reader desires, he or she can continue reading to learn about the specific facts, procedural posture, and analysis of a case.

We wish to thank to Professor Robert Rigg, Director of the Criminal Defense Program at the Drake Legal Clinic, for making this project possible.

Current and past editions of the newsletter are available in PDF format at the following address:
http://www.law.drake.edu/students/?pageID=criminalLawNewsletter.

We hope you enjoy the 2012 – 2013 Edition of the Criminal Law Newsletter.

Ashley Sparks

Blake Stubbs
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Bifurcated Trials

In re Det. of Blaise, 830 N.W.2d 310 (Iowa 2013)

This case arose from the State’s attempt to have Paul Blaise committed as a sexually violent predator (SVP) and a simultaneous appeal over a mistrial. The issues in this case were whether (1) Blaise had been denied his right to a speedy trial, (2) whether the trial should have been bifurcated, and (3) whether the prosecution misstated the evidence at trial. The Iowa Supreme Court concluded that “Blaise was not prejudiced by his trial counsel’s failure to argue for bifurcation on due process grounds.”

In 2005, Blaise approached S.E. in a park and asked her “hypothetical” questions of a sexual nature. S.E. attempted to get away from Blaise, but he persisted. She eventually asked another pedestrian to walk her to her car and called the police. Officers found Blaise in the park and noticed that he had a gun. Blaise later pled guilty to harassment as a result of the incident.

During Blaise’s incarceration, the state attempted to have him committed as a SVP. The jury found that he was a SVP, and the trial court ordered him committed for treatment. Blaise appealed, then asked for a stay of his appeal so that he could file a motion for a new trial based on an argument of improper testimony at his harassment trial. The Iowa Supreme Court granted the stay with a limited remand so that the district court could rule on the motion for new trial. The district court granted Blaise’s motion. The State appealed the district court’s ruling, and the appeal was combined with the appeal of the SVP verdict. The Iowa Court of Appeals affirmed the district court’s ruling on the motion for new trial.

At the new trial, Blaise’s attorney unsuccessfully moved for bifurcation, citing the potential for jury confusion. The State introduced “extensive testimony from Blaise about his prior misconduct,” including prior acts of sexual abuse and harassment. The State also asked Blaise about his sexual fantasies and violent tendencies. The jury once again found Blaise to be a SVP, and he was again ordered to be committed.

Because speedy trial and bifurcation claims are raised in the context of an ineffective assistance claim, the standard of review for both was de novo. The standard of review for a trial court’s evidentiary rulings is abuse of discretion. A person subject to a civil commitment under Iowa Code chapter 229A “is entitled to a trial for the determination of whether the respondent is an SVP within ninety days

1 Id.
2 Id. at 318.
3 In re Detention of Blaise, 830 N.W.2d 310, 313 (Iowa 2013).
4 Id.
5 Id.
6 Id.
7 Id.
8 Id.
9 Id.
10 Id.
11 Id.
12 Id.
13 Id. at 313–14.
14 Id. at 314.
15 Id.
16 Id.
17 Id.
18 Id.
19 Id. at 315.
20 Id. (citing State v. Hubka, 480 N.W.2d 867, 868 (1992)).
after the probable cause hearing.” If the state violates the respondent’s speedy trial right, he is entitled to dismissal. Blaise argued that, since his attorney failed to raise a speedy trial argument in district court, his trial counsel’s assistance was ineffective. He also argued that the speedy trial waiver he signed was not valid because the district court did not have jurisdiction.

To show ineffective assistance, the Iowa Supreme Court declared that Blaise must show “that his trial counsel failed to perform an essential duty and that prejudice resulted.” Blaise had the burden of proving these elements by a preponderance of the evidence. The Court distinguished In re B.L., because that case was dismissed while the first appeal was still pending. The Court noted that, during appeal, the district court keeps jurisdiction over collateral matters. A speedy trial waiver falls into that category. Because the timing of the new trial did not affect the merits of the appeal, the district court did not act outside its jurisdiction in accepting Blaise’s waiver.

The Court cited the rule that “[w]hen a case on appeal is remanded, absent waiver of the right to a speedy trial, the period during which the defendant must be tried commences on the date procedendo issues.” The Court concluded that Blaise failed to demonstrate that he was prejudiced by the waiver.

To show that Blaise was subject to commitment the State had to prove: (1) that Blaise was “convicted of or charged with a sexually violent offense,” and (2) that he “suffer[ed] from a mental abnormality making him likely to commit further sexually violent offenses if he is not confined.” Because harassment is not a sexually violent offense under the statute, the State had to prove beyond a reasonable doubt that Blaise’s harassment was sexually motivated.

Blaise argued that his trial counsel was ineffective in failing to argue for bifurcation to avoid a due process violation. Because the evidence that Blaise’s harassment was sexually motivated was overwhelming, the Court concluded that Blaise was not prejudiced by his trial counsel’s failure to make a due process argument.

The Court also looked at whether there was a reasonable probability (such that it would undermine confidence in the outcome) that the outcome of the case would have been different but for the ineffective assistance of counsel. Again, because the evidence of sexual motivation was so overwhelming, the Court concluded that no prejudice resulted from any breach of duty by counsel.
As to Blaise’s claim about prosecutorial misstatement of evidence (based on an exchange between the prosecutor and Blaise’s expert), the Court held that no prejudice resulted because the prosecutor corrected her misstatement.\textsuperscript{39}

\textsuperscript{39} \textit{Id.} at 324–25.
Charging

State v. Brothern, 832 N.W.2d 187 (Iowa 2013)

In Brothern, the court considered “whether trial counsel’s failure to object to an amendment of the trial information after the close of evidence to add a habitual offender enhancement constitute[ed] ineffective assistance of counsel.”

Defendant Anthony Brothern beat his girlfriend and held a knife to her chest. He was charged with “Assault Domestic Abuse Causing Bodily Injury - Enhanced,” in violation of Iowa code section “708.2A(3)(b) — Class D Felony” (count one) and “Assault Domestic Abuse by Use or Display of a Weapon” in violation of section 708.2A(2)(c) (count two). Although the charge in count one was listed as a “Class D Felony,” the code section listed corresponded with an unenhanced misdemeanor provision, so the State’s intentions in charging were unclear. At the close of trial, but prior to closing arguments, the State moved to amend both counts to reflect a habitual offender enhancement — 708.2(A)(4) — Class D Felony — using Brothern’s prior felony convictions for extortion and prohibited acts. In response, Brothern’s trial counsel objected to the amendment of count two on due process grounds but was overruled, and Brothern was found guilty as to count one and acquitted on count two.

A separate trial was schedule for the enhancements to count one and a new attorney was appointed; however, prior to trial Brothern admitted to the previous convictions and plead guilty to the enhancements. Prior to sentencing, Brothern filed a motion for a new trial and motion in arrest of judgment arguing that it was improper to bootstrap the charge of habitual offender to an underlying misdemeanor and that his trial counsel was ineffective.

At the hearing over the motions Brothern’s counsel argued that amending the trial information at a point so late in the trial was prejudicial to the defendant and the State argued that the amendment was appropriate because the defendant knew the habitual enhancement would be added if he refused the plea bargain (which the state claimed to have communicated to Brothern’s trial counsel). The motions were both denied because the district court concluded that the change to habitual offender only changed “sentencing [options] and was not a wholly new or different offense.” Brothern was sentenced to a term of incarceration not to exceed fifteen years.

He appealed claiming his trial counsel was ineffective for failing to object to the habitual offender enhancement to count one. The case was transferred to the court of appeals, which rejected the ineffective assistance of counsel claim and the Court granted application for further review.

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41 Id.
42 Id.
43 Id.
44 Id.
45 Id.
46 Id. at 189–90.
47 Id. at 190.
48 Id.
49 Id. at 191.
50 Id.
51 Id.
52 Id.
The Court first pointed out that this appeal had to be handled as an ineffective-assistance-of-counsel claim because the trial counsel’s objection did not come immediately after the amendment (i.e., the earliest opportunity), but instead came after the jury returned its verdicts. The basis of Brother’s argument then, was that “a constitutionally adequate counsel would have objected to the amendment, and the objection would have been sustained.”

The Court noted that because the issue is not typically raised on direct appeal, if the record was inadequate to determine the claim it would be preserved for postconviction relief.

To establish that his trial counsel breached a duty, Brother has to show the attorney’s performance fell below the standard of a ‘reasonably competent attorney’. To demonstrate prejudice for ineffective-assistance purposes, Brother must show ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’

The Court first considered whether, if the objection was made appropriately, it would have been able to succeed. Its analysis was based on Iowa Rule of Criminal Procedure 2.4(8) which states:

> The court may, on a motion of the state, either before or during trial, order the indictment amendment so as to correct errors or omissions in matters of form or substance. Amendment is not allowed if substantial rights of the defendant are prejudiced by the amendment, or if a wholly new and different offense is charged.

The Court began with whether the State’s motion to amend was appropriate. It determined that an amendment can be made either “before or during trial” and that an amendment after the close of evidence but before the case went to the jury fell within the timeframe of “during” trial. Secondly, the Court determined that an amendment of the same charge, but just to a habitual offender enhancement within that charge, did not constitute a “wholly new and different offense.”

Thirdly, the Court considered whether the amendment prejudiced the substantial rights of Brother based on whether “it create[d] such a surprise that the defendant would have [had] to change trial strategy to meet the charge in the amended information.” The Court had never “specifically considered whether the ‘prejudice’ component of rule 2.4(8) includes the notion that a defendant might have made a different plea decision had he or she known of the amendment earlier.”

The Court found that “amending the trial information during trial to add an enhancement can

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53 Id. at 191 (citing State v. Johnson, 476 N.W.2d 330, 334 (Iowa 1991)).
54 Id. (noting that the lower court treated the issue as a appeal from the denial of his post-trial motions, but that both sides now are treating the issue as if the ineffective-assistance claim were being raised for the first time).
55 Id.
56 Id. at 192 (quoting Strickland v. Washington, 466 U.S. 668, 687 (1984)).
57 Id.
58 Id.
59 Id. at 192–93.
60 Id. at 193.
61 Id. (quoting State v. Maghee, 573 N.W.2d 1, 6 (Iowa 1997)).
62 Id. at 193–95 (highlighting several jurisdictions in which courts found amendments to be prejudice to the defendant where the defendant knew that the amendment would be a consequence of failing to plea).
prejudice ‘substantial rights of the defendant’ - if the defendant had no prior notice of the State’s plan to amend and would have pled guilty had he or she known that plan before trial.”\footnote{63} For Brothern to succeed on this claim he would “have to show at minimum that his counsel had not received notice of the State’s intent to seek that enhancement if he went to trial . . . [and] that he would have pled guilty if notice had been provided.”\footnote{64}

Because the record did not provide information about Brothern’s trial counsel’s knowledge and Brothern’s notice about the enhancement, the Court affirmed his conviction and sentence, but did not foreclose Brothern from filing an application for post conviction relief.\footnote{65}

\textbf{State v. Velez, 829 N.W.2d 572 (Iowa 2013)}

In this case the Iowa Supreme Court considered whether a factual basis existed for a guilty plea for two counts of willful injury stemming from a single incident.\footnote{66} The Court concluded that “the record established an independent factual basis for the second charge.”

Valentin Velez and Jared Welsh forced their way into a home while Shawn Kennedy was sleeping on the couch.\footnote{67} Velez held a twelve-inch metal pole.\footnote{68} He found a baseball bat in the house and gave it to Welsh.\footnote{69} Velez, claiming Kennedy owed him $500, hit Kennedy repeatedly with the pole while demanding the money.\footnote{70} Welsh, believing that the attack was getting out of hand, sprayed mace in the room in an effort to stop it.\footnote{71} Velez and Welsh left the house; meanwhile, Kennedy had sustained serious injuries to his arms and one of his legs.\footnote{72}

Velez pleaded guilty to two counts of willful injury causing serious injury.\footnote{73} On appeal, Velez challenged only one of the convictions, arguing that there was no factual basis for the trial court to find him guilty of both counts because they arose “from a single incident involving a single victim.”\footnote{74} The court of appeals agreed with Velez, holding that the record “was not sufficient to show a factual basis for two separate assaults.”\footnote{75} The court of appeals then told the district court to let the state supplement the record in order to correct the error.\footnote{76} The Iowa Supreme Court agreed to review the case further.\footnote{77}

The issue in this case was whether Velez committed two separate assaults causing serious injury.\footnote{78} The Court concluded that there was a sufficient factual basis to find that, since Kennedy suffered “multiple serious injuries,” Velez “committed at least two completed acts constituting willful injury causing serious injury in violation of Iowa Code section 708.4.”\footnote{79}

\footnotesize{\textsuperscript{63} Id. at 196 (declining to hold that “due process prohibits any amendment of the information to add an enhancement once trial begins” (emphasis in original)).

\textsuperscript{64} Id. at 197.

\textsuperscript{65} Id.

\textsuperscript{66} State v. Velez, 829 N.W.2d 572, 576 (Iowa 2013) (the issue arose in the context of an ineffective assistance claim).

\textsuperscript{67} Id. at 575.

\textsuperscript{68} Id.

\textsuperscript{69} Id.

\textsuperscript{70} Id.

\textsuperscript{71} Id.

\textsuperscript{72} Id.

\textsuperscript{73} Id.

\textsuperscript{74} Id.

\textsuperscript{75} Id.

\textsuperscript{76} Id.

\textsuperscript{77} Id.

\textsuperscript{78} Id. at 577.

\textsuperscript{79} Id. at 583.}
Velez argued that his trial counsel “was ineffective for allowing him to enter a guilty plea without a factual basis.” He also argued ineffective assistance on double jeopardy grounds. The Court acknowledged that ineffective assistance claims “may be decided on direct appeal if the record is adequate to decide the claim.” The Court applied a de novo standard of review. The standard applicable to ineffective assistance claims is that “the appellant must demonstrate by a preponderance of the evidence that (1) counsel failed to perform an essential duty, and (2) prejudice resulted.”

In order to resolve the first element of the ineffective assistance test, the Court decided whether there was a supporting factual basis for Velez’s guilty plea. To determine this, the Court “examine[d] the minutes of testimony, statements made by the defendant and the prosecutor at the guilty plea proceeding, and the presentence investigation report.” The record “need only demonstrate the facts that support the offense.” Here, Velez waived the presentence investigation.

Velez argued that the State failed to show “sufficient evidence to provide a factual basis for conviction on two discrete counts of willful injury under Iowa Code section 708.4.” Velez admitted that Kennedy’s injuries were “serious,” as defined by section 708.4.

The Court turned to the minutes of the testimony. First, the doctor who examined Kennedy testified about the extent of his injuries. Testimony from two witnesses, Crawford and Bell, revealed little because neither of them witnessed the attack itself. There was also very little testimony from Kennedy, who was “a reluctant witness.” Velez’s own testimony, however, revealed that he told his girlfriend about the attack and about how badly he had injured Kennedy. Velez did not offer a detailed statement about the attack at the guilty plea proceeding. The Court attempted to ascertain the details of the attack from Welsh’s testimony. Compared to the other witnesses, Welsh was clear and specific; he testified about the weapons used, the number of times Velez struck Kennedy, and where Velez struck Kennedy.

The Court looked at the language of the statute “to determine what the legislature intended as a ‘unit of prosecution’ for a particular crime.” After examining the statute’s legislative history, the Court determined that the legislature never considered the unit of prosecution issue when creating this statute. The Court thus attempted to

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80 Id. at 575.
81 Id. at 575–76.
82 Id. at 576 (citing State v. Bearse, 748 N.W.2d 211, 214 (Iowa 2008)).
83 Id. (citing Ennenga v. State, 812 N.W.2d 696, 701 (Iowa 2012)).
84 Id. (quoting Ennenga, 812 N.W.2d at 701) (internal quotation marks omitted).
85 Id.
86 Id. (quoting State v. Keene, 630 N.W.2d 579, 581 (Iowa 2001)) (internal quotation marks omitted).
87 Id. (quoting State v. Ortiz, 789 N.W.2d 761, 768 (Iowa 2010)) (internal quotation marks omitted).
88 Id.
89 Id. at 577.
90 Id. at 578.
91 Id.
92 Id.
93 Id.
94 Id. at 577–78.
95 Id. at 578.
96 Id.
97 Id. at 578–79.
98 Id. at 579.
99 Id.
100 Id. at 580.
determine what constitutes “an act” under the definition of the statute.\textsuperscript{101}

Looking first at the plain language of the statute, the Court quoted \textit{State v. Kidd}, a case in which the court “laboriously analyzed the meaning of the word ‘an,’ at length.\textsuperscript{102} From this, the Court concluded that “the legislature delineated each count as a single act.”\textsuperscript{103}

The Court outlined several tests other courts have used to determine what can be considered “multiple acts” or “multiple counts.”\textsuperscript{104} Although Iowa courts typically do not apply the \textit{Blockburger v. United States}, elements test when the multiple charges originate from the same statute, the Court did note that another part of \textit{Blockburger} could be useful.\textsuperscript{105} The Court looked to its previous analysis of \textit{Blockburger} in \textit{State v. Schmitz}.\textsuperscript{106} In \textit{Schmitz}, the Iowa Supreme Court concluded that the state’s theft statute defined theft as “a single act of possession of stolen property,” rather than a continuous act.\textsuperscript{107} The Court decided to follow the United States Supreme Court’s principle that an offense should not be considered “continuing” unless the applicable statute explicitly says so.\textsuperscript{108}

The Court also discussed the “break-in-the-action” test to determine whether separate acts were committed.\textsuperscript{109} In \textit{State v. Walker}, the Court determined that the defendant’s separate acts of “hitting the victim and knocking him to the ground, and kicking him when he was on the ground” were sufficient to provide a factual basis for the defendant’s guilty plea to two separate offenses.\textsuperscript{110} The Court pointed out that the Iowa Court of Appeals has repeatedly used the break-in-the-action test in the past.\textsuperscript{111}

Next, the Court discussed the “completed-acts” test, which it had employed in the context of a defendant’s multiple sex acts with two victims.\textsuperscript{112} The Court in \textit{State v. Constable}, concluded that each act that met the conduct prohibited by the statute constituted a separate, completed act.\textsuperscript{113}

Relying on Welsh’s testimony, as well as Velez’s admission that Kennedy suffered many serious injuries, the Court held that “Velez committed at least two completed acts constituting willful injury causing serious injury . . . .”\textsuperscript{114} Welsh’s testimony described a break in the action and several completed acts that would each have violated the statute.\textsuperscript{115} The break in the action occurred when Velez stopped hitting Kennedy in order to pat him down (possibly for money) and then resumed hitting him.\textsuperscript{116} There was another break in the action when Kennedy “produced a lighter,” and Velez continued hitting him after that.\textsuperscript{117}

\begin{flushright}
\textsuperscript{101} \textit{Id.} \\
\textsuperscript{102} \textit{Id.} (quoting \textit{State v. Kidd}, 562 N.W.2d 764, 765 (Iowa 1997)). \\
\textsuperscript{103} \textit{Id.} \\
\textsuperscript{104} \textit{Id.} at 581. \\
\textsuperscript{105} \textit{Id.} (citing \textit{Blockburger v. United States}, 284 U.S. 299 (1932)). \\
\textsuperscript{106} \textit{Id.} (citing \textit{State v. Schmitz}, 610 N.W.2d 514, 516 (Iowa 2000)). \\
\textsuperscript{107} \textit{Id.} (quoting \textit{Schmitz}, 610 N.W.2d at 517) (internal quotation marks omitted). \\
\textsuperscript{108} \textit{Id.} at 581–82. \\
\textsuperscript{109} \textit{Id.} at 582. (citing and discussing \textit{State v. Walker}, 610 N.W.2d 524 (Iowa 2000)). \\
\textsuperscript{110} \textit{Id.} (citing \textit{Walker}, 610 N.W.2d at 526–27). \\
\textsuperscript{111} \textit{Id.} \\
\textsuperscript{112} \textit{Id.} (citing \textit{State v. Constable}, 505 N.W.2d 473, 477 (Iowa 1977)). \\
\textsuperscript{113} \textit{Id.} (quoting \textit{Constable}, 505 N.W.2d at 477–78). \\
\textsuperscript{114} \textit{Id.} \\
\textsuperscript{115} \textit{Id.} \\
\textsuperscript{116} \textit{Id.} at 584. \\
\textsuperscript{117} \textit{Id.}
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there were several completed acts of assault under the statutory definition.\footnote{Id.}

The Court ultimately rejected Velez’s double jeopardy claim because “the legislative intent was to punish these two or more acts” that Velez committed.\footnote{Id.} The Court rejected Velez’s rule of lenity claim, noting that the legislative intent is readily discernible.\footnote{Id. at 584–85.} The Court also declined to expand the “one homicide” rule to cover convictions under section 708.4.\footnote{Id. at 585.} Finally, the Court determined that Velez’s collateral estoppel argument did not have merit.\footnote{Id.}
Competence and Insanity

Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)

This case arose over the first-degree murder conviction of Lynn Lamasters in 2005.123 “In 2009, he filed an application for postconviction relief alleging his trial counsel was ineffective for (1) failing to raise the defense of temporary insanity or diminished capacity and (2) failing to adequately support the request for bifurcation of his trial.”124 Lastly, he claimed that his counsel was ineffective because he failed to appeal the trial court’s denial of his request for bifurcation.125 The Iowa Supreme Court found “that the postconviction court did rule on Lamaster’s present claims, and they [were] properly preserved for appeal [but because the] claims lack[ed] merit[,] . . . [the Court] affirm[ed] the denial of Lamaster’s application for postconviction relief.”126

In 2003, Lamaster’s lived with his girlfriend and her two children.127 After Christmas that year, Lamasters and his girlfriend took the children to visit their fathers and no one saw his girlfriend alive thereafter.128 In the days that followed, Lamasters then used large amounts of methamphetamine, sold some of their belongings, and told friends that he was taking trips gambling.129 When the fathers of the children inquired about when Lamasters’s girlfriend would pick up her children, Lamasters told different stories and that she would not pick them up on time.130 Lamasters was picked up by law enforcement on January 6, 2004 after he ran away from a deputy sheriff and stabbed himself in the abdomen.131

The car Lamasters was driving when he was picked up belonged to his girlfriend and while Lamasters was recovering from the stab wounds in the hospital, law enforcement began investigating her whereabouts. When officers discussed her whereabouts with Lamasters, he gave a suspicious response when an officer asked him whether he thought his girlfriend had been hurt.132 When officers began to suspect foul play they questioned Lamasters in the hospital, after reading him Miranda rights.133 Officers found methamphetamine in his girlfriend’s car and arrested Lamasters for drug charges and parole violations after he was released from the hospital.134

Eventually DCI agents and local police searched his girlfriend’s home pursuant to a warrant.135 DNA from a bloodstain on the carpet matched that of his girlfriend.136 The search team found his girlfriend’s body in a freezer in the basement.137 She had been strangled with an electrical cord.138 After more DNA testing, they discovered that Lamasters’ blood was on his girlfriend’s sweater.139 The police also found his blood on a piece of electrical cord on the

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123 Lamasters v. State, 821 N.W.2d 856, 859 (Iowa 2012).
124 Id.
125 Id.
126 Id.
127 Id.
128 Id.
129 Id.
130 Id.
131 Id. (quoting Iowa Court of Appeals’ opinion on direct appeal).
132 See id. (quoting Lamasters’s statement regarding time of death).
133 Id.
134 Id.
135 Id.
136 Id.
137 Id.
138 Id.
139 Id.
floor next to the freezer and on the electrical cord around her neck. There were four cigarette butts on the floor; one of these matched Lamasters, two matched his girlfriend’s ex-husband, and the fourth was unknown. Meanwhile, a further search of the car Lamasters had been driving revealed the key to the freezer.

Lamasters was charged with first-degree murder. He moved to bifurcate the “guilt phase” of the trial from the separate issues of insanity, diminished responsibility, and intoxication. He argued that it would undermine his defense if he were forced to argue “I didn’t do it . . . but if I did I was insane.” The district court denied this motion because Lamasters had not yet pleaded an insanity defense.

Lamasters then filed another motion to bifurcate along with a notice of insanity and diminished responsibility defenses. In support of the motion, Lamasters presented correspondence between one of his attorneys and a psychiatrist, Dr. Gratzer. The State requested a psychiatric evaluation of Lamasters and production of Dr. Gratzer’s preliminary report. The district court denied the motion without addressing the state’s requests, holding that the factors for bifurcation were not present in this case.

Lamasters proceeded to trial without raising an insanity or diminished responsibility defense. He was convicted of first-degree murder and sentence to life without parole. His conviction was affirmed on direct appeal.

Lamasters filed a pro se postconviction petition. After counsel was appointed, he filed an amended petition, alleging: (1) ineffective assistance of appellate counsel for failing to argue that the district court erred in denying the bifurcation motions; (2) ineffective assistance of trial counsel for failing to “pursue a defense of temporary insanity,” and (3) ineffective assistance of trial counsel for “failing to present adequate and available evidence to support a claim for bifurcation of issues of guilt and insanity or diminished capacity defense.” The district court denied Lamasters’s application for postconviction relief.

The court of appeals ruled in favor of the state without reaching the merits of the appeal, agreeing with the State’s position “that error was not properly preserved for appellate review because the district court failed to rule on the claims presented, other than a general denial of Lamasters’s application.” In other words, since Lamasters had not filed a Rule 1.904 motion for a more specific ruling, he did not properly preserve error. The Iowa Supreme Court agreed to review the case, applying a de novo standard of review.

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140 Id. at 859–60.
141 Id. at 860.
142 Id.
143 Id.
144 Id.
145 Id. (internal quotation marks omitted).
146 Id.
147 Id.
148 Id.
149 Id.
150 Id.
151 Id. at 861.
152 Id.
153 Id.
154 Id.
155 Id. (internal quotation marks omitted).
156 Id. at 862.
157 Id. (internal quotation marks omitted).
158 Id. (referring to IOWA R. OF CIV. P. 1.904).
159 Id.
The Iowa Supreme Court pointed out that “[w]hen a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal.” One way to preserve error in such a situation would be to file a Rule 1.904(2) motion. However, “[i]f the court’s ruling indicates that the court considered the issue and necessarily ruled on it, even if the court’s reasoning is ‘incomplete or sparse,’ the issue has been preserved.” From this, the Court concluded that Lamasters’s arguments were properly preserved for appeal.

In evaluating the merits of Lamasters’s three ineffective assistance claims, the Court used the test that the claimant must show that counsel breached a professional duty and that prejudice resulted. The breach of duty element requires a showing that the attorney failed to meet the standard of a “reasonably competent attorney.” The Court emphasized that this is a fact-based test. An attorney’s miscalculation in trial strategy or tactics does not necessarily constitute ineffective assistance. For the second element, the Court stated that “Lamasters must show his counsel’s errors were so serious as to deprive [him] of a fair trial.” In other words, the attorney’s error must have had some effect on the outcome of the case. There must have been a reasonable probability that the outcome would have been different if not for the attorney’s error. A reasonable probability “is a probability sufficient to undermine confidence in the outcome.” The Court declined to analyze Lamasters’s claims on the breach element “because all of Lamasters’s claims [could] be resolved on the prejudice prong.”

The Court first addressed Lamasters’s claim that his trial counsel should have raised an insanity defense. It was Dr. Gratzer’s opinion that Lamasters might meet the criteria for the insanity defense, and he suggested to Lamasters’s attorneys that Lamasters be evaluated further. The attorneys disagreed and did not pursue the matter beyond that. However, the Court pointed out that no expert has deemed Lamasters legally insane at the time of the killing and that Lamasters consistently denied killing his girlfriend, even at his postconviction hearing. Also, the trial testimony “did not suggest Lamasters was incapable of knowing the nature and quality of his acts or incapable of distinguishing between right or wrong in relation to those acts . . . .”

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160 Id. (quoting Meier v. Senecaut, 641 N.W.2d 532, 537 (Iowa 2002)) (internal quotation marks omitted).
161 Id. at 863.
162 Id. at 864 (emphasis in original).
163 Id. at 864–65.
164 Id. (quoting Castro v. State, 795 N.W.2d 789, 794 (Iowa 2011)).
165 Id. (quoting Strickland v. Washington, 466 U.S. 668, 687 (1984)) (internal quotation marks omitted).
166 Id.
167 Id. (quoting Hinkle v. State, 290 N.W.2d 28, 34 (Iowa 1980)).
168 Id. (quoting Strickland, 466 U.S. at 687) (alteration in original) (internal quotation marks omitted).
169 Id. (citing Strickland, 466 U.S. at 691).
170 Id.
171 Id. (quoting Strickland, 466 U.S. at 694) (internal quotation marks omitted).
172 Id. at 867 (citing Ledezma v. State, 626 N.W.2d 134, 142 (Iowa 2001)).
173 Id.
174 Id.
175 Id.
176 Id.
177 Id.
Lamasters’s elaborate scheme to cover up his girlfriend’s disappearance. \(^{178}\) From all of this evidence, the Court concluded that there was not a reasonable probability of an insanity defense being successful. \(^{179}\)

The Court then addressed Lamaster’s argument that his attorney should have raised a diminished responsibility defense. \(^{180}\) The Court concluded that Lamasters failed on this argument for the same reasons that he failed on his argument regarding the insanity defense. \(^{181}\) The Court noted that Lamasters’s attempts to hide his crime would undermine any argument that he lacked the mental capacity to form the requisite criminal intent. \(^{182}\)

Finally, the Court addressed Lamasters’s claims of ineffective assistance regarding bifurcation. \(^{183}\) The Court discussed State v. Jenkins, a case in which the defendant argued on appeal that “a defendant is entitled to a bifurcated trial when the psychiatric examination forces the defendant to disclose information otherwise protected by the fifth amendment.” \(^{184}\) The defendant alternately argued that prejudice results “when evidence relevant only to the issue of sanity becomes tantamount to a confession of guilt.” \(^{185}\) The Iowa Supreme Court in Jenkins held that the district court did not abuse its discretion when it denied the defendant’s motion to bifurcate because the defendant had a weak alibi defense and because no incriminating statements resulted from the psychiatric examination. \(^{186}\)

When testifying about his interview with Lamasters, Dr. Gratzer mentioned that Lamasters gave reasons why he might have hypothetically killed his girlfriend after denying that he did so. \(^{187}\) After examining this portion of the record, the Court concluded that Lamasters’s attorneys did not have any information about incriminating statements Lamasters made to Dr. Gratzer. \(^{188}\) The Court simply did not find Lamasters’s answers to Dr. Gratzer’s questions persuasive on the bifurcation issue. \(^{189}\) Moreover, for reasons the Court described previously, it concluded that Lamasters would not have been likely to succeed in his insanity defense even if the trial had been bifurcated. \(^{190}\)

**Metrish v. Lancaster, 133 S. Ct. 1781 (2013)**

In this case Burt Lancaster was convicted of first-degree murder and a related firearms offense in state court. \(^{191}\) At the time of he committed the crime, Michigan courts recognized diminished capacity as a defense, but by the time of his trial and conviction, an appellate court had rejected the defense in a ruling. \(^{192}\) Lancaster asserted “that [the] retroactive application of the Michigan Supreme Court decision [rejecting the diminished capacity defense] denied

\(^{178}\) See id. at 867–68 (discussing Lamasters’s stories about his girlfriend’s whereabouts and his attempts to sell her possessions).

\(^{179}\) Id. at 868.

\(^{180}\) Id. at 869.

\(^{181}\) Id.

\(^{182}\) Id.

\(^{183}\) Id.

\(^{184}\) Id. at 870 (quoting State v. Jenkins, 412 N.W.2d 174, 175–76 (Iowa 1987)) (internal quotation marks omitted).

\(^{185}\) Id. (quoting Jenkins, 412 N.W.2d at 176) (internal quotation marks omitted).

\(^{186}\) Id. (quoting Jenkins, 412 N.W.2d at 176).

\(^{187}\) Id.

\(^{188}\) Id. at 871.

\(^{189}\) Id.

\(^{190}\) Id. at 872.


\(^{192}\) Id.
him due process of law.” On habeas review the Court must “assess a claim for relief under the demanding standard set by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),” which establishes that a petitioner “may only gain relief if the state-court decision he assails ‘was contrary to, or involved an unreasonable application of early established Federal law.’” The Court held that the petitioner in this case did not meet the standard and the Sixth Circuit erred in granting Lancaster federal habeas relief.

Lancaster, a former police officer who suffered from long-term mental-health problems, killed his girlfriend in 1993. Lancaster asserted diminished capacity and insanity defenses at trial. He was nevertheless convicted of first-degree murder and possessing a firearm in the commission of a felony. Lancaster later had these convictions overturned at a federal habeas proceeding because the prosecutor “had exercised a race-based peremptory challenge to remove a potential juror” in violation of Batson v. Kentucky.

By the time of his second trial, the Michigan Supreme Court had overturned the Michigan Court of Appeals’ decisions recognizing the diminished capacity defense in People v. Carpenter. Lancaster was therefore not allowed to renew his diminished capacity defense at his second trial. Lancaster was convicted again.

The Michigan Court of Appeals affirmed, rejecting Lancaster’s argument “that retroactive application of Carpenter to his case violated his right to due process.” According to the state appellate court, Carpenter merely interpreted an existing state statute and did not involve any change in the law. Lancaster continued his due process claim in a federal habeas petition after the Michigan Supreme Court refused to review his case. The district court denied the petition.

Reversing the district court’s decision, the Sixth Circuit held that the Carpenter decision was unforeseeable given the Michigan Court of Appeals’ repeated recognition of the diminished capacity defense in the past, among other factors. Therefore, the Sixth Circuit concluded that Lancaster “was entitled to a new trial at which he could present his diminished-capacity defense.” The Supreme Court heard this case to determine whether the Michigan Court of Appeals, in rejecting Lancaster’s due process claim, unreasonably applied the Supreme Court’s decisions in Bouie v. City of Columbia and Rogers v. Tennessee.

The Michigan Court of Appeals’ decision was not an unreasonable application of clearly established federal law. The Supreme Court noted that, in

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193 Id.
194 Id. at 1784-85.
195 Id. at 1785.
196 Id.
197 Id.
198 Id.
199 Id. (citing Batson v. Kentucky, 476 U.S. 79 (1986)).
200 Id. (citing People v. Carpenter, 627 N.W.2d 276 (Mich. 2001)).
order to obtain federal habeas relief, Lancaster must demonstrate that the state court ruling rested on “an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.”

The defendants in *Bouie* were African-Americans who were convicted of criminal trespass because “they refused to comply with orders to leave a drug store’s restaurant department, a facility reserved for white customers.”

The Court in that case held that the defendants’ convictions violated due process because the statute under which they were convicted failed to “give fair warning of the conduct which it prohibit[ed].” In *Rogers*, the Court held that “the Tennessee Supreme Court’s refusal to adhere to the year and a day rule . . . did not violate due process.”

The Court summarized the history of the diminished capacity defense in Michigan. The Michigan Court of Appeals recognized this defense in 1973. Two years later, the state legislature enacted “a comprehensive statutory scheme setting forth the requirements for and the effects of asserting a defense based on either mental illness or mental retardation.”

The statute did not explicitly address the diminished capacity defense, but the Michigan Court of Appeals ruled in 1978 “that the defense comes within th[e] codified definition of legal insanity.” Therefore, a defendant claiming he lacked the mental capacity necessary to form the requisite criminal intent had to satisfy the statutory requirements of asserting the insanity defense. The statute left open the burden-of-proof question, so the Michigan courts “continued to apply the common-law burden-shifting framework in effect at the time of the insanity defense’s codification.” In other words, the defendant would bear “the initial burden of presenting some evidence of insanity,” thus giving the state the burden of proving that the defendant was sane beyond a reasonable doubt.

The state legislature amended the act in 1994, giving the defendant the burden of proving insanity by a preponderance of the evidence.

The Michigan Supreme Court held in *Carpenter* that the diminished capacity defense was incompatible with the legislature’s statutory scheme, which “created an all or nothing insanity defense.” The Supreme Court distinguished *Carpenter* from *Bouie*, noting that *Carpenter* was essentially the inverse of *Bouie*. Moreover, the Court noted that *Bouie* was not particularly similar to this case.

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211 Id. at 1786–87 (quoting Harrington v. Richter, 131 S. Ct. 770 (2011)).
212 Id. at 1787 (citing Bouie, 378 U.S. at 348–49).
213 Id. (quoting Bouie, 378 U.S. at 350) (internal quotation marks omitted).
214 Id. at 1788.
215 Id. at 1788–91.
216 Id. at 1788.
217 Id. at 1789 (quoting People v. Carpenter, 627 N.W.2d 276, 277 (Mich. 2001)) (internal quotation marks omitted).
218 Id. (quoting People v. Mangiapane, 271 N.W.2d 240 (Mich. 1978)) (internal quotation marks omitted) (alteration in original).
219 Id.
220 Id.
221 Id. at 1789–90.
222 Id. at 1790.
223 Id. at 1790–91 (quoting People v. Carpenter, 627 N.W.2d 276, 283 (Mich. 2001)) (internal quotation marks omitted).
224 Id. at 1791. (“Rather than broadening a statute that was narrow on its face, *Carpenter* disapproved lower court precedent recognizing a defense Michigan’s high court found, on close inspection, to lack statutory grounding.”)
225 Id.
The Court also distinguished Rogers, holding that the diminished capacity defense, unlike the year and a day rule, “is not an ‘outdated relic of the common law’ widely rejected by modern courts and legislators.”226 Moreover, the diminished capacity defense had much more solid standing in Michigan law than the year and a day rule had in Tennessee law.227 In conclusion, the Court noted that it “has never found a due process violation in circumstances remotely resembling Lancaster’s case . . . .”228


In this case the Court considered whether the Ninth and Sixth Circuits appropriately concluded that “death row inmates pursuing federal habeas are entitled to a suspension of proceedings when found incompetent” under 18 U.S.C. §§ 3599 & 4241.229 The Court held that district courts do not have to “stay federal habeas proceedings when petitioners are adjudged incompetent.”230

This case was a consolidation of two cases. In one case Ernest Gonzales was convicted of felony murder, armed robbery, aggravated assault, first-degree burglary, and theft and was sentenced to death.231 After exhausting state court remedies he filed for a writ of habeas corpus in the district court, but by that time he was not capable of assisting his appointed counsel in the proceedings.232 He argued that under Rohan v. Woodford, a stay should be granted because he was mentally incompetent, but the district court denied the stay.233 The district court reasoned that a stay was not necessary because an appeal is record based and requires only minimal communication on the part of the petitioner.234 While the petition was pending, the Ninth Circuit decided Nash v. Ryan, in which it “held that petitioners have a right to competence on appeal, even though appeals are entirely record based.”235 The Ninth Circuit granted Gonzales’s writ of mandamus “concluding that . . . ‘he is entitled to a stay pending a competency determination’ under 18 U.S.C. § 3599.”236

In the other case, Sean Carter was convicted of aggravated murder, aggravated robbery, and rape and was sentenced to death.237 After exhausting state appeals, Carter filed for a writ of habeas corpus, eventually amending that request to include a competency determination and stay of proceedings.238 After several psychiatric examinations, the court determined that some of Carter’s assistance was required to develop his claims and due to his incompetence, dismissed the petition without prejudice and tolled the statute of limitations.239 After the state appealed, the Sixth Circuit acknowledged that there is not a right to competence for petitioners facing the death penalty, but found a right to

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226 *Id.* (quoting Rogers v. Tennessee, 532 U.S. 451, 462 (2001)).
227 *Id.* at 1792.
228 *Id.*
230 *Id.* at 700.
231 *Id.*
232 *Id.*
233 *Id.* 700–01 (citing Rohan v. Woodford, 224 F. 3d 803 (2003)).
234 *Id.* at 701.
235 *Id.* (quoting Nash v. Ryan, 581 F.3d 1048 (2009)).
236 *Id.* (quoting In re Gonzales, 623 F.3d 1242, 1244 (C.A. 9 2010)).
237 *Id.*
238 *Id.*
239 *Id.*
competence in 18 U.S.C. § 4241. The court amended the lower court’s dismissal and granted a stay “indefinitely with respect to any claims that required [Carter’s] assistance.”

The Supreme Court did not find a right to stay habeas proceedings under § 3599 as the Ninth Circuit did on Gonzales’s case. The Court pointed out that the section only provides a right to federal funded counsel through federal habeas proceedings. Additionally, the right to competence, found in the right to Due Process, is not implied through the constitutional right to counsel. Although there is a connection in that a defendant must be able to assist his counsel during trial, there is no assumption that a right to counsel implies a right to competence. Along with this reasoning the Court disagreed with the Ninth Circuit’s conclusion there is a “substantial” constitutional concern raised by the petitioner’s due process claim like there was in Rohan. Given the record-based nature of habeas proceedings, the Court placed confidence in the abilities of attorneys in “reviewing the state-court record, identifying legal errors, and marshaling relevant arguments, even without their client’s assistance.”

With regard to the Sixth Circuit’s conclusion based on § 4241, the Supreme Court held that a right to a stay for competence in habeas proceedings does not exist and further, that the section does not even apply to such proceedings. The Court found that “[b]y its own terms, § 4241 applies only to trial proceedings prior to sentencing and ‘at any time after the commencement of probation or supervised release.’” Additionally, the section is applicable to “federal criminal defendants” and Carter was not a federal defendant, but a state prisoner challenging his state conviction through federal civil action. Lastly the Court pointed out that the section provides for competency evaluations where a defendant is “unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.” “A habeas proceeding . . . is not a ‘proceeding against the habeas petitioner, . . . [but instead is] a civil action against the warden of the state prison.”

The Court declined to provide advice to the district courts about exercising discretion with regard to granting stays where the court deems appropriate. In discussing the outer limits of the district court’s discretion, the Court found that in Gonzales’ case, the district court “did not abuse its discretion in [holding that claims could be resolved as a matter of law, regardless of competence], because a stay is not generally warranted when a petitioner raises only record based claims.” As for Carter’s claims, the Court held that even though the petitioners claims could have benefited from his assistance, they had already

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240 Id. 701–02 (citing Rees v. Payton, 384 U.S. 312 (1966) (holding that section 4241 could be employed where habeas is sought in capital cases).
241 Id. at 702.
242 Id.
243 Id.
244 Id. at 703.
245 Id. (citing Cooper v. Oklahoma, 517 U.S. 348, 354 (1996)).
246 Id. at 704.
247 Id. at 706.
249 Id.
251 Id.
252 Id. 707–08 (citing Rhines v. Weber, 544 U.S. 269, 276 (2005)).
253 Id. at 708.
been “adjudicated on the merits in the state postconviction proceedings.” 254 The Court held that where it is possible that a claim would benefit from the petitioner’s assistance, the court should “take into account the likelihood that the petitioner will regain competence in the foreseeable future . . . [and where] there is no reasonable hope of competence, a state is inappropriate and merely frustrates the State’s attempts to defend its presumptively valid judgment.” 255 The Ninth Circuit’s holding was reversed and the Sixth Circuit’s holding was remanded for further proceedings. 256

254 Id.
255 Id. at 709.
256 Id. at 709–10.
Double Jeopardy

Evans v. Michigan, 133 S. Ct. 1069 (2013)

The issue in this case involved defendant Lamar Evans, who was charged with arson for burning real property (other than a dwelling). After the State rested its case, Evans moved for directed verdict of acquittal, arguing that the State had not provided sufficient evidence of a particular element of the offense. However, it turned out that the unproven ‘element’ was not actually a required element at all. Nevertheless, the trial court entered a directed verdict of acquittal believing the State had failed to prove this particular element. On appeal, the U.S. Supreme Court determined that midtrial acquittal in these circumstances is an acquittal for double jeopardy purposes.

At the trial court level, after the State rested its case in chief, Evans moved for directed verdict of acquittal, claiming that even though he was charged with burning “other real property,” and “not a dwelling,” the State’s evidence only showed that the property was a dwelling. By that time in the trial, the State only had one witness testify regarding the nature of the property burned, and that witness claimed the property was a “dwelling house.” The trial court was persuaded by Evans’s argument, and held that “the ‘testimony [of the homeowner] was this was a dwelling house,’ so the nondwelling requirement of [the statute] was not met.” The Michigan Court of Appeals reversed and remanded, finding that Evans’s charge was a lesser-included offense and that disproving the greater offense was not necessarily required.

The Michigan Supreme Court affirmed, holding that “when a trial court grants a defendant’s motion for a directed verdict on the basis of an error of law that did not resolve any factual element of the charge offense, the trial court’s ruling does not constitute an acquittal for the purpose of double jeopardy and a retrial” is allowed.

The U.S. Supreme Court granted certiorari “to resolve the disagreement among the state and federal courts regarding the issue of whether a retrial is barred when a trial court grants an acquittal after the State fails to prove an ‘element’ of the offense that, in actuality, it did not have to prove.” The Court held that “[a] mistaken acquittal is an acquittal nonetheless.”

The Court based its conclusion based on precedent—“an acquittal precludes retrial even if it is premised upon an erroneous decision.” The Court noted that acquittals conclude proceedings absolutely. In this case, it was clear that the trial Court evaluated the State’s evidence and found that it was insufficient to establish the

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258 Id.
259 Id.
260 Id.
261 Id.
262 Id.
263 Id.
264 Id. (first alteration in original) (quoting the trial court case).
265 Id.
266 Id. at 1074 (internal quotation marks omitted).
267 Id.
268 Id. (citing Sanabria v. United States, 437 U.S. 54, 68–69, 78 (1978) (noting that the acquittal was upheld even though it was based on an erroneous decision to exclude certain evidence).
269 Id. at 1075.
elements of the offense.\textsuperscript{270} The State, in other words, failed to prove its case; therefore, Evans was acquitted. \textsuperscript{271} Although it was clear that the trial court was erroneous in its decision, the “error affects only ‘the accuracy of [the] determination’ to acquit, not ‘its essential character.’” \textsuperscript{272}

Evans argued that by basing a defendant’s double jeopardy rights on the dismissal being a factual error (as opposed to a legal one), the State violated the Due Process Clause’s guarantee of a fair trial.\textsuperscript{273} Yet, the State argued that it should be able to appeal verdicts of acquittal with regard to factual elemental error because it would be in society’s best interest to do so.\textsuperscript{274} The Court, however, reasoned that the Fifth Amendment is designed to protect criminal defendants by preventing the government from trying a crime twice.\textsuperscript{275}

The Court noted that Evans’s claim differed from that of United States v. Scott, which supplied a key distinction between acquittals and other resolutions that to not invoke the protection of the Double Jeopardy Clause.\textsuperscript{276} Thus, when a ruling involves guilt or innocence, the acquittal invokes double jeopardy.\textsuperscript{277} In this case, Evans correctly argued that by determining that the State failed to prove an element of the offense, the directed verdict essentially determined his guilt or innocence.\textsuperscript{278}

As such, the Court held that because Evans’s trial ended in acquittal based on the State’s failure to prove all elements of the crime, the Double Jeopardy Clause bars retrial for the same offense.\textsuperscript{279}

\textsuperscript{270} Id.
\textsuperscript{271} Id.
\textsuperscript{272} Id. at 1076 (quoting United States v. Scott, 437 U.S. 82, 98 (1978)).
\textsuperscript{273} Id. at 1074–76.
\textsuperscript{274} Id. 1076.
\textsuperscript{275} Id. 1077.
\textsuperscript{276} Id. (citing Scott, 437 U.S. 82 (1978)).
\textsuperscript{277} Id.
\textsuperscript{278} Id.
\textsuperscript{279} Id. at 1081.
Evidentiary Issues

State v. Huston, 825 N.W.2d 531 (Iowa 2013)

In this case, Karen Huston appealed her conviction of child endangerment causing serious injury, claiming the evidence was insufficient to prove a “serious injury.” The issue on further review was “whether the district court committed reversible error in Huston’s criminal jury trial by allowing a caseworker for the Iowa Department of Human Services (DHS) to testify that a child abuse report against Huston was administratively determined to be ‘founded.’” The Iowa Supreme Court limited its review to only the evidentiary ruling on the founded child abuse report. As such, the Court held that it is “reversible error to allow testimony that DHS had determined the child abuse complaint against Huston was founded.” The Court vacated the court of appeals decision, reversed the judgment of the district court, and remanded the case for a new trial.

Huston was the step-grandmother and caregiver of a five-year-old living in her home. Tasked with caring for a young child, Huston was limited in her ability due to confinement in a wheelchair and her obesity, COPD, and asthma conditions. Although the child’s mother would visit the child daily, Huston generally prepared sandwiches and other quick meals for the child. Concern for the child grew after a routine office visit revealed that the child had lost weight and no medical conditions existed explaining such drastic changes. DHS was contacted, but declined to force hospitalization. Months later, DHS was contacted regarding the child yet again; this time, the concern was about lack of care with regard to the child’s crossed eyes. DHS advised that the child should be taken to the hospital again; it was subsequently determined the child was failing to thrive. There, the doctor noted the child’s “pale and gray” skin and her flat, thinning hair. The doctor found the child’s failure to thrive to be very serious, and he was concerned that the child was undergoing abuse or neglect at home.

The doctor obtained authorization to remove the child from Huston’s home, admit her into the hospital, and then place the child in foster care. When removed, the DHS worker noted that the child was very dirty, the child’s hair was matted, she was hungry, and she refused to talk or make eye contact. After removal, the child was admitted to the hospital, where she remained for five days.

280 State v. Huston, 825 N.W.2d 531, 532 (Iowa 2013).
281 Id.
282 Id.
283 Id.
284 Id.
285 Id. at 533.
286 Id.
287 Id. (noting that the child lost 12% of her body weight between doctor’s visits).
288 Id.
289 Id.
290 Id.
291 Id.
292 Id.
293 Id. at 533–34 (noting the doctor’s grave concerns regarding the child’s mental and physical well-being).
294 Id. at 534.
295 Id.
296 Id.
pounds. Thus, the doctors taking care of the child determined that she was failing due to lack of an adequate amounts of food. After her release from the hospital, the child was placed in foster care and continued to thrive.

The DHS worker interviewed Huston and her husband, who both initially claimed that the child was not living with them at the time of DHS intervention. However, Huston eventually admitted that the child did live at her home, and she reported that she had seen the child overeat and throw-up, and thus believed the child had an eating disorder.

In December 2010, Huston was charged with two counts of child endangerment for (1) knowingly acting in a manner that created a substantial risk to the child or willfully depriving the child of food, causing serious injury and (2) intentional use of unreasonable force, torture, or cruelty on the child, causing bodily injury. At a three-day trial, the DHS worker testified regarding her investigation and findings. The DHS worker testified that child abuse was “founded” in two separate reports—one a denial of critical care and failure to provide adequate supervision, the other, failure to provide adequate food. The DHS worker was also asked about the appeal process for founded reports, and asked whether Huston appealed her founded report, but the worker was not allowed to answer that question.

Huston moved for a judgment of acquittal on both counts, and was granted the motion on count one (the willful deprivation of food, causing serious injury). The court proceeded with count two (intentional use of unreasonable force), and the jury found Huston guilty on the felony charge of child endangerment causing serious bodily injury. On appeal, Huston claimed the district court erred by admitting the DHS worker’s testimony regarding the founded child abuse report and allowing testimony on the process for appealing such a report.

The Iowa Court of Appeals affirmed Huston’s conviction and concluded “the district court acted within its discretion by admitting [the DHS caseworker’s] testimony as relevant.” The court of appeals also noted that the testimony in question was not unfairly prejudicial because its probative value outweighed its potential to inflict unfair prejudice. Likewise, any error in allowing the testimony was harmless. On further review, the Iowa Supreme Court decided whether the trial court committed reversible error by allowing the DHS worker’s testimony regarding the founded child abuse report filed against Huston.

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297 Id. (noting that the child “ate everything presented to her and sometimes asked for more to eat” and “[o]n the last day of her hospitalization, [she] ate a lot of food and vomited”).
298 Id. (noting that in a controlled environment and when given calories, the child was able to properly grow and remain healthy).
299 Id. (detailing how the child continued to gain weight and her thinning hair began to fill-in).
300 Id. at 535.
301 Id.
302 Id.
303 Id.
304 Id. (quoting the DHS caseworker’s testimony at the trial).
305 Id. at 536.
306 Id. at 536.
307 Id.
308 Id.
309 Id. (noting that “[t]he testimony explained the investigatory and protective steps taken by DHS to determine whether evidence supported the initial information DHS received” regarding child abuse).
310 Id.
311 Id.
312 Id. at 537.
claimed the danger was in the jury’s reliance on the founded DHS report in determining her guilt with respect to the criminal charges at issue.\textsuperscript{313} Meanwhile, the State argued the error—if any—was harmless.\textsuperscript{314}

In this case, the Iowa Supreme Court found that the DHS caseworker’s testimony could have been limited to provide only the context necessary—that Huston was being investigated in response to a report of child abuse.\textsuperscript{315} The court found it was not necessary to go on to explain that the report was founded.\textsuperscript{316} However, admissibility of evidence is determined by employing a two-part test under Iowa Rule of Evidence 5.403, which balances: (1) the probative value of the evidence and (2) the danger of prejudicial or wrongful effect.\textsuperscript{317} Here, the Court found “no probative value to the DHS determination the abuse report against Huston was founded.”\textsuperscript{318} The Court held that knowing “[w]hether or not the abuse report was deemed founded [wa]s irrelevant to any issue for the jury to decide.”\textsuperscript{319} As such, the Court held that a “real danger” existed, and the agency finding may unfairly influence the jury.\textsuperscript{320}

Although “[t]he State argue[ed] the risk of prejudice was mitigated by testimony from the DHS caseworker as to the lower burden of proof to establish a child abuse complaint as founded by the agency,” the Court did “not believe it would have been proper in this case to allow testimony that the child abuse report was determined to be founded even with a limiting instruction.”\textsuperscript{321} Therefore, the district court abused its discretion by allowing the DHS caseworker to testify as to the founded nature of the child abuse report.\textsuperscript{322}

**State v. Jones, 817 N.W.2d 11 (Iowa 2012)**

The Iowa Supreme Court in *Jones* determined the following issues: (1) “whether Iowa Rule of Criminal Procedure 2.17(2) requires a trial court to announce the verdict in open court following a bench trial” and (2) “whether the State committed a *Brady* violation.”\textsuperscript{323} The Court held that rule 2.17(2) requires that a trial court “announce the verdict in a recorded proceeding in open court.”\textsuperscript{324} Additionally, the Court found that the state did not commit a *Brady* violation.\textsuperscript{325}

In the fall of 2007, Arzel Jones met M.P. and quickly began a relationship with her.\textsuperscript{326} On November 30, Jones asked M.P. to come with him to his apartment, and M.P. complied.\textsuperscript{327} Once at Jones’s apartment, Jones began arguing with M.P., alleging that she had been unfaithful in their relationship.\textsuperscript{328} Over the course of several hours, Jones severely beat M.P.\textsuperscript{329} M.P. did not show up for work the following morning, and

\textsuperscript{313} *Id.*
\textsuperscript{314} *Id.*
\textsuperscript{315} *Id.*
\textsuperscript{316} *Id.*
\textsuperscript{317} *Id.*
\textsuperscript{318} *Id.*
\textsuperscript{319} *Id.*
\textsuperscript{320} *Id.* at 538.

\textsuperscript{321} *Id.* at 539.
\textsuperscript{322} *Id.*
\textsuperscript{323} *State v. Jones, 817 N.W.2d 11, 13 (Iowa 2012).*
\textsuperscript{324} *Id.* (finding that in this case, “the trial court cured its error and substantially complied with rule 2.17(2)”).
\textsuperscript{325} *Id.*
\textsuperscript{326} *Id.*
\textsuperscript{327} *Id.*
\textsuperscript{328} *Id.*
\textsuperscript{329} *Id.* (noting that Jones “punched M.P. in the chest two or three times, slapped her across the face, and slapped the back of her head”).
out of concern, M.P.’s ex-boyfriend contacted police. 330 When police arrived at Jones’s apartment, Jones quickly silenced M.P. by covering her mouth, and forcing her into the bedroom to ensure concealment. 331 After police left, Jones forced M.P. to call her family and work to explain why she would not be able to come home or into work. 332 A few days later, Jones allowed M.P. to go to work; however, he went to the bar at which she worked, watched her all night, and then forced her to stay with him at his apartment, and forced her to have non-consensual sex by holding a fork to her throat. 333 Jones also punched, kicked, and strangled M.P. that night. 334

After the attack, Jones forced M.P. to take a shower, then drove her to an emergency room. 335 Jones instructed M.P. on how to answer questions from medical professionals, and ultimately forced her to leave the hospital before she was able to receive treatment. 336 The following afternoon, M.P. was permitted to go home, at which point she told her family of the abuse she had endured. 337 M.P.’s family immediately took her to the hospital, where they confirmed that M.P. had experienced severe abuse. 338

Jones was subsequently charged with third-degree kidnapping, domestic abuse assault causing bodily injury, first-degree kidnapping, attempted murder, second-degree sexual abuse, and first-degree harassment. 340 The trial court found Jones guilty of third-degree kidnapping, domestic abuse assault causing bodily injury, assault with intent to inflict serious bodily injury, second-degree sexual abuse, and third-degree sexual abuse. 341

On appeal, Jones claimed that the trial court must announce a verdict in open court. 342 The applicable criminal procedure rule states: “In a case tried without a jury the court shall find the facts specially and on the record, separately stating its conclusion of law and rendering an appropriate verdict.” 343 The Iowa Supreme Court determined that although it has stated different interpretations of “on the record” in different context as applicable in different rules, for purposes of this rule (2.17(2)), the Court stated that a written verdict is sufficient. 344

The Court did acknowledge the importance of a defendant’s presence in the courtroom, agreeing with U.S. v. Canady, which expressed the psychological influence present when a defendant and judge are face-to-face during the reading of a verdict. 345 However, the Court stated there is no case law suggesting that a judge’s verdict

330 Id.
331 Id.
332 Id. at 14.
333 Id. (noting that at bar close, Jones was waiting for M.P. in the parking lot).
334 Id.
335 Id. (noting that M.P. feared for her life and believed she could not escape).
336 Id.
337 Id.
338 Id. ("The physician estimated M.P. received the welt on her neck sometime in the proceeding twelve to eighteen hours.")

340 Id. at 14 (detailing separate charges for separate incidents).
341 Id. at 15. (“The court later amended the verdict by written order, finding Jones guilty of assault causing bodily injury instead of domestic abuse assault causing bodily injury... because the State had failed to prove” a sufficient relationship.).
342 Id.
343 Id. (quoting IOWA R. CRIM. P. 2.17(2)) (internal quotation marks omitted).
344 Id. at 17.
345 Id. at 18 (citing U.S. v. Canady, 126 F.3d 352 (2d Cir. 1997)).
would change simply because the defendant is present. Therefore, in recognizing this importance, the Court settled on a principle for application to rule 2.17(2) interpreting the rule “to require the court to reconvene the proceeding and announce its verdict in open court, unless the defendant has waived his or her right to received the verdict in open court.”

Since the trial court in this case failed to announce the verdict in open court, the Supreme Court addressed the possibly remedy. The Court found that because the trial court later read the verdict aloud (at sentencing), the error was cured. Therefore, Jones was entitled to no further relief.

The second issue before the Court was whether the state committed a Brady violation by failing to disclose the transcript of a 911 call made with regard to M.P.’s whereabouts. A Brady violation occurs when (1) the prosecution suppresses evidence; (2) such evidence was favorable to the defense; and (3) the evidence was material to the issue at hand. The Iowa Court of Appeals found that “Jones waived his Brady-violation claim by conceding . . . that the state did not have prior possession of the transcript.”

Although that acknowledgment is unclear from the record, the Court found there to be “no consequence that the prosecutor possessed or did not possess the call transcript prior to the verdict.” Regardless, Jones had no access to the transcript prior to the verdict. The evidence suppressed (the transcript) was important to the prosecution, in this case. However, the Court acknowledged that “Jones could have used the transcript to impeach M.P.’s testimony as to the source of her injuries;” therefore, the Court found the transcript to be “evidence favorable to Jones.”

Although Jones met both the first and second prongs of the Brady test, his argument failed on the third and final prong. In evaluating the materiality of the suppressed evidence (the transcript), the Court determined whether there was a “reasonable probability” of a different outcome. The Court found that the transcript would have only been detrimental to Jones, and it did not create a reasonable probability that a different outcome would resulted if the transcript had been disclosed prior to the verdict. Therefore, Jones failed to show that the State committed a Brady violation.

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346 See id.
347 Id. at 19–20 (footnote omitted). The court also addressed the practicality of this rule as applied, noting that by reconvening: (1) the court could proceed directly to sentencing; (2) challenges to the verdict could be immediately addressed; (3) the court could immediately address the possibility of a deferred judgment; (4) the court could prevent the possibility of the media publishing the verdict before the defendant hears it himself; and (5) the court would ensure that the defendant definitely received the news. Id.
348 Id. at 20.
349 Id. at 21.
350 Id.
351 Id.
352 Id. (citations omitted).
353 Id.
354 Id.
355 Id. (noting that this finding meets the first prong of Brady).
356 Id. at 22.
357 Id. (noting that this finding meets the second prong of Brady).
358 See id. at 21–22.
359 Id. at 22 (noting that a reasonable possibility is not enough).
360 Id.
State v. Schories, 827 N.W. 2d 659 (Iowa 2013)

In this case, Schories appealed his conviction of operating a vehicle while under the influence of a controlled substance. On appeal, Schories claimed that “there was insufficient evidence to support the verdict, that the court failed to properly instruct the jury on the prescription drug defense, and that the district court improperly allowed evidence into the record related to a syringe found in” his car. Schories also claimed his attorney was ineffective in his assistance as counsel. The Iowa Supreme Court found “insufficient evidence to support the verdict and reverse[d] the district court,” without considering Schories’s other claims.

In August 2010, Schories was pulled over for driving a vehicle erratically. After being stopped, the officer observed a syringe located in the vehicle between the front seat and center console. Schories was transferred to the police station for further evaluation, and tests revealed he was positive for methadone. Schories was charged with operating while intoxicated for driving under the influence of a controlled substance.

At trial, Schories argued the prescription drug defense, claiming the methadone found in his urine was prescribed to him and that the State failed to prove beyond a reasonable doubt that he was not following the prescribed amount for ingestion. The court, however, denied Schories’s motion, and the jury subsequently found Schories guilty. On appeal, Schories claimed the “conviction cannot be sustained on the basis that the jury’s findings were not supported by substantial evidence.”

At trial, the State called its only witness, Officer Boone, who had stopped Schories on the night in question. Boone recalled watching Schories’s car closely—noting his semi-high speed, abrupt changing of lanes without signal, and his close following of other cars. After stopping Schories, Boone noticed bloodshot, watery eyes, improper balance and slow movements. Boone conducted several roadside tests, including a breathalyzer. The tests results were mixed—the breathalyzer did not indicate alcohol, yet some of the field-sobriety tests demonstrated intoxication.

At some point during the stop, Schories asked Boone to retrieve his phone and wallet from his car. Boone complied, and noticed a syringe located between the driver’s seat and the center console. However, the syringe was

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362 Id. at 660.
363 Id. (noting that the attorney failed to properly preserve claims, failed to ask for spoliation instructions, failed to ask for specific instructions related to his affirmative defense, and failed to present evidence regarding selling plasma).
364 Id.
365 Id.
366 Id.
367 Id.
368 Id. (“[U]nder Iowa Code section 321J.2(1)(c), a driver commits the offense when driving...”)
not preserved for evidence, by mistake of Boone. Boone also discovered an unmarked pill bottle and pills. Boone referenced his “pill Bible” and determined the pills were methadone and hydromorphone, both controlled substances.

After being examined roadside, Schories was transported to the police station, where he consented to another breath test, which showed no signs of alcohol consumption. Boone also conducted other intoxication tests, which again showed mixed results of toxicity. Boone concluded that Schories’s coordination was off. Boone also surveyed Schories’s arms for injection sites, and he found what looked like day-old track marks. Based on the totality of the circumstances, Boone concluded that Schories was under the influence of controlled substances, and had been driving under such conditions.

During the investigation, Schories told Boone he was prescribed methadone and hydromorphone for pain management, and he told Boone that he had taken both drugs earlier in the day. At trial, Schories’s pain management doctor testified that he indeed prescribed Schories both methadone and hydromorphone for pain. The doctor testified that based on his knowledge of the drugs, neither would cause Schories to drive erratically. The doctor also noted that he did not believe Schories was abuse or misusing the drugs; rather, he believed based on years of experience with Schories, that he was consistently using the drugs as prescribed.

The Iowa Supreme Court held that there was “no question that a reasonable fact finder could conclude that Schories was driving a vehicle . . . when a controlled substance . . . was in his system.” However, the “fighting issue [was] whether Schories was entitled to acquittal as a matter of law based on the evidence presented relating to the prescription drug defense.” Because there was no dispute that Schories had a valid prescription, the question became whether “there substantial evidence in the record to support the jury’s conclusion that Schories at the time of his arrest was not taking methadone according to his physician’s instructions and the labeling instructions of the pharmacy”

Schories claimed that the State failed to provide sufficient evidence to “support the jury verdict because there was no evidence that he failed to take the prescription drugs as directed by his doctor or the pharmacy.” Schories argued that the State only showed “methadone use, not methadone abuse.” In response, the State claimed that Schories’s behavior and symptoms demonstrate abuse, as well as, the mislabeling (removing of label) and his injections. The Iowa Supreme

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378 Id.
379 Id.
380 Id.
381 Id.
382 Id. at 662.
383 Id.
384 Id. (noting that methadone and hydromorphone can be injected).
385 Id.
386 Id.
387 Id. at 663.
388 Id.
389 Id.
390 Id. at 665.
391 Id.
392 Id.
393 Id.
394 Id.
395 Id. at 665–67.
Court, however, found fault in the State’s arguments. At trial, the State simply showed that methadone was present in Schories’s system; the State did not show that an overdose was present. Second, the Court found that the removal of the label on the drugs was not enough evidence to show that Schories knew he could not drive while under the influence of these drugs. Likewise, Schories was not warned or put on notice of the danger of driving while using his prescriptions. Lastly, the court noted that although Schories had track marks and bruising on his arms, there was no evidence demonstrating how long methadone remains in a person’s urine when injected, how the injection sites got on his arm, or whether methadone could even be melted down and injected. Therefore, the Iowa Supreme Court held that “there was insufficient evidence for a jury to conclude beyond a reasonable doubt the State disproved Schories’s prescription medication defense.”

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Watson v. Iowa Department of Transportation Motor Vehicle Division, 829 N.W.2d 566 (Iowa 2013)

This case arose after a driver contested a one-year suspension of his commercial driver’s license (CDL). The Iowa Supreme Court considered whether the Iowa Department of Transportation (IDOT) “erred in concluding that in the CDL context, breathalyzer test results are not to be adjusted for the breathalyzer test’s margin of error.” The Court held that there was no error and affirmed the license suspension.

Brandon Watson was driving a commercial vehicle through Iowa. An Iowa state trooper stopped Watson and administered a breathalyzer test with Watson’s consent. The breathalyzer showed that Watson had a BAC of 0.041. Iowa Code section 321.208(1)(a) provides IDOT authority to suspend a person’s CDL if they have a BAC of .04 or more. The Iowa Department of Transportation issued Watson a notice of a one-year suspension of his CDL. Watson appealed, arguing that “Iowa’s CDL suspension statute requires that the IDOT subtract the breathalyzer’s recognized margin of error of .004 from the test results, and therefore, the IDOT had insufficient evidence to find he had violated the statute.”

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396 Id. at 666–67.
397 Id. at 666.
398 Id. (“The mere presence of methadone does not establish misuse because its presence could have been the product of valid use consistent with his prescription.”).
399 Id. at 667.
400 Id.
401 Id.
402 Id. at 668.
404 Id.
405 Id.
406 Id.
407 Id.
408 Id.
409 Id.
410 Id.
sustained Watson’s suspension on intra-agency review.  
Watson sought judicial review, but the district court affirmed. The court of appeals also affirmed. The issue in this case was whether IDOT’s findings were supported by “substantial evidence.” The Iowa Supreme Court held that IDOT’s finding of Watson’s 0.04 BAC was supported by substantial evidence, and it upheld IDOT’s suspension of Watson’s CDL.

On appeal, the Iowa Supreme Court declared that it would apply Iowa Code chapter 17A to decide whether it would come to the same conclusion as the district court. The IDOT’s findings must be based on “substantial evidence” to be upheld. On the other hand, reversal is proper if the defendant’s rights were prejudiced because of “an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency.” Because interpretation of this area of law was not clearly vested in the IDOT, the Court gave no deference to the agency’s interpretation of section 321.208.

The IDOT argued that “the general margin of error provision in Iowa’s operating-while-intoxicated statute does not apply in the CDL context.” The Court pointed out that the provisions in section 321.208 refer IDOT to section 321J.1, which does not mention margin of error adjustments of test results. Instead, it is section 321J.12(6) that “requires that the IDOT, before making a determination of the alcohol concentration for the purpose of suspending a noncommercial license, adjust chemical test results downward by the test’s standard margin of error.”

The Court emphasized that its goal in interpreting a statute “is to give effect to the legislative intent . . . .” Thus, when a statute has a clear meaning, a reviewing court should not search for any meaning beyond the statute’s plain language. The Court also noted that “commercial drivers are held to higher standards than noncommercial drivers.” Because the margin of error provision does not refer to the statute governing license revocations for noncommercial drivers, the Court concluded that the legislature never intended to apply that provision to CDL operators’ licenses.

The Court reasoned that 321J.2 and 321J.2A clearly only apply to noncommercial drivers because “the commercial suspension section sets its own maximum allowable limit [of BAC].” Moreover, the margin of error provision has been amended since the CDL suspension section was added, and it was never amended to refer explicitly to the CDL suspension section. The Court concluded that the CDL  

411 Id.
412 Id.
413 Id.
414 See id.
415 Id. at 572.
416 Id. at 568 (citing Ludtke v. Iowa Dep’t of Transp., 646 N.W.2d 62, 65 (Iowa 2002)).
417 Id. (citing IOWA CODE § 17A.19(10)(f)).
418 Id. (quoting IOWA CODE § 17A.19(10)(c)).
419 Id. at 568–69.
420 Id. at 569.
421 Id.
422 Id.
423 Id. at 569–70 (quoting State v. Schultz, 604 N.W.2d 60, 62 (Iowa 1999)) (internal quotation marks omitted).
424 Id. at 570 (citing State v. Guzman-Juarez, 591 N.W.2d 1, 2 (Iowa 1999)).
425 Id. (citing Wiebenga v. Iowa Dep’t of Transp., 530 N.W.2d 732, 735 (Iowa 1995)).
426 Id.
427 Id.
428 Id. at 571.
suspension provision seems not to contemplate any margin of error adjustment in BAC test results.\textsuperscript{429}
Immigration

Chaidez v. United States, 133 S. Ct. 1103 (2013)

In this case the Supreme Court considered “whether... [Padilla v. Kentucky] applied] retroactively, so that a person whose conviction became final before [the Court] decided Padilla can benefit from it.” The Court held that it does “not have retroactive effect.”

Roselva Chaidez committed fraud against an automobile insurance company. She pleaded guilty to two counts of mail fraud. Chaidez was sentenced to four years of probation, and the court ordered her to pay restitution. Her conviction became final in 2004.
The offenses Chaidez committed are considered “aggravated felonies” under federal immigration law; someone who commits an aggravated felony is subject to deportation. Chaidez claimed that her attorney never told her about this law.

In 2009, after Chaidez’s application for citizenship notified them of her offenses, immigration officials sought her removal. In an effort to overturn her conviction, Chaidez filed a petition for a writ of coram nobis, arguing that her lawyer’s “failure to advise her of the immigration consequences of pleading guilty constituted ineffective assistance of counsel under the Sixth Amendment.”

The Supreme Court decided Padilla... while the petition was pending. Padilla held that “criminal defense attorneys must inform non-citizen clients of the risks of deportation arising from guilty pleas.” In response, the government argued that Padilla could not benefit Chaidez “because it announced a ‘new rule’ and, under Teague [v. Lane], such rules do not apply in collateral challenges to already-final convictions.”

The district court rejected the government’s argument and vacated Chaidez’s conviction. The Seventh Circuit reversed, agreeing with the government’s stance that Padilla “had declared a new rule and so should not apply in a challenge to a final conviction.”

The Supreme Court agreed to hear this case “to resolve a split among federal and state courts on whether Padilla applies retroactively.” The Court held that Padilla does not apply retroactively.

According to Teague, when the Supreme Court announces a new rule, “a person whose conviction is already final may not benefit from the decision in a habeas or similar proceeding.” Teague held that a case announces a new rule “when it breaks new ground or imposes a new obligation on the government” or if the result “was not dictated by precedent existing at the

431 Id.
432 Id.
433 Id. at 1106.
434 Id.
435 Id.
436 Id.
437 Id.
438 Id.
439 Id.
440 Id.
441 Id. (citing Padilla v. Kentucky, 559 U.S. 356, 366 (2010)).
442 Id. (quoting Teague v. Lane, 489 U.S. 288 (1989)).
443 Id.
444 Id.
445 Id. at 1107 (footnote omitted).
446 Id.
447 Id. (footnote omitted).
time the defendant’s conviction became final.”\textsuperscript{448} On the other hand, a case does not announce a new rule when it merely applies an existing principle or decision to different facts.\textsuperscript{449}

The typical test in an ineffective assistance case is the one announced in \textit{Strickland v. Washington}, which held that “legal representation violates the Sixth Amendment if it falls ‘below an objectives standard of reasonableness,’ as indicated by ‘prevailing professional norms,’ and the defendant suffers prejudice as a result.”\textsuperscript{450} \textit{Padilla}, before arriving at the \textit{Strickland} question, asked: “Was advice about deportation [was] ‘categorically removed’ from the scope of the Sixth Amendment right to counsel because it involved only a ‘collateral consequence’ of a conviction, rather than a component of the criminal sentence?”\textsuperscript{451} More to the point, \textit{Padilla} had to resolve the issue of whether \textit{Strickland} even applied before deciding how it applied.\textsuperscript{452}

In 1985, the Supreme Court decided \textit{Hill v. Lockhart}, “which explicitly left open whether advice concerning a collateral consequence must satisfy Sixth Amendment requirements.”\textsuperscript{453} Between \textit{Hill} and \textit{Padilla}, state courts and lower federal courts “almost unanimously concluded that the Sixth Amendment does not require attorneys to inform their clients of a conviction’s collateral consequences, including deportation.”\textsuperscript{454}

Therefore, when the Court decided \textit{Padilla} it resolved a question that it previously had not decided “in a way that altered the law of most jurisdictions . . . .”\textsuperscript{455} Deportation is a serious penalty that is closely related to criminal law, such that it results almost automatically from some criminal convictions. \textsuperscript{456} Reiterating its reasoning that \textit{Padilla} announced a new rule because it asked a threshold question before reaching the \textit{Strickland} question, the Court rejected Chaidez’s arguments to the contrary.\textsuperscript{457}

\textbf{Moncrieffe v. Holder, 133 S. Ct. 1678 (2013)}

In this case the Court considered whether drug crimes involving “social sharing of small amount[s] of marijuana” were included in the category of aggravated felonies, warranting harsh consequences, under the Immigration and Nationality Act (INA).\textsuperscript{458} The Court held that they are not.\textsuperscript{459}

The INA allows the government to deport non-citizens who are convicted of certain crimes, including some drug offenses.\textsuperscript{460} Typically when a non-citizen is found to be deportable, he or she may ask the Attorney General for some sort of discretionary relief from removal.\textsuperscript{461} However, if the non-citizen has been convicted of a crime defined in the INA as an “aggravated felony,” he or she is both deportable and ineligible for discretionary relief.\textsuperscript{462}

\begin{itemize}
\item \textsuperscript{448} \textit{Id.} (quoting Teague, 489 U.S. at 301) (emphasis in original) (internal quotation marks omitted).
\item \textsuperscript{449} \textit{Id.} (quoting Teague, 489 U.S. at 307).
\item \textsuperscript{450} \textit{Id.} (quoting \textit{Strickland v. Washington}, 466 U.S. 668, 687–88 (1984)).
\item \textsuperscript{451} \textit{Id.} at 1108 (quoting \textit{Padilla}, 559 U.S. at 366).
\item \textsuperscript{452} \textit{Id.}
\item \textsuperscript{453} \textit{Id.} (citing \textit{Hill v. Lockhart}, 474 U.S. 52 (1985)).
\item \textsuperscript{454} \textit{Id.} at 1109.
\item \textsuperscript{455} \textit{Id.} at 1110.
\item \textsuperscript{456} \textit{Id.}
\item \textsuperscript{457} \textit{Id.} at 1111–13.
\item \textsuperscript{458} \textit{Moncrieffe v. Holder, 133 S. Ct. 1678}, 1682 (2013).
\item \textsuperscript{459} \textit{Id.}
\item \textsuperscript{460} \textit{Id.}
\item \textsuperscript{461} \textit{Id.}
\item \textsuperscript{462} \textit{Id.}
\end{itemize}
felony under the INA is drug trafficking, which the INA defines as “any felony punishable under the Controlled Substances Act.”

If the non-citizen was convicted under a state statute, that statute must prohibit conduct that is punishable as a felony under the Controlled Substances Act (CSA) in order to qualify as an aggravated felony under the INA.

Adrian Moncrieffe came to the United States from Jamaica legally when he was a toddler. In this case, police found a small amount of marijuana in Moncrieffe’s car during a traffic stop.

He pleaded guilty in Georgia state court to possession of marijuana with intent to distribute and was sentenced to five years’ probation.

The federal government attempted to deport Moncrieffe, arguing that his Georgia conviction constituted an aggravated felony because possession of marijuana with intent to distribute is a felony under the CSA.

The immigration judge agreed with the government’s argument and ordered Moncrieffe to be deported. The Board of Immigration Appeals affirmed the immigration court’s ruling. The Fifth Circuit denied Moncrieffe’s petition for review, rejecting his argument that another section of the CSA made marijuana distribution “punishable only as a misdemeanor if the offense involves a small amount of marijuana for no remuneration.”

This case involved the issue of whether a conviction under a statute that prohibits conduct covered by both felony and misdemeanor provisions of the CSA constitutes a conviction for an offense that constitutes a felony under the CSA.

“If a noncitizen’s conviction for a marijuana distribution offense fails to establish that the offense involved either remuneration or more than a small amount of marijuana, the conviction is not for an aggravated felony under the INA.”

In cases like this, the Supreme Court normally uses a categorical approach “to determine whether the state offense is comparable to an offense listed in the INA. The Court determines whether the state statute defining the offense “categorically fits within the ‘generic’ federal definition of a corresponding aggravated felony.” In other words, the state statute must “share[] the nature of the federal offense that serves as a point of comparison.”

The state drug offense must necessarily prohibit conduct punishable under the CSA, and the CSA must necessarily prescribe felony punishment for that conduct.

The Court emphasized that “the generically defined federal crime is ‘any felony punishable under the Controlled Substances Act’ . . . not just any offense under the CSA.” The Court focused on section 841 of the CSA, which provides for two different kinds of punishment for marijuana distribution offenses depending on whether the marijuana is

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463 Id. at 1683.
464 Id. (quoting Lopez v. Gonzales, 549 U.S. 47, 60 (2006)).
465 Id.
466 Id.
467 Id.
468 Id.
469 Id.
470 Id.
471 Id.
472 Id. at 1684.
473 Id. at 1693–94.
474 Id. at 1684.
475 Id. (citing Gonzales v. Duenas-Alvarez, 549 U.S. 183, 186 (2007)).
476 Id.
477 Id. at 1685.
478 Id. (internal quotation marks omitted).
a small amount not meant for sale; one offense is a felony, while the other is not.\textsuperscript{479} Because of the way the Georgia statute is written, the Court concluded that it was unclear whether Moncrieffe’s conviction would correspond to the CSA felony or the CSA misdemeanor.\textsuperscript{480} Therefore, according to the categorical approach, Moncrieffe was not convicted of an aggravated felony.\textsuperscript{481}

The government argued that the misdemeanor provision in the CSA is irrelevant to the categorical test because it “is merely a ‘mitigating exception,’ to the CSA offense, not one of the ‘elements’ of the offense.”\textsuperscript{482} The government also argued that, since possession with intent to distribute is presumptively a felony under the CSA, a state offense with the same elements is presumptively an aggravated felony under the INA.\textsuperscript{483} The Court rejected this argument, noting that marijuana distribution is neither a felony nor a misdemeanor until it is determined whether the misdemeanor provision applies.\textsuperscript{484} The misdemeanor provision is an exception, but neither provision is the default.\textsuperscript{485}

The Court also rejected the government’s proposal of allowing a non-citizen to argue and demonstrate at an immigration proceeding that the conviction involved a small amount of marijuana not meant for sale.\textsuperscript{486} This idea, the Court concluded, is “entirely inconsistent with both the INA’s text and the categorical approach.”\textsuperscript{487} The

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\textsuperscript{479} Id. at 1685–86.
\textsuperscript{480} Id. at 1686–87.
\textsuperscript{481} Id. at 1687.
\textsuperscript{482} Id.
\textsuperscript{483} Id.
\textsuperscript{484} Id. at 1687–88.
\textsuperscript{485} Id. at 1688.
\textsuperscript{486} Id. at 1690.
\textsuperscript{487} Id.
\textsuperscript{488} Id. (citing Chambers v. United States, 155 U.S. 122 (2009)).
\end{footnotesize}
Ineffective Assistance of Counsel

**Trevino v. Thaler, 133 S. Ct. 1911 (2013)**

In this case the Supreme Court considered the timing at which a state prisoner can raise a claim of ineffective assistance of counsel.\(^{489}\) In *Martinez v. Ryan*, the Supreme Court “considered the right of a state prisoner to raise, in a federal habeas corpus proceeding, a claim of ineffective assistance of trial counsel.”\(^{490}\) The Court held that “lack of counsel on collateral review might excuse [a] defendant’s state law procedural default.”\(^{491}\) The Court stated that this holding applied when state procedural law required the defendant to make an ineffective assistance claim in an “initial-review collateral proceeding.”\(^{492}\) In this case, Texas state law gave a defendant the option to “initially raise an ineffective-assistance-of-trial-counsel claim in a state collateral review proceeding,” but it does not require him to do so.\(^{493}\) The Court held that the *Martinez* exception applied to scenarios covered by the Texas law.\(^{494}\)

Carlos Trevino was convicted of murder and sentenced to death in Texas state court.\(^{495}\) The trial judge appointed counsel to represent Trevino in his direct appeal.\(^{496}\) The Texas Court of Criminal Appeals rejected Trevino’s claims, which did not include a claim of ineffective assistance of trial counsel.\(^{497}\) After sentencing, the trial judge appointed new counsel to represent Trevino in state collateral proceedings.\(^{498}\) Trevino’s claims for postconviction relief were denied by the state courts.\(^{499}\) Trevino argued ineffectiveness of counsel at the sentencing hearing, but he failed to allege any “failure adequately to investigate and to present mitigating circumstances during the penalty phase of [his] trial.”\(^{500}\)

Trevino then filed a federal habeas petition.\(^{501}\) Trevino’s new appointed counsel argued that his attorney at the penalty phase failed to adequately investigate and present evidence of mitigating circumstances.\(^{502}\) The only witness to testify at the sentencing hearing was Trevino’s aunt, who talked about Trevino’s “difficult upbringing.”\(^{503}\) Trevino’s attorney argued that his trial counsel should have found and presented other evidence, including the fact that Trevino’s mother abused alcohol while she was pregnant with him.\(^{504}\) The federal court stayed the habeas proceedings so that Trevino could raise this claim in state court.\(^{505}\) The state court held Trevino had procedurally defaulted on this claim because he failed to raise it in his initial post-conviction proceeding.\(^{506}\) The federal district court then denied Trevino’s ineffective assistance claim, holding that his procedural default constituted “an independent and

\(^{489}\) Trevino v. Thaler, 133 S. Ct. 1911, 1914 (2013)

\(^{490}\) Id. (citing Martinez v. Ryan, 132 S. Ct. 1309 (2012)).

\(^{491}\) Id.

\(^{492}\) Id. at 1914–15 (citing Martinez, 132 S. Ct. at 1320).

\(^{493}\) Id. at 1915.

\(^{494}\) Id.

\(^{495}\) Id.

\(^{496}\) Id.

\(^{497}\) Id.

\(^{498}\) Id.

\(^{499}\) Id.

\(^{500}\) Id. (italics omitted).

\(^{501}\) Id.

\(^{502}\) Id.

\(^{503}\) Id. at 1915–16.

\(^{504}\) Id. at 1916.

\(^{505}\) Id.

\(^{506}\) Id.
adequate state ground” to bar the court from considering his claim. The Fifth Circuit affirmed without reaching the merits of the case.

The issue in this case was “whether, as a systematic matter, Texas affords meaningful review of a claim of ineffective assistance of trial counsel.” The Supreme Court concluded that the law of Texas does not afford a meaningful review of ineffective assistance claims.

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assistance claim on direct appeal under Texas procedural rules. The Court reasoned that, if Martinez did not apply to this case, then the Texas procedural system would be unfair because it practically forces defendants to raise ineffective assistance claims for the first time on collateral review. Therefore, when a state procedural framework “makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal,” the Martinez rule applies.

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521 Id.
522 Id. at 1919.
523 Id. at 1921.
Jury Instructions

State v. Becker, 818 N.W.2d 135 (Iowa 2012)

In Becker, the defendant appealed his conviction of first-degree murder, claiming “the jury was improperly instructed on the insanity defense and that the jury should have been instructed regarding the consequences of a verdict of not guilty by reason of insanity.” The Iowa Supreme Court held that the jury instructions were sufficient.

In July 2008, Mark Becker lived with his parents in rural Parkersburg, Iowa. During that time, Becker began having hallucinations that Edward Thomas, his former high school football coach, was sending him messages. After a violent episode, Becker’s parents called the sheriff, and Becker was committed to a psychiatric unit. The following week, Becker was released from the hospital and given prescription medication for his illness. Throughout the following month, Becker had frequent violent outbreaks upon which he was again committed. Becker moved out of his parents’ home for a short time, but quickly returned and continued to have violent episodes and the sheriff’s office involvement persisted. Later that year, Becker moved into his own apartment and was receiving assistance from Cedar valley Community Support Services.

Just a few days before the shooting of Thomas, Becker was involved in another violent episode with a Cedar Falls, Iowa, resident. In this incident, Becker approached a home, asked for a man by name, and then proceeded to beat the man’s front door with a baseball bat. Police were called and Becker was arrested and sent to a psychiatric unit for further evaluation. Becker was diagnosed that day with paranoid schizophrenia and given medication. Within a few days, Becker was released and returned to his parents’ home.

After returning home, Becker broke into his parents’ gun safe, took a .22 caliber gun and began target shooting. Becker then reloaded the gun and drove one of his parents’ vehicles to an Aplington residence, where he asked for Thomas by name. Becker, however, reached the wrong residence, so he decided to Parkersburg to ask people where Thomas could be found. Becker was eventually directed to the high school weight room, where he approached Thomas and shot him six times. Thomas died from the

525 Id. at 137.
526 Id. at 163.
527 Id.
528 Id.
529 Id.
530 Id. at 137–38 (noting that Becker had numerous outbursts in which he violently attacked his own mother).
531 Id. at 138.
532 Id.
533 Id.
534 Id.
535 Id.
536 Id.
537 Id.
538 Id. (“He later told officials that after his practice session he knew he would have to get close to Thomas in order to be sure that he hit him.”).
539 Id.
540 Id. at 138–39 (“Becker told one of these people that he needed to find Thomas because he was working with him on a tornado relief project.”).
541 Id. at 139 (noting that Becker “shot Thomas six times in the head, chest and leg” and then
gunshot wounds and Becker was charged with first-degree murder. 542 Becker provided notice of an insanity defense.543 In support of his defense, Becker called two psychiatrists who offered testimony that Becker neither knew nor understood the nature of the consequences of shooting Thomas due to his diagnosis of paranoid schizophrenia.544 The State agreed with Becker’s diagnosis; however, they argued that Becker did in fact know right from wrong.545

During the jury’s deliberation, the jury sent several questions to the district court judge, notably, asking what would happen if the jury determined Becker was not guilty due to insanity.546 The district court judge replied citing jury instruction number 10, which stated that the jury’s duty was to determine guilt or innocence, not punishment.547 Becker ultimately appealed “claiming the district court improperly instructed the jury when it submitted the Iowa State Bar Association’s jury instructions defining the elements of the insanity defense instead of the instruction Becker requested.”548 Becker also asserted the district court impinged on his due process rights under the Iowa Constitution by refusing to provide jury instructions on the consequence of an insanity defense.549

On review, the Iowa Court of Appeals affirmed the district court’s ruling, and on further review, the Iowa Supreme Court addressed Becker’s claims that (1) the instructions failed to accurately define insanity and (2) that, instead, his instruction should have been offered.550

The Iowa Supreme Court noted that when reviewing jury instructions, the Court looks at the instructions as a whole, not separately.551 Thus, the Court is not required to give a particular party’s requested instructions; rather, the Court must only state the correct and applicable rule of law.552 On appeal, Becker argued the jury instructions misstated the law.553 The Court reasoned that Becker’s proposed jury instructions did in fact closely mirror the applicable Iowa Code; however, the Court held that in reviewing jury instructions, it does not automatically find for the jury instruction that most-closely mirrors the statute.554 Rather, the Court looks to see if the instruction given at the trial court level sufficiently states the applicable law.555 Here, the Court found that the trial court’s instruction “accurately and fairly state[d] the applicable law.”556

With regard to the district court’s response to the jury’s question about the consequences of a finding of guilt, Becker claimed that the Iowa Constitution required the district court

“proceeded to kick and stomp on Thomas, yelling, ‘Fuck you, old man.””).
542 Id.
543 Id. (noting that after Becker shot Thomas, he “left the weight room screaming that he had killed Satan”).
544 Id. (noting that defense counsel claimed Becker was “incapable of distinguishing right from wrong”).
545 Id.
546 Id. at 140.
547 Id. (noting that instruction number 10 does not reference the consequences associated with an insanity defense).
548 Id.
549 Id.
550 Id.
551 Id. at 141.
552 Id. (noting that instructions must accurately state the law, but need not mirror the applicable statute).
553 Id. at 142.
554 Id. at 144.
555 Id.
556 Id.
to inform the jury of the consequences of finding a person not guilty by reason of insanity.\textsuperscript{557} The question here was “whether the district court’s refusal to provide the jury with the proposed consequence instruction necessarily denied Becker a fair trial and made his subsequent conviction constitutionally infirm.”\textsuperscript{558}

The Iowa Supreme Court analyzed its prior holdings regarding a jury’s role in the post-verdict status of defendants deemed not guilty by reason of insanity.\textsuperscript{559} The Court then held that because “there is no historical tradition of requiring a consequence instruction,” Becker’s claim failed.\textsuperscript{560} The Court went on to “note that no state or federal court has found the giving or not giving a consequence instruction violates due process.”\textsuperscript{561} Thus, when looking at the totality of the circumstances, the Court held that Becker’s trial was not fundamentally unfair due to the lack of a jury instruction on consequences.\textsuperscript{562} Rather, the instructions offered by the Court, including the response to the jury’s question, fairly and accurately described the applicable law.\textsuperscript{563} Likewise, the Iowa Constitution does not require a jury instruction regarding the consequences of a finding of not guilty by reason of insanity.\textsuperscript{564}

\textbf{State v. Frei, 831 N.W.2d 70 (Iowa 2013)}

In this case, Denise Frei was charged with first-degree murder for the killing of her longtime boyfriend.\textsuperscript{565} At trial, Frei claimed her actions were justified based on evidence of experiencing battered woman syndrome.\textsuperscript{566} Frei also claimed insanity based on diagnoses of depression and anxiety.\textsuperscript{567} Frei was convicted of first-degree murder, and appealed her conviction, arguing that “the district court erred in denying her motion for a mistrial and by giving improper jury instructions on justification, insanity, and reasonable doubt.”\textsuperscript{568} However, the Iowa Supreme Court affirmed the district court’s holding.\textsuperscript{569}

On July 19, 2009, the police were called to Frei’s home, where they found her sitting on the front porch with bloodstained clothes and hands.\textsuperscript{570} Initially, Frei told police that she had discovered her boyfriend’s body after hearing a “drug deal ‘gone bad;’” however, Frei eventually admitted to killing her abusive boyfriend.\textsuperscript{571} At trial, Frei claimed defenses of justification and insanity, arguing her boyfriend “subjected her to humiliating and degrading emotion, verbal, and sexual abuse and that he threatened to kill her children and grandchild if she ever left him.”\textsuperscript{572} Frei also testified that her boyfriend cut her off from her family.

\textsuperscript{557} Id. at 149.
\textsuperscript{558} Id. at 153.
\textsuperscript{559} Id. at 155 (noting that the jury’s role is limited “to factfinding without regard to the consequences”).
\textsuperscript{560} Id. at 156 (“Jury instructions as to consequences of verdicts are disfavored generally, and they have been specifically rejected in the context of a verdict of not guilty by reason of insanity.”).
\textsuperscript{561} Id. at 158.
\textsuperscript{562} Id. at 161.
\textsuperscript{563} Id. at 163.
\textsuperscript{564} Id.
\textsuperscript{565} State v. Frei, 831 N.W.2d 70, 71 (Iowa 2013).
\textsuperscript{566} Id.
\textsuperscript{567} Id.
\textsuperscript{568} Id.
\textsuperscript{569} Id. at 71-72.
\textsuperscript{570} Id. at 72.
\textsuperscript{571} Id.
\textsuperscript{572} Id.
and routinely threatened her safety and the safety of her family. 573

Frei, her son and his girlfriend devised a plan to kill the boyfriend in July 2009. 574 The plan was to get the boyfriend drunk enough that he would pass out, and then suffocate him by wrapping Saran wrap around his face. 575 The boyfriend, however, woke up while the group was wrapping his face, and he struggled to break free. 576 In a fit of panic, the group began striking the boyfriend with random household objects until he died. 577 It was not until her son admitted to his role in the plan that Frei finally admitted her role. 578

At the trial, Frei called a doctor to testify regarding her depression, posttraumatic stress disorder, and battered woman’s syndrome. 579 The doctor described the severe, life-long traumatic abuse Frei endured, and “opined this extensive history of abuse distorted Frei’s thoughts and feelings and impacted her ability to make rational decisions.” 580 More specifically, the doctor stated, “Frei would have understood it was legally wrong to kill [her boyfriend] but would have also believed it was right to protect her children from his threat to kill them.” 581 The State answered noting that Frei plotted to kill her boyfriend and understood the nature and quality of her acts. 582 The State relied on Frei’s own admissions—that she planned the attack week ahead of time and tried to make the death look accidental. 583 The jury found Frei guilty of first-degree murder, and Frei appealed. 584

First, Frei argued the “objective” requirement of the justification defense—requiring defendant to act and perceive as a reasonable person—is incompatible with the requirement that the State must prove the defendant possessed the level of culpability required to support a conviction for the charged crime.” 585 Frei reasoned that so long as the subjective belief of reasonableness is present, then the objective reasonableness belief should not matter. 586 As such, Frei’s proposed instructions—“defining ‘reasonable force’ as ‘only the amount of force a reasonable person or a person with the Defendant’s alleged degree of mental illness would find necessary to use under the circumstances’”—were denied by the district court. 587 Instead, the court decided to use an instruction that “retained an objective reasonableness requirement.” 588 The Iowa Supreme Court agreed with the State, noting that the instructions given to the jury mirrored the applicable section in the Iowa Code regarding justification as a defense. 589

Frei also requested a variation of the jury instruction on reasonable doubt, but the district court declined to give the instruction. 590 On appeal, the Iowa Supreme Court noted that “[t]he

573 Id.
574 Id.
575 Id.
576 Id.
577 Id.
578 Id.
579 Id. at 72-73.
580 Id. at 73 (noting Frei’s abuse by the boyfriend and former husband, as well as, abuse from her childhood).
581 Id.
582 Id.
583 Id.
584 Id. (appealing jury instructions on elements of justification, insanity, and reasonable doubt, and the denied motion for mistrial after the State violated a motion in limine).
585 Id. at 74.
586 Id.
587 Id.
588 Id.
589 Id. at 75.
590 Id. at 76.
Due Process Clause provides no definitional guidance as it require no ‘particular form of words be used in advising the jury of the government’s burden of proof.”591 Frei claimed “the reasonable doubt instruction given by the district court . . . fell short of the applicable due process standard because it failed to ‘impress upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused.’” 592 However, the Iowa Supreme Court held that “the instructions sufficiently ‘set out an objective standard for measuring the jurors’ doubts.’”593

Frei also opposed the insanity defense instruction, claiming that by allocating the burden of proof to her to prove insanity violated her right to equal protection.594 Meanwhile, the State argued that Frei did not preserve the issue for appeal purposes—she claimed constitutional violations with regard to due process, but not equal protection.595 The Iowa Supreme Court held that the issue was not properly preserved for appeal and thus did not review the issue.596

Lastly, before the trial, Frei won a motion in limine that precluded any mentioning by the State of Frei’s use of racial slurs or her made-up story involving racial slurs.597 The State was allowed to reference the fact that Frei first blamed the death of her boyfriend on “other persons.” 598 During the opening statements of the trial, the State referenced the made-up Hispanic drug dealers, and Frei moved for a mistrial due to the violation of the motion in limine.599 The district court declined to offer a corrective instruction, and instead, the State corrected itself, telling the jury that the State misspoke in referencing “Hispanics.”600 However, Frei believed this misstatement strongly influenced the jurors’ impressions before having a chance to hear all of the evidence.601 The Iowa Supreme Court concluded that the State’s opening remarks “did not deprive Frei of a fair trial,” because no racial slurs were used and the State corrected itself to act in accordance with the motion in limine.602 Therefore, the Court affirmed the district court and found that it did not abuse its discretion by denying Frei’s motion for a mistrial.603

591 Id. at 77 (quoting Victor v. Nebraska, 511 U.S. 1, 5 (1994)).
592 Id. at 79 (citations omitted).
593 Id. at 78 (citing State v. McFarland, 287 N.W.2d 162, 163 (Iowa 1980)).
594 Id. at 80.
595 Id.
596 Id.
597 Id.
598 Id.
599 Id.
600 Id. (“During opening statement there was a reference made the Defendant blamed others for ad rub deal, and Hispanics. It should just been Defendant blamed others. I was incorrect in Hispanics. It was defendant blamed others.”).
601 Id.
602 Id. at 81.
603 Id.
This case arose over a noncustodial interview between law enforcement officers and petitioner, Genovevo Salinas during the course of a murder investigation. During that interview, Petitioner was responsive, but when asked about whether a “ballistics test would show that the shell casings found at the crime scene would match [his] gun,” he became silent. After collecting more evidence, Petitioner was eventually charged with murder and at trial, the “prosecutors argued that his reaction to the officers’ question suggested that he was guilty.” Petitioner argued that the prosecutors’ claim violated his Fifth Amendment privilege against self-incrimination. The jury found Petitioner guilty of murder and the Court of Appeals affirmed the conviction reasoning that “Petitioner’s prearrest, pre-Miranda silence was not ‘compelled’ within the meaning of the Fifth Amendment.” The Texas Court of Criminal Appeals affirmed the conviction on the same grounds. The Supreme Court took the case to resolve the split among lower courts over whether a defendant’s assertion of the privilege against self-incrimination can be used it the prosecutor’s case-in-chief, but never reached the issue, because the Court affirmed the conviction based on the fact that Petitioner never expressly invoked his right to remain silent during the noncustodial interview.

The Court started its analysis noting that “[i]t has long been settled that the privilege [against self-incrimination is] ‘generally not self-executing’ and that a witness who desires its protection ‘must claim it.” The Court noted that there is not a formula for invoking the privilege, but that a “witness does not do so simply by standing mute.” The Court reviewed the importance of an assertion of the right so that the Government is on notice of when a witness intends to rely on the privilege. Additionally, the Court outlined the two exceptions to the requirement that a witness must invoke the privilege: (1) “that a criminal defendant need not take the stand and assert the privilege at his own trial;” and (2) that a witness need not invoke the privilege when subjected to “inherently compelling pressures” on the part of the government.

The Court held that neither exception was applicable in this case because Petitioner’s interview with police was voluntary, as Petitioner acknowledged. This voluntary circumstance is not the type of circumstance where a person is “deprived of the ability to voluntarily invoke the Fifth Amendment,” and because the Petitioner failed to do so, “the prosecution’s use of his

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\text{Miranda}\\
\text{Salinas v. Texas, 133 S. Ct. 2174 (2013)}\\
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\[604\text{ Salinas v. Texas, 133 S. Ct. 2174, 2178 (2013).}\\
\[605\text{ Id. at 2177–78.}\\
\[606\text{ Id.}\\
\[607\text{ Id. at 2178.}\\
\[608\text{ Id. at 2178–79 (citation omitted).}\\
\[609\text{ Id. at 2179 (citation omitted).}\\
\[610\text{ Id (citations omitted).}\\
\[611\text{ Id (citations omitted).}\\
\[613\text{ Id. (citation omitted).}\\
\[614\text{ Id. at 2179 (providing various reasons why such notice is important).}\\
\[615\text{ Id. at 2179–80 (citing Griffin v. California, 380 U.S. 609, 613–615 (1965); Miranda v. Arizona, 384 U.S. 436, 467–68 (1966)).}\\
\[616\text{ Id. at 2180.}\\
\]
noncustodial silence did not violate the Fifth Amendment.”

Petitioner urged the Court to “adopt a third exception to the invocation requirement for cases in which a witness stands mute and thereby declines to answer that officials suspect would be incriminating.” The Court declined to create a third exception to the “general rule’ that a witness must assert the privilege against self-incrimination, as it would “needlessly burden the Government’s interest in obtaining testimony and prosecuting criminal activity.”

The Court noted that there have been several cases in which the Court has held that silence was not sufficient for invoking the right against self-incrimination and cases in which the Court has held that the express invocation was applicable “even when an official has reason to suspect the answer” will be incriminating. Further, the Court held that such an exception could not apply even where there is a combination of a witness’ silence and official suspicions.

The Court was unable to distinguish the noncustodial, pre-Miranda interview, where Petitioner was silent over one question, with Berghuis v. Thompkins, which occurred in the context of post-Miranda silence. In Thompkins, the “defendant failed to invoke the privilege when he refused to respond to questioning for 2 hours and 45 minutes.” “If the extended custodial silence in that case did not invoke the privilege, then surely the momentary silence in this case did not do so either.” Whether the issue is over the response of silence to one question or incriminating statements made after a time-period of silence, “[a] suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege.”

The Court also declined to entertain arguments by the Petitioner over popular misconceptions over legal doctrines and the potential influx of litigation if the Court did not rule in his favor. Although the Court acknowledged that not all people are well schooled in legal doctrine, it pointed out that “the Fifth Amendment guarantees that no one may be ‘compelled in any criminal case to be a witness against himself,’ [but] it does not establish an unqualified ‘right to remain silent.’” The Court argued that it was actually the Petitioner’s position that would produce line-drawing problems in litigation as the Court would have to make decisions about “precisely what point such reactions transform ‘silence’ into expressive conduct.”

Since Petitioner did not invoke his right against self-incrimination, the Court affirmed the decision of the Texas Court of Criminal Appeals.

\footnotetext{623 Id.}
\footnotetext{624 Id.}
\footnotetext{625 Id. at 2182–83.}
\footnotetext{626 Id. (noting that statements against interest are admissible in criminal trials based on Federal Rule of Evidence 804(b)(3)).}
\footnotetext{627 Id. at 2183 (compare with the Petitioner’s argument that litigation would arise over what exactly a suspect must say to invoke his or her privilege against self-incrimination).}
\footnotetext{628 Id.}
State v. Howard, 825 N.W.2d 32 (Iowa 2012)

In this case, Robert Howard appealed his conviction of second-degree sexual abuse and child endangerment, claiming that the district court improperly denied his motion to suppress evidence of a confession. 629 The Iowa Supreme Court held that “the detective’s questioning crossed the line into an improper promise of leniency under [Iowa’s] long-standing precedents, rendering Howard’s subsequent confession inadmissible.” 630

On January 14, 2010, Howard and his girlfriend brought their then seventeen-month-old son to see a doctor because they discovered blood in his diaper. 631 The treating physician examined the baby and determined that although the parents claimed the blood was the result of hard stool, the true “cause of the bleeding was blunt penetration trauma to [the child’s] anus.” 632 While at the hospital, DHS responded and interviewed Howard and the baby’s mother separately. 633 Initially Howard repeatedly told the DHS worker that the child had blood in his diaper due to hard stool, but eventually broke down and admitted to sexually abusing the baby. 634 It is this conversation that Howard claims provided him false hope of leniency, and should therefore be suppressed. 635

“Howard moved to suppress his confession alleging that the state violated Miranda and that his confession was involuntary under the totality-of-the-circumstances and evidentiary tests.” 636 However, the district court denied Howard’s motion to suppress, finding that the “statements that an individual needs treatment . . . and a promise to get help for the defendant [do] not constitute a promise of leniency.” 637 “The jury found Howard guilty of second-degree sexual abuse and child endangerment causing bodily injury,” and the district court sentenced Howard to twenty-five years in prison for his conduct. 638

The court of appeals affirmed the jury verdict, holding that there was not a promise of leniency, and that although the detective referenced Howard’s ability to get help if he confessed, the statements did not “imply ‘help’ would be in lieu of criminal charges.” 639 On further review by the Iowa Supreme Court, the Court reviewed the statements under the promise-of-leniency doctrine, which inquires as to “whether the language used amounts to an inducement which is likely to cause the subject to make a false confession.” 640

Under this test, the Iowa Supreme Court held that while the detective’s line of questioning did not overtly state a lighter sentence would be imposed for confessing, his questioning was “misleading by omission.” 641 The

630 Id.
631 Id.
632 Id. (noting that due to the unique bruising pattern, swelling, and signs of blood flow, the doctor determined the penetration occurred within hours of being brought into the hospital).
633 Id. at 35.
634 Id. at 37–38.
635 Id.
636 Id. at 38.
637 Id. (quoting the district court’s ruling on the motion to suppress).
638 Id. at 39.
639 Id.
640 Id. at 39–40 (quoting State v. Mullin, 85 N.W.2d 598, 601 (Iowa 1957)).
641 Id. at 41 (finding that the detective’s “statements strategically planted in Howard’s mind the idea that he would receive treatment,
detective’s “repeated references to getting help combined with his overt suggestions that after such treatment Howard could rejoin [the mother and child] conveyed the false impression that if Howard admitted to sexually abusing [the child] he merely would be sent to a treatment facility.” 642 Moreover, the detective did not “counter his false impression with any disclaimed that he could make no promises or that charges would be up to the county attorney.” 643 Thus, the Court held that the detective’s interrogation of Howard “crossed the line into an impermissible promise of leniency, rendering the confession that followed inadmissible.” 644 This error was not harmless, thus, the Court held that Howard must receive a new trial. 645

and nothing more, if he confessed.” (quoting the Iowa Court of Appeals)).

642 Id.
643 Id.
644 Id.
645 Id. at 41–42 (“Howard does not argue the evidence was insufficient to convict him without the inadmissible confession. Rather, he argues he is entitled to a new trial because the State cannot show the erroneous admission of his confession was harmless error.”).
Necessary and Proper Clause

United States v. Kebodeaux, 133 S.Ct. 2496 (2013)

In this case the Court considered whether the Constitution’s Necessary and Proper Clause granted Congress the “power to enact [the Sex Offender Registration and Notification Act (SORNA)] requirements and apply them to a federal offender who had completed his sentence prior to the time of SORNA’s enactment.”

In 1999, Petitioner, Anthony Kebodeaux, a member of the United States Air Force, was convicted of a sex offense by a special court-martial and discharged. Kebodeaux completed his sentence and several years later, SORNA was enacted and required “those convicted of a federal sex offense[] to register in the State’s where they live, study, and work. . . . [even if the offender] had already completed their sentence.”

Petitioner came to the attention of the Federal Government after he moved to a new city in Texas and failed to update his registration as a sex offender, despite being up to date with Texas state requirements up to that point.

Petitioner was convicted of violating SORNA in district court, and the Fifth Circuit initially affirmed, but then reversed sitting en banc, holding that “Kebodeaux had ‘fully served’ his sex-offense sentence; he was ‘no longer in federal custody, in the military, under any sort of supervised release or parole, or in any other special relationship with the federal government.’” The Fifth Circuit pointed out that once a person is “unconditionally set free” there is not a jurisdictional basis for criminal prosecution.

The Court’s primary point of contention was that it disagreed that Petitioner had been released unconditionally and lacked any “special relationship with the federal government.” The Court focused its analysis on the Wetterling Act, which the Solicitor General brought to its attention. Petitioner was subjected to the requirements of this act as it was enacted in 1994 and was continuously updated through his offense and conviction. This Act “used the federal spending power to encourage States to adopt sex offender registration laws.”

Similar to SORNA, the Act applied to federal sex crimes and imposed federal penalties on those who failed to register in States in which they lived, worked, and studied.

Further, crimes committed by military personnel were specifically included under the Act after the authority to designate sex offenses was delegated to the Director of the Bureau of Prisons in 1998. And, in a separate section of the Act, the Secretary of Defense was provided authority to define military crimes triggering registration requirements, to which the crime of which Petitioner was convicted was added in 1998.

\[647\] Id. at 2499.
\[648\] Id. at 2499-2500.
\[649\] Id. at 2500.
“no plausible counterargument to the obvious conclusion, namely that as of the time of Kebodeaux’s offense, conviction and release from federal custody, these Wetterling Act provisions applied to [him] and imposed upon him registration requirements very similar to those that SORNA later imposed.”

The Court concluded that “if, as of the time of Kebodeaux’s offense, he was subjected to a federal registration requirement, then the Necessary and Proper Clause authorized Congress to modify the requirement as in SORNA and to apply the modified requirement in Kebodeaux.”

The Court pointed out that it would be difficult to dispute that the Watterling Act fell beyond the scope of the Necessary and Proper Clause as many crimes have already been defined through the use of the Clause.

Further “Congress’ decision to impose such a civil requirement that would apply upon the release of offender like Kebodeaux is eminently reasonable [as Congress could easily] conclude that registration requirements applied to federal sex offenders after their release can help protect the public from those federal sex offenders and alleviate public safety concerns.” Additionally, the federal government has often tracked “former federal prisoners through probation, parole, and supervised release in part to prevent further crimes thereby protecting the public against the risk of recidivism” much like the Wetterling Act did. Comparatively,

SORNA did not exclude those who were “unconditionally released,” but just modified applicable registration requirements and encouraged state compliance through spending provisions.

The Court concluded “that the SORNA changes as applied to Kebodeaux fall within the scope of Congress’ authority under the Military Regulation and Necessary and Proper Clauses” and reversed the Fifth Circuits holding.

660 Id. at 2502.
661 Id. (noting that the Court of Appeals and Kebodeaux came close to this conclusion).
662 Id. at 2502-03 (noting that the clause includes the power to make rules for regulating naval forces and that congressional power in making those rules is broad).
663 Id. at 2504 (citations omitted).
664 Id. 2504-05 (noting information and time distinctions in requirements).
665 Id. at 2505.
Plain Error


This case involved an appeal from the federal court of appeals for the Fifth Circuit, in which the defendant, who pled guilty to being a felon in possession of a firearm, and filed a motion to correct his sentence, but the motion was denied. A federal court of appeals normally will not correct a legal error made in criminal trial court proceedings unless the defendant first brought the error to the trial court’s attention. However, Federal Rule of Criminal Procedure 52(b) acts as an exception to the rule in that plain errors affecting substantial rights may be considered by the federal court even though it was not brought to the attention of the trial court. The question on this review was the time at an error becomes “plain”? Does a plain error need to be present at the trial court level; or is it sufficient for the error to become “plain” at the time of appellate review? Here, the U.S. Supreme Court held that “as long as the error was plain as of that later time—the time of appellate review—the error is “plain” within the meaning of the Rule.”

In this case, Armacion Henderson was sentenced to an above-the-guidelines period of imprisonment so that he could qualify for in-prison drug treatment. At the time of the sentencing, Henderson’s counsel presented no objection, and Henderson subsequently appealed, claiming the judge made a “plain error” in sentencing him in excess of the guidelines “solely for rehabilitative purposes.” In the meantime, the U.S. Supreme Court decided Tapia v. United States, in which it held that “it is error for a court to ‘impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation.’” Therefore, Henderson’s sentence became unlawful; but, his counsel had not objected at the trial court level, meaning the court of appeals could not hear the case unless Rule 52(b) applied. The appellate court concluded that because Henderson cannot show plain error at the time of his trial, he is not entitled to reconsideration of his sentence. The U.S. Supreme Court granted certiorari to settle differences among the various circuits.

Neither precedent nor Rule 52(b) answers the question of whether “the time for determining ‘plainness’ [is] the time when the error is committed, or [whether] an error [can] be ‘plain’ if it is not plain until the time the error is reviewed.” The general rule is that appellate courts must apply the rules in effect at the time of the trial. Yet, Rule 52(b) by itself makes this general principle non-absolute. However, Rule 52(b) does not resolve the temporal

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667 Id.
668 Id.
669 Id.
670 Id. at 1124–25.
671 Id. (noting that the Court of Appeals may then consider the error even if it was not brought to the attention of the trial court).
problem here, and precedent has not reached this issue yet.\textsuperscript{681} In \textit{Johnson v. United States}, the Court held that “where the law at the time of trial was settled and clearly contrary to the law at the time of appeal, it is enough that an error be “plain” at the time of appellate consideration.”\textsuperscript{682} However, that case did not address the potential problem of unsettled law at the time of the trial court decision that was then settled at the time of review, causing potential plain error.\textsuperscript{683}

The U.S. Supreme Court held that “whether a legal question was settled or unsettled at the time of trial, ‘it is enough that an error be “plain” at the time of appellate consideration.’”\textsuperscript{684} The Court found that “the competing ‘time of error’ rule is out of step with our precedents, creates unfair and anomalous results, and works practical administrative harm.”\textsuperscript{685}

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\textsuperscript{681} Id. at 1127.  \\
\textsuperscript{682} Id. (quoting Johnson v. United States, 520 U.S. 461, 468 (1997)).  \\
\textsuperscript{683} Id.  \\
\textsuperscript{684} Id. at 1130.  \\
\textsuperscript{685} Id. at 1129.
\end{flushright}
Plea Negotiations

United States v. Davila, 133 S.Ct. 2139 (2013)

This case arose over plea-bargaining in a case involving conspiracy to defraud the United States by filing false income tax returns. Rule 11 of the Federal Rules of Criminal Procedure governs guilty pleas. “Rule 11(c)(1), instructs that ‘[t]he court must not participate in [plea] discussions’ . . . [and] Rule 11(h), states [that a] variance from the requirements of th[e] rule is harmless error if it does not affect substantial rights.” “Rule 52(a) [governs court errors generally, and] similarly prescribes [that] ‘[a]ny error . . . that does not affect substantial rights must be disregarded.’”

During pretrial proceedings in this case and in camera hearing was held because Anthony Davila was requesting new counsel. At the hearing the judge informed Davila that he could represent himself, but would not be appointed a new counsel, and then offered several pieces of advice that implied that Davila should enter a guilty plea. Three months later he entered a guilty plea and later appealed claiming that he did so because of strong encouragement on the part of the judge while at a hearing during pretrial proceedings. Upon appeal, the Eleventh Circuit held that due to the violation of Rule 11(c)(1), automatic vacatur of the guilty plea was warranted. This Court remanded finding that Rule 11(h) controls and “vacatur of the plea is not in order if the record shows no prejudice to Davila’s decision to plead guilty.”

Through the course of its analysis the Court differentiated between Rules 11(c)(1), 11(h) and 52. Rule 11(c)(1) was created in response to judges involvement in plea bargaining becoming “common practice” and the concern over the voluntariness of defendant’s pleas where a judge is encouraging a plea that could potentially also reside over sentencing. In a later amendment, Rule 11(h) was added to reject the extreme sanction of automatic reversal and clarify that the harmlessness inquiry applies to plea errors. Rule 52 outlines harmless error and plain error analysis in light of trial court errors generally. If affirmed that he was not under presser, threats, or promises to enter the plea).

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687 Id.
688 Id. (quoting Fed. R. OF CRIM. P. 11).
689 Id.
690 Id. (Davila initiated the hearing because he did not believe his attorney was offering any type of defensive strategy and was only instructing him to enter a plea).
691 Id.
692 Id. at 2144-2145 (during his guilty plea, Davila did not mention the pre-plea hearing and

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693 Id. at 2143 & 2245 (interestingly, Davila’s counsel on appeal sought to withdraw from the case pursuant to Anders v. California, 386 U.S. 738, (1967), stating that there were no arguable issues on appeal, but the court denied the attorney’s motion and upon independent review of the record, hinted that the statements by the magistrate judge during the in camera hearing should be evaluated).
694 Id.
695 Id. at 2146 (citations omitted).
696 Id. at 2146-2147 (citations omitted) (this amendment came in response to McCarthy v. United States, 294 U.S. 459 (1969) where the Court distinguished between “ceremony . . . . [and] substance” through Rule 11(h) finding that failure to inquire about a defendant’s understanding of charges constituted a procedural error, to which harmless error review of Rule 52(a) could not be utilized; in creating 11(h) the advisory committee emphasized that Rule 11 would remain the default rule).
697 Id. at 1247.
substantial rights are not affected, the error must be disregarded and the government bears the burden of showing the error was harmless.\textsuperscript{698} Plain-error can cause reversal even where the error was not brought to the court’s attention and the defendant must show that the error affects substantial rights.\textsuperscript{699}

In \textit{United States v. Vonn}, and \textit{United States v. Domiguez Benitez}, the Court held that a Rule 11 error can be harmless or plain error depending on when it is raised.\textsuperscript{700} When the plea error is first objected to on appeal, the plain error rule of 52(b) applies when a defendant allows a Rule 11 error to pass without an objection in trial court.\textsuperscript{701} The defendant’s burden in such cases is to “show a reasonable probability that, but for the error, he would not have entered the plea.”\textsuperscript{702}

In this case there was no dispute that the judge violated Rule 11(c)(1) by participating in plea discussions at the \textit{in camera} hearing.\textsuperscript{703} Davila contended that plea-colloquy errors such as those in \textit{Vonn} and \textit{Domiguez Benitez} are different than what occurred in his case, because those requirements come into play after a defendant has agreed to plead guilty.\textsuperscript{704} As such, he argued that Rule 11(c)(1) violations still require automatic vacatur under these circumstances.\textsuperscript{705} He argued that when a judge inserts himself in pretrial discussions prior to the defendant deciding whether to plead guilty or stand trial, he becomes a second prosecutor, and suggestions to enter a plea “infect the ensuing pretrial process.”\textsuperscript{706}

The Court was not persuaded by this line of argument as neither the text of 11(c) nor the Advisory Committee indicated that there were different categories of participation in plea negotiations or that one might be a “necessarily . . . error graver than” the type of error in \textit{Vonn} and \textit{Domiguez Benitez}.\textsuperscript{707} Further the Court found that “Rule 11(h), specifically designed to stop automatic vacaturs, calls for across-the-board application of the harmless-error prescription (or, absent prompt objection, the plain-error rule).”\textsuperscript{708} The Court pointed out that automatic reversal is allowed in a very limited class of errors that are characterized as “structural” and include things like “denial of counsel of choice, denial of self-representation, denial of a public trial, and failure to convey to a jury that guilty must be proved beyond a reasonable doubt.”\textsuperscript{709} Particular facts in this case also were damming to Davila’s argument such as him waiting three months to raise the issue of the judge’s behavior in the \textit{in camera} proceeding and failing to indicate any pressure to plea when it was inquired about at his guilty plea.\textsuperscript{710}

After explaining that the automatic vacatur was inappropriate under Rule 11, the court remanded the case to determine whether the case should be analyzed under the plain-

\textsuperscript{698} Id.
\textsuperscript{699} Id.
\textsuperscript{701} Id. (citation omitted).
\textsuperscript{702} Id. (citation omitted).
\textsuperscript{703} Id. at 2148.
\textsuperscript{704} Id.
\textsuperscript{705} Id.
\textsuperscript{706} Id.
\textsuperscript{707} Id. at 2149.
\textsuperscript{708} Id.
\textsuperscript{709} Id. (citations omitted).
\textsuperscript{710} Id.
error or harmless-error standard prescribed by Rule 52.\textsuperscript{711}
This disciplinary case involves attorney Paul Bieber, who allegedly violated several rules of professional conduct relating to a fraudulent real estate transaction. The Iowa Supreme Court found that Bieber did violate rules of professional conduct and thus suspended his license indefinitely with no possible reinstatement for six months.

Bieber has been a member of the Iowa bar since 1980 and has maintained a distinguished law practice in Scott County. However, in June 2011, Bieber pled guilty to misprision of a felony and was sentenced to three years probation in federal court. The facts of the transaction leading to misprision of a felony are as follows. Bieber was retained to act on behalf of a seller of real estate. The real estate agent and buyers agreed to create documents inflating the sale price in order to obtain a larger loan from the lending company. To do so, the parties documented the “sale price” at $155,000, when the real price for the property was $100,000. The parties then agreed that after the sale, $55,000 (the difference between the actual and inflated prices) would be paid back to the buyers.

Bieber, representing the seller, knew about the deal—he “was aware of the lower actual price and the cash back payment, and the fact that those details would not be conveyed to the lender.” Then, when Bieber prepared the declaration of value for his client, he falsely represented the sale price. Subsequently, the Iowa Supreme Court Attorney Disciplinary Board (Board) alleged Bieber violated Rules 32:1.2(d) (regarding counseling or assisting a client in criminal activity), 32:1.16(a) (detailing the procedure for withdrawing as counsel), 32:4.1(a) (involving making a false statement of material fact or law), and 32:8.4(b) (regarding an attorney’s criminal acts as adversely reflecting trustworthiness and fitness).

Initially, Bieber denied knowing that his documentation was criminal conduct because the false statement was not “material” to the lender. Rather, Bieber and his client believed the $55,000 rebate would be used for repairs and improvements on the property. However, at the time of the hearing, Bieber conceded to all allegations.

Here, Bieber agreed that he violated Rule 32:1.2(d) by knowing of the discrepancy in sale price, yet
assisting his client with concealing that fact from the lender. Likewise, Bieber’s misrepresentation of the sale price was a false statement of material fact and in violation of Rule 32:4.1(a). Bieber also agreed that he violated Rule 32:8.4(b) by engaging in criminal activity while representing his client because there was a “rational connection between Bieber’s conduct and his fitness to practice law.” Here, Bieber actively concealed information from the lender, knowing that it was misrepresented. Additionally, Bieber violated Rule 32:1.16(a)(1) by failing to withdraw as counsel. In this case, Bieber knew that his actions would constitute fraud and would thus cause him to violate rules of professional conduct; yet, he continued to represent the seller without attempting to withdraw as counsel.

When considering the most appropriate sanction, the court looks at the mitigating and aggravating circumstances of the situation. Here, the commission recommended a six-month suspension due to Bieber’s lack of prior disciplinary actions and lack of profit from the misrepresentation. The Iowa Supreme Court noted the severity of the circumstances surrounding the criminal conviction of the fraudulent conduct, but it also pointed out that circumstances were mitigated by Bieber’s clean record, acknowledgment of wrongdoing, and remorse. Therefore, the Court suspended Bieber’s license for an indefinite period without possibility of reinstatement for six months.

Iowa Supreme Court Attorney Disciplinary Board v. Cannon, 821 N.W.2d 873 (Iowa 2012)

This disciplinary action involved Peter Cannon and three criminal convictions, which constituted ethical violations under the Iowa Rules of Professional Conduct. After reviewing the criminal convictions, the Iowa Supreme Court found that Cannon violated Rule 32:8.4(b), and suspended his license to practice law for thirty days.

Cannon was admitted to the Iowa bar in 1983 and practiced at a firm before going solo. In July 2009, Cannon was convicted of operating a boat while intoxicated, first offense, and later that year, was convicted of possession of cocaine. A year later, Cannon was convicted of operating a vehicle while intoxicated (OWI). The [Iowa Supreme Court Attorney Disciplinary Board (Board)] contend[ed] [that] these offenses violated Iowa Rule of Professional Conduct 32:8.4(b),” which relates to lawyer’s conduct and criminal activity. Rule 32:8.4(b) states: “It is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer’s honesty,
trustworthiness, or fitness as a lawyer in other respects.” Mere criminality is not enough to violate this rule; rather, one must engage in conduct that “demonstrates . . . defects that would detract from [one's] ability to be trusted with ‘important controversies and confidential information.” In this case, the Board alleged that Cannon’s conduct that resulted in numerous criminal convictions violated the very core of this rule. Cannon’s boating incident, cocaine possession, and subsequent OWI raised significant concern for the safety and well being of others and him. The Court noted that the offenses demonstrated a clear pattern of criminal conduct.

One fact weighing in Cannon’s favor, was that “no actual physical or economic harm” was inflicted on “clients as a result of Cannon’s crimes.” Nevertheless, the factors weighing against Cannon—his repeated substance abuse and convictions for similar criminal conduct, disrespect for law enforcement officials by failing to cooperate, and the risk of his irresponsible conduct—were significant and could not be overlooked. Therefore, after weighing the mitigating and aggravating factors, the Court found that Cannon violated Rule 32:8.4(b) and suspended his license for thirty days.

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743 Id. at 877 (alterations in original) (quoting IOWA R. PROF’L CONDUCT 32:8.4(b)) (internal quotation marks omitted).
744 Id. (quoting Iowa Sup. Ct. Att’y Disciplinary Bd. v. Schmidt, 796 N.W.2d 33, 40 (Iowa 2011)).
745 Id. at 877–78.
746 Id. at 878–79.
747 Id. at 879 (demonstrating “a disrespect for the law and law enforcement”).
748 Id. at 880.
749 Id.
750 Id. 880–883 (noting that Cannon was “an experienced attorney” and “should have known better” (quoting Iowa Sup. Ct. Att’y Disciplinary Bd. v. Howe, 706 N.W.2d 360, 381 (Iowa 2005))).
752 Id.
753 Id.
754 Id. at 527.
755 Id.
756 Id.
members at the end of every year, based on a pre-determined formula. In 2010, the bookkeeper noticed Henrichsen had failed to provide any checks from a particular client for work already performed. The bookkeeper knew the checks usually came in monthly, and notified the other shareholders, who then asked the bookkeeper to investigate further. The bookkeeper's investigation showed that there were actually several clients for whom Henrichsen was not turning over fees. Another shareholder then confronted Henrichsen, who admitted to depositing the checks into his personal bank account. Henrichsen subsequently left the firm, started his own practice, and self-reported to the Iowa Supreme Court Attorney Disciplinary Board (Board). In his admission to the Board, Henrichsen acknowledged that he did not why he kept the money for personal use, and at his hearing, he testified both he and his counselor believed he had control issues. The Board recommended a public reprimand. The Board alleged Henrichsen violated Rule 32:8.4(c), which involves dishonest, fraudulent, deceitful, and misrepresentative conduct on behalf of the attorney. Here, Henrichsen withheld money from the law firm and instead deposited the money into his own personal bank account in direct violation of the shareholder agreement.

The Iowa Supreme Court stated its belief that “honesty is paramount in the legal profession;” thus, the sanction for controverting funds may be severe. In Henrichsen’s case, the record showed that his actions took place over a several-year timespan and that his compulsory defense did not excuse his misconduct. Even though Henrichsen self-reported and had been involved in several volunteer and community activities, the Court held that the seriousness of his ethical violation called for a suspension of his license for a period of three months.

**Iowa Supreme Court Attorney Disciplinary Board v. Kersenbrock, 821 N.W.2d 415 (Iowa 2012)**

In *Kersenbrock*, the Iowa Supreme Court Attorney Disciplinary Board (Board) alleged that attorney Sara Kersenbrock engaged in “a number of improper business activities, including improper handling of client retainers.” Due to the severity of the circumstances, the Iowa Supreme Court suspended Kersenbrock’s license to practice for thirty days. In *Kersenbrock*, a former employee-paralegal who worked for Kersenbrock raised the allegations of improper attorney conduct.

757 *Id.* at 528–29 (citing several cases in which the court has issued severe sanctions for conduct similar to that of Henrichsen’s).
758 *Id.* at 530.
759 *Id.*
760 *Id.*
761 *Id.*
762 *Id.*
763 *Id.*
764 *Id.*
765 *Id.*
766 *Id.* at 528.
767 *Id.*
768 *Id.*
769 *Id.*
771 *Id.* (noting that although the Grievance Commission recommended a public reprimand, the Iowa Supreme Court, upon de novo review, imposed a stronger sanction).
772 *Id.* at 417.
former employee’s “complaint prompted the client security commission to audit Kersenbrock,” and the commission found that several aspects of record keeping with regard to trust accounts to be improper. 773 A complaint was subsequently filed against Kersenbrock by the Board, alleging violation of several Iowa Rules of Professional Conduct including: Rule 32:1.5(a) for “collecting an unreasonable fee;” Rule 32:1.15(a) for “failing to maintain adequate records;” Rule 32.1.15(c) for “failing to deposit retainers into client trust account[s];” and Rule 32:8.4(c) for “engaging in conduct involving misrepresentation.” 774

At the Board’s hearing, the former employee-paralegal testified that Kersenbrock habitually failed to deposit client money in a trust account. 775 Likewise, the auditor found that few deposits were made into client trust accounts during the five-year timeframe in question. 776 Kersenbrock admitted to failing to comply with client trust account rules, but attempted to rationalize her behavior, claiming that in some instances, the client retainers had already been earned when given to her, thus eliminating the need for deposit in a trust account. 777 The commission found Kersenbrock in violation of the above-mentioned Iowa Rules of Professional Conduct, and recommended a public reprimand. 778

On review, the Iowa Supreme Court is permitted to “impose a ‘lesser or greater sanction than the discipline recommended by the grievance commission.’” 779 The Court found that Kersenbrock violated the professional conduct rule regarding client trust accounts by “failing to deposit retainers into a client trust account.” 780 Likewise, the Court found that Kersenbrock’s failure to keep adequate and timely records was in direct violation of the rules of professional conduct. 781 In addition, the Court found that Kersenbrock violated a rule regarding probate fees by taking a probate fee prematurely. 782 The Board alleged that Kersenbrock received both the first and second portions of the probate fee before the final report was filed. 783 The Court also found that Kersenbrock engaged in dishonest, fraudulent, and deceitful conduct, resulting in misrepresentation. 784

When determining the appropriate sanction, the Court is mindful of the commission’s recommendations and the circumstances surrounding the violations. 785 The Court was mindful

773 Id. (noting that Kersenbrock failed to “deposit retainers into a client trust account, failed to prepare monthly [statements], and improperly certified various aspects of annual client security questionnaire[s]”).
774 Id.
775 Id. (noting that instead of depositing client money into a trust account, Kersenbrock stored money in books on her personal bookshelf or simply prematurely deposited the money into her own bank account).
776 Id.
777 Id. at 418. Kersenbrock admitted that “she ‘had not done official reconciliation with the checkbook,’” but had “performed monthly reconciliations ‘in her head.’” Id.
778 Id. at
779 Id. at 419.
780 Id.
781 Id. at 419–20.
782 Id. at 420.
783 Id. (noting that Kersenbrock admitted to collecting the second-half probate fees prematurely and in violation of the Iowa Rules of Professional Conduct).
784 Id. (noting that Kersenbrock misrepresented her client security, even though she was failing to keep and maintain proper client accounting).
785 Id. at 421 (noting that “[t]he appropriate sanction is determined by weighing the aggravating and mitigating circumstances and considering the ‘nature of the violation, the need
that Kersenbrock’s actions inflicted no harm on any of her clients; however, the Court was wary of the extent of the inadequate records. The Court noted that because there was no harm to clients, it was nearly impossible to determine the extent to which Kersenbrock had engaged in such improper conduct. Likewise, the Court noted the “cumulative impact of all violations [was] an important consideration,” thus, under the circumstances, a greater sanction was required. Therefore, the Court concluded that the appropriate sanction under these specific circumstances demanded a suspension of Kersenbrock’s license to practice law for thirty days.

**Iowa Supreme Court Attorney Disciplinary Board v. Laing, 832 N.W.2d 366 (Iowa 2013)**

This case arose from conservator services provided by Donald N. Laing and D. Scott Railsback to a ward over a period of time lasting more than three decades. As a result of these services, the “attorneys were later sued by the ward who alleged, and the district court found, the attorneys had charged and received excessive fees for their services.” After the Iowa Supreme Court Attorney Disciplinary Board (Board) charged multiple ethical violations and the Grievance Commission of the Supreme Court of Iowa (Commission) found violations of the rules, the Court suspended their licenses for eighteen months.

Laing and Railsback were appointed as conservators for John T. Klein in 1974. He was a Vietnam veteran who struggled with paranoid schizophrenia, depression, and substance abuse. His need for a conservator arose out of inheriting farmland and property from his mother’s estate and later from an aunt. During the thirty-four years that Laing and Railsback were appointed work that they “characterized as ‘conservator services’ . . . steadily increased from $42 to $125 per hour . . . [and] ranged from a low of 31.75 hours to a high of 236 hours.” In addition, “the number of hours [Laing and Railsback] claimed for preparation of annual reports rose steadily over the years . . . [climbing to] seventy-six hours.” During the trial for the attorneys’ removal as conservators, the district court found that a reasonable hourly rate for “conservator services” was $15 per hour and that annual reports should not have taken more than

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786 Id. at 422.
787 Id. (noting that “persistent failure to keep appropriate records has the effect of preventing effective review of [the] accounting practices”).
788 Id. (finding that although the commission recommended a public reprimand, the Court found the violations to be egregious enough to warrant a greater punishment).
789 Id. at 422–23.
791 Id.
792 Id.
793 Id. at 368 (stating that Laing was the primary attorney while Railsback assisted periodically).
794 Id.
795 Id.
796 Id. at 371 (noting that “conservator services” ranged from things like payment of expenses or banking transactions to things that do not require legal training or expertise such as attending birthday parties and shopping for clothes).
797 Id.
eight hours to prepare. Over the course of the thirty-four years, the amounts for which the attorneys filed annual reports and sought compensation through the courts was only given a second look on three occasions, but each time, the court approved the amount or modified it only slightly.

When Laing filed the thirty-fourth annual report and request for fees, “Klein appeared through separate counsel, objected to the conservator’s annual report, and requested Laing’s removal as conservator.” The new counsel also filed a petitioner “alleging [Laing and Railsback] had engaged in fraud and deceit in requesting excessive fees and praying for restitution.” At trial, the district court found that the respondents had claimed excessive hours and received excessive fees for services that could have been completed by a legal secretary or paralegal. The court entered judgment in favor of Klein in the amount of $175,511.60. The court of appeals affirmed the judgment, but modified the amount to $178,497.91, and the request for further review was denied by the Court.

The Board then filed a complaint against the attorneys for:

1. Engaging in conduct involving dishonesty, fraud, deceit or misrepresentation . . .
2. Engaging in conduct that was prejudicial to the administration of justice . . .
3. Collecting clearly excessive fees . . .
4. Continuing employment as conservator or attorney for the conservator under circumstances presenting a conflict of interest.

Through a hearing the Commission then found that Laing and Railsback claimed excessive hours and charged excessive fees for legal services and conservator’s services . . . [and that their] course of conduct in claiming excessive hours for services and charging excessive fees constituted dishonesty, fraud, deceit, or misrepresentation reflecting adversely on their fitness to practice law . . . and constituted conduct prejudicial to the administration of justice.

Lastly, it found that the attorneys violated rules by continuing to serve as conservator despite a conflict of interest created through their negotiations of farm leases and being conservator. The Commission recommended a three-year licensing suspension.

The Court reviews attorney disciplinary proceedings de novo, and the Commission’s recommendations are not binding. The “Board must prove its allegations of misconduct by a convincing preponderance of the evidence.”

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798 Id.
799 Id at 369 (noting that hearings were held with regard to the ninth, tenth and eleventh annual reports).
800 Id. at 371.
801 Id. at 371–72.
802 Id. at 372.
803 Id.
804 Id.
evidence.”810 In this instance, the Court held that the Board met its burden.811 The Court agreed with the Commission’s findings. In considering sanctions, the Court looked to the nature and extent of the [attorneys’] ethical infractions, [their] fitness to continue practicing law, [the Court’s] obligation to protect the public from further harm . . . ., the need to deter other attorneys from engaging in similar misconduct, [the Court’s] desire to maintain the reputation of the bar as a whole, and any aggravating or mitigating circumstances.812 The Court viewed the attorneys’ “profound and persistent lack of awareness of and responsibility for the excessiveness of their fess as an aggravating factor.”813 The Court found the attorneys’ difficult position a mitigating factor as they were filling in when family members were not stepping-up and taking responsibility for Klein’s complicated situation.814 The Court held that the attorney’s licenses should be suspended for eighteen months and that reinstatement shall not be ordered until the judgment imposed by the district court is satisfied.815

Iowa Supreme Court Attorney Disciplinary Board v. Marks, 831 N.W.2d 194 (Iowa 2013)

This case arose after the Iowa Supreme Court Attorney Disciplinary Board (Board) alleged that Samuel Zachary Marks “violated four ethical rules in handling a probate matter by providing representation that was not competent, failing to act with reasonable diligence, failing to expedite litigation, and engaging in conduct prejudicial to the administration of justice.”816 After the grievance committee found that Marks “violated the Iowa Rules of Professional Conduct and recommended a six-month suspension” this Court reviewed the facts and recommendation finding that “Marks committed ethical violations and suspend[ed] his license to practice law indefinitely with no possibility of reinstatement for three months.”817

This case was initiated when the Board filed a complaint having to do with nine delinquency notices surrounding the handling of the estate of William General Rumley by Marks beginning in 2003. The last of those notices was filed near the end of 2009 for “failing to file a final report in the estate.”818 Marks had 60 days to cure the delinquency and when he failed to cure the delinquency, the Polk County District Court filed a certification with the court administrator who forwarded it to the Board. Marks did not answer the complaint filed by the Board, and upon the Board’s motion, the allegations

810 Id. at 368 (citing Iowa Sup. Ct. Att’y Disciplinary Bd. v. Howe, 706 N.W.2d 360, 366 (Iowa 2005)).
811 Id. at 373.
812 Id. (citing Iowa Sup. Ct. Bd. of Prof’l Ethics & Conduct v. Kallsen, 670 N.W.2d 161, 164 (Iowa 2003)).
813 Id.
814 Id.
815 Id.
817 Id.
818 Id.
in the complaint were deemed admitted.\textsuperscript{819}

Marks appeared before the Court for past disciplinary issues in 2009 and 2012. The 2009 issue arose from neglecting responsibilities in probating two estates, one of which was the Rumley estate that was at issue in this case.\textsuperscript{820} His license was suspended for 30 days in that instance.\textsuperscript{821} For the 2012 issue, Marks was issued a public reprimand, because the behavior at issue then actually took place prior to the 2009 suspension.\textsuperscript{822} In addition, Marks was subject to discipline on a few other instances for failure to cooperate with the Board’s investigation into probate matters.\textsuperscript{823}

In disciplinary matters, the Court reviews the proceedings de novo and the “Board bears the burden of proving misconduct by a convincing preponderance of the evidence . . . . If [the Court] determine[s] the board has met its burden and proven misconduct, we may impose a greater or lesser sanction than the sanction recommended by the commission.” \textsuperscript{824} In this case, the commission recommended a six-month suspension and as a condition of reinstatement, a requirement that Marks obtain a medical or mental health to certify that he is fit to practice law.\textsuperscript{825} The Board charged Marks with violating Iowa Rules of Professional Conduct having to do with competence, diligence, expediting litigation, and misconduct.\textsuperscript{826}

With regard to competence, Iowa Rule of Professional Conduct 32:1.1 provides that lawyers shall provide competent representation to clients which requires “legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.” \textsuperscript{827} The Court found that the Board proved that Marks was not competent by preponderance of the evidence because during his testimony before the grievance commission, Marks acknowledged that he did not feel competent to practice in the area of probate.\textsuperscript{828}

Iowa Rule of Professional Conduct 32:1.3 has to do with diligence and states “[a] lawyer shall act with reasonable diligence and promptness in representing a client.” \textsuperscript{829} In the area of diligence, merely missing one deadline will not rise to the level of an ethical violation, but that such a violation arises from multiple instances of failing to perform required functions or meet deadlines.\textsuperscript{830} The Court concluded that the Board proved Marks lacked diligence.

\textsuperscript{819} Id. (citing IOWA CT. R. 36.7) (noting that the Board provided Marks with four opportunities to respond over a period of eight months and that even after Marks promised to follow up to the last communication, he failed to do so).
\textsuperscript{820} Id. at 197.
\textsuperscript{821} Id.
\textsuperscript{822} Id. (noting that if the Court was aware of the behavior prior to the 2009 violation it likely would not have suspended Mark’s license for more than 30 days).
\textsuperscript{823} Id. (noting that his license was temporarily suspended in 2006 and he was publicly reprimanded in 2007).
\textsuperscript{824} Id. (quoting Iowa Sup. Ct. Att’y Disciplinary Bd. v. Cannon, 821 N.W.2d 873, 876–77 (Iowa 2012)).
\textsuperscript{825} Id.
\textsuperscript{826} Id. 197–200 (citing IOWA R. OF PROF’L CONDUCT 32:1.1, 1.3, 3.2, & 8.4(d)).
\textsuperscript{827} Id. 197–98 (citing IOWA R. OF PROF’L CONDUCT 32:1.1).
\textsuperscript{828} Id. at 197 (noting that Marks indicated that he was not “proficient in the probate area” and that he had “some sort of mental block” that stopped him from wrapping up the Rumley estate.)
\textsuperscript{829} Id. at 198 (quoting Iowa Rule of Professional Conduct 32:1.3).
\textsuperscript{830} Id. 198–99 (citing Iowa Sup. Ct. Att’y Disciplinary Bd. v. Van Ginkel, 809 N.W.2d 96, 102 (Iowa 2012)).
by a convincing preponderance of the evidence through his testimony before the commission that he put the case on the “back burner” and the 2009 disciplinary action surrounding the same estate.831

As to expediting litigation, Iowa Rule of Professional Conduct 32:3.2 instructs that a “[a] lawyer shall make reasonable efforts to expedite [a lawsuit] consistent with the interest of the client.”832 It is usually necessary that actions or inactions result in adverse consequences for clients with regard to expediting litigation.833 The Court did not find that the Board proved this ethical violation by a convincing preponderance of the evidence, despite neglecting some of his duties in expediting the probate of the estate.834

According to Iowa Rule of Professional Conduct 32:8.4(d), “[i]t is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.” 835 Generally, these prejudices “hamper[] the efficient and proper operation of the courts.”836 With regard to probate of estates specifically, an ethical violation has been found when the attorney’s conduct in handling the estate was dilatory.837 The Court also noted that it “expect[s] and demand[s] attorneys to cooperate with disciplinary investigations . . . [and] [a] failure to do so is an independent act of misconduct.”838 The Court held that the Board met its burden in establishing Marks’s violation of this rule.839

Sanctions are “based on the specific circumstances of each case.”840 The Court considers “the nature of the alleged violations, the need for deterrence, protection of the public, maintenance of the reputation of the bar as a whole, and the respondents fitness to continue the practice of law, as well as any aggravating and mitigating circumstances.”841 Aggravating factors in this case included Marks multiple appearances before the Court for disciplinary issues and warnings from the Court that future appearances could result in harsher sanctions.842 Marks’s case is further complicated by depression, for which he continued to take medication but had terminated counseling, which he previously stated was helpful.843 When depression is untreated, it is considered an aggravating factor.844 The Court considered the lack of damage to the estate, despite Mark’s lack of diligence, a mitigating factor.845 An additional mitigating factor for Marks was his extensive volunteer service.846 Based on all of these considerations the Court suggested that Marks voluntarily elect to discontinue his probate practice and

831 Id. at 199.
832 Id. (quoting IOWA R. OF PROF’L CONDUCT 32:3.2; BLACK’S LAW DICTIONARY 1017 (9th ed. 2009)).
833 Id. (citations omitted).
834 Id.
835 Id. (quoting IOWA R. OF PROF’L CONDUCT 32:8.4).
836 Id. at 200 (quoting Iowa Sup. Ct. Att’y Disciplinary Bd. v. Cunningham, 812 N.W.2d 541, 550 (Iowa 2012)).
837 Id. (citations omitted).
838 Id.
839 Id.
840 Id. at 200–01 (citing Iowa Sup. Ct. Att’y Disciplinary Bd. v. Cannon, 821 N.W.2d 873, 880 (Iowa 2012)).
841 Id. at 201 (quoting Cannon, 821 N.W.2d at 880).
842 Id.
843 Id.
844 Id. at 202 (citing Iowa Sup. Ct. Att’y Disciplinary Bd. v. Weaver, 812 N.W.2d 4, 13 (Iowa 2012)).
845 Id.
846 Id.
suspended his license for three months.\textsuperscript{847}

\textbf{Iowa Supreme Court Attorney Disciplinary Board v. Palmer, 825 N.W.2d 322 (Iowa 2013)}

This case involved attorney Eric Palmer and the Iowa Supreme Court Attorney Disciplinary Board’s (Board) allegations that he forged the signature of his client on documents related to a conservatorship and then filed those documents with the court.\textsuperscript{848} The Iowa Supreme Court held that Palmer violated Rule 32:3.3(a)(1) and thus suspended his license for thirty days.\textsuperscript{849}

Palmer was admitted to practice in Iowa in 1986 and served as a part-time magistrate judge, as an Oskaloosa City Councilman, and as a member of the Iowa House of Representatives.\textsuperscript{850} Palmer routinely volunteered to do work pro bono, and had a substantial community volunteer record.\textsuperscript{851} Nevertheless, in 2009, Palmer was hired by the Paulos’ to create a conservatorship for their child.\textsuperscript{852} The Paulos’ sought a conservatorship for the purpose of settling a personal injury suit involving their child.\textsuperscript{853} At the direction of Palmer, his secretary signed the name of Mrs. Paulos on several documents required for the conservatorship and settlement.\textsuperscript{854} Palmer then notarized the signatures and filed them in district court.\textsuperscript{855}

“Palmer subsequently filed a motion to withdraw,” claiming “he had been unable to prepare an annual report . . . because the conservators had failed to pay for his services and had refused to respond to his attempts to communicate with them.”\textsuperscript{856} At the hearing on the motion to withdraw, Mrs. Paulos claimed some of the signatures on the documents were not made by her.\textsuperscript{857} The presiding judge then notified the Board of the alleged forgeries.\textsuperscript{858} In response to the Board’s investigation, Palmer admitted that he directed his secretary to sign the documents on behalf of his client, but he claimed that he had express permission from the client to do so because it was a time-sensitive matter.\textsuperscript{859} However, Mrs. Paulos could not recall whether she indeed gave Palmer permission to sign her name.\textsuperscript{860} Regardless, Palmer notarized the documents, knowing that Mrs. Paulos did not actually sign them in his presence.\textsuperscript{861}

Based on the facts, the Board claimed Palmer violated Rule 32:3.3(a)(1), which prohibits false statements of fact or law and requires attorneys to correct any such false statements.\textsuperscript{862} The Iowa Supreme Court held that, although the Board failed to prove that Palmer caused the signature to be issued without the client’s express permission, the Board did prove that

\begin{itemize}
  \item \textsuperscript{847} \textit{Id.} (declining to establish a restriction prohibiting Marks from practicing in the area of probate).
  \item \textsuperscript{848} Iowa Sup. Ct. Att’y Disciplinary Bd. v. Palmer, 825 N.W.2d 322, 323 (Iowa 2013).
  \item \textsuperscript{849} \textit{Id.} at 323–24.
  \item \textsuperscript{850} \textit{Id.} at 323.
  \item \textsuperscript{851} \textit{Id.}
  \item \textsuperscript{852} \textit{Id.}
  \item \textsuperscript{853} \textit{Id.} (noting that the lawsuit initiated over the use of Paxil while the child was in utero).
  \item \textsuperscript{854} \textit{Id.}
  \item \textsuperscript{855} \textit{Id.}
  \item \textsuperscript{856} \textit{Id.}
  \item \textsuperscript{857} \textit{Id.}
  \item \textsuperscript{858} \textit{Id.}
  \item \textsuperscript{859} \textit{Id.} at 324.
  \item \textsuperscript{860} \textit{Id.}
  \item \textsuperscript{861} \textit{Id.}
  \item \textsuperscript{862} \textit{Id.}
\end{itemize}
Palmer violated the rule by notarizing and filing documents knowing the signatures were not authentic.\textsuperscript{863} The Court also found that Palmer’s conduct was prejudicial to the administration of justice, and therefore, in violation of Rule 32:8.4(d).\textsuperscript{864}

After considering the mitigating and aggravating circumstances of the case, the Court suspended Palmer’s license for thirty days.\textsuperscript{865}

**Iowa Supreme Court**


Powell was a longtime solo practitioner of law who occasionally employed associates. \textsuperscript{866} Powell was disciplined in 2007 and received official admonitions in 2005 and 2010.\textsuperscript{867} One of Powell’s bookkeepers reported that he was improperly using the office trust fund account. \textsuperscript{868} Audits showed a shortage in the account, and another bookkeeper lodged a similar complaint.\textsuperscript{869}

Powell’s license was suspended in 2011, and a trustee was appointed to take over his trust account. \textsuperscript{870} The trustee found that the account was short $43,000. \textsuperscript{871} The Attorney Disciplinary Board (Board) then filed a complaint against Powell, alleging violations of trust fund rules in both the Iowa Court Rules and the Iowa Rules of Professional Conduct. \textsuperscript{872} Powell filed a petition, hoping to lift the temporary suspension of his license.\textsuperscript{873} He obtained a loan to pay off the account shortfall, claiming it resulted from “sloppy procedures and oversight.” \textsuperscript{874} He also submitted evidence showing that he had taken measures to prevent future problems with the account.\textsuperscript{875} Powell’s request was granted.\textsuperscript{876}

The Board’s complaint then proceeded to a hearing.\textsuperscript{877} The Board found that Powell repeatedly deposited client funds into an operating account when they should have been put into the trust account. \textsuperscript{878} Powell often paid unearned legal fees to himself and transferred funds from his trust account to his operating account without notifying the client or accounting for the fee. \textsuperscript{879} Powell essentially ignored the rules for keeping a trust account over a lengthy period. However, since the malfeasance in question, Powell had implemented corrective measures and had experienced no account problems since his reinstatement.\textsuperscript{880} The Board also noted that Powell was close to retirement and that he had worked many pro bono cases over the course of his career.\textsuperscript{881}

This issue in this case was whether Powell should have his license suspended. The Iowa Supreme Court concluded that Powell violated Rule

\textsuperscript{863} Id. at 324–25.
\textsuperscript{864} Id.
\textsuperscript{865} Id.
\textsuperscript{866} Id. at 325–26 (detailing Palmer’s extensive volunteer and public service history, but also noting his two prior public reprimands and one prior private admonition).
\textsuperscript{868} Id.
\textsuperscript{869} Id.
\textsuperscript{870} Id. at 3.
\textsuperscript{871} Id.
\textsuperscript{872} Id.
\textsuperscript{873} Id.
\textsuperscript{874} Id.
\textsuperscript{875} Id.
\textsuperscript{876} Id.
\textsuperscript{877} Id.
\textsuperscript{878} Id.
\textsuperscript{879} Id. at 4.
\textsuperscript{880} Id.
\textsuperscript{881} Id.
32:1.15 and several Iowa Court Rules governing trust funds. 882 Accordingly, the Court suspended Powell’s license for three months. 883

The Iowa Supreme Court applied a de novo standard of review. 884 The Board has the burden of proving disciplinary violations “by a convincing preponderance of the evidence.” 885 Although the Court agreed with the Board that the evidence supported the Board’s finding that Powell violated Rule 32:1.15, it concluded that the evidence did not support the finding that Powell had no claim to funds removed from or not put into his trust account. 886

The Court emphasized that sanctions are determined on a case-by-case basis using a multi-factor test. 887 Although conversion or theft normally results in revocation, a case involving conversion of unearned advance fees usually results in suspension. 888 The Court cited Powell’s past ethical violations as aggravating factors. 889 On the other hand, mitigating factors included Powell’s past pro bono work and the fact that no client funds were actually lost as a result of his conduct. 890 Ultimately, because Powell ignored trust fund rules for several years, the Court decided to suspend his license for three months. 891

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882 Id. at 5.
883 Id. at 9.
884 Id. at 5.
885 Id. (citing Iowa Sup. Ct. Att’y Disciplinary Bd. v. Conrad, 723 N.W.2d 791 (Iowa 2006)).
886 Id.
887 Id. at 6.
888 Id. at 6–7.
889 Id. at 8.
890 Id.
891 Id. at 9.

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Iowa Supreme Court
Attorney Disciplinary Board
v. Qualley & Bleyhl, 828 N.W.2d 282 (Iowa 2013)

This attorney disciplinary action involved partners George Qualley and Thomas Bleyhl, who allegedly violated Iowa Code of Professional Conduct Rules 32:1.4, 32:1.7, and 32:1.8. 892 The Iowa Supreme Court held that Qualley and Bleyhl violated the rules set forth; therefore, the partners’ licenses were suspended for sixty days. 893

In September 2008, Broadmoor Place Homeowners Association (Broadmoor) sought legal assistance from Qualley and Bleyhl in collecting dues from a delinquent homeowner. 894 Qualley and Bleyhl began by sending a thirty-day notice to the homeowner, but that did not cure the delinquency. 895 Qualley and Bleyhl then began a foreclosure action on behalf of Broadmoor. 896 While the foreclosure was pending, the homeowner filed for bankruptcy. 897 Qualley and Bleyhl represented Broadmoor in the bankruptcy action as well, filing for a motion for relief from automatic stay within the bankruptcy court. 898 The motion was not resisted and subsequently granted, and Broadmoor obtained a decree of foreclosure in October 2009. 899 “In the decree, Broadmoor acknowledged a first mortgage existed on the subject property that was superior to their lien,”

893 Id.
894 Id. at 285.
895 Id.
896 Id.
897 Id.
898 Id.
899 Id.
yet during this time, Qualley and Bleyhl continued to take action on the lien.\textsuperscript{900} In September 2009, CitiMortgage, Inc., the first mortgage holder, commenced action to foreclose on the property, but then in August 2010 dismissed its action just prior to the sheriff’s sale.\textsuperscript{901} In spring 2010, Qualley and Bleyhl prepared documents for a sheriff’s sale, but the decree did not include a provision for attorney’s fees—some of which could have been collected from the debtor had it been included in the decree.\textsuperscript{902} The client, Broadmoor, was expecting more than $2,600 in attorney’s fees—most of which could have been collected from the debtor had it been included in the decree.\textsuperscript{903} At the hearing before the Greiveance Commission (Commission), Qualley and Bleyhl claimed they may have erred in leaving out the provision, but they offered no reasonable explanation for the omission.\textsuperscript{904} The duo also left out accruing association dues in the decree but failed to provide an explanation.\textsuperscript{905}

Just before the sheriff’s sale by Qualley and Bleyhl, the lawyers advised their client that it could purchase the property at the sheriff’s sale, but they advised against such a purchase.\textsuperscript{906} Instead, the lawyers disclosed that they had a potential buyer and that they intended to represent the buyer in the transaction.\textsuperscript{907} Qualley and Bleyhl disclosed that this dual representation may cause an ethical conflict, but noted that they did not believe it would pose a problem in this situation.\textsuperscript{908}

As the events unfolded, it turned out that the “potential buyer” was actually a close friend and possible business partner of Qualley and Bleyhl.\textsuperscript{909} Prior to the sheriff’s sale, the trio discussed investing in real estate and “flipping” property.\textsuperscript{910} Qualley and Bleyhl believed they could buy the property and sell it quickly for a substantial profit, and they included the “potential buyer” in this deal.\textsuperscript{911} In order to conduct this transaction, the trio formed Elite Real Estate, LLC, but there was a “serious factual dispute in the matter concern[ing] whether Qualley and Bleyhl advised Broadmoor’s property manager of their relationship with Elite.”\textsuperscript{912}

At the sheriff’s sale, Qualley provided a written bid for Broadmoor.\textsuperscript{913} After that bid, Qualley or Bleyhl made an oral bid on behalf of Elite, outbidding Broadmoor by just $400.\textsuperscript{914} As the high bidder, Elite received the deed at the sheriff’s sale.\textsuperscript{915} Within a few weeks, Qualley and Bleyhl provided Broadmoor with a check in the amount of the proceeds from the sale, in satisfaction of the judgment in the foreclosure action.\textsuperscript{916} However, Broadmoor was dissatisfied with the work of the attorneys, especially regarding the duo’s decision to forego delinquent association fees as part of the judgment.\textsuperscript{917} “After fruitless attempts to resolve the matter with Qualley and Bleyhl, Broadmoor’s board president filed a complaint with the Iowa Supreme

\textsuperscript{900} Id.
\textsuperscript{901} Id. at 285–86.
\textsuperscript{902} Id. at 286.
\textsuperscript{903} Id.
\textsuperscript{904} Id.
\textsuperscript{905} Id.
\textsuperscript{906} Id.
\textsuperscript{907} Id.
\textsuperscript{908} Id.
\textsuperscript{909} Id.
\textsuperscript{910} Id.
\textsuperscript{911} Id.
\textsuperscript{912} Id. at 287.
\textsuperscript{913} Id.
\textsuperscript{914} Id.
\textsuperscript{915} Id.
\textsuperscript{916} Id.
\textsuperscript{917} Id.
The Board claimed Qualley and Bleyhl violated multiple rules of conduct in their representation of Broadmoor and Elite, including issues regarding a conflict of interest, communication with the client, the fee agreement, and dishonest conduct or fraud. The conflict of interest rule limits the instances in which an attorney can represent both parties in an action. Here, “Qualley and Bleyhl represented both Broadmoor and Elite in the sale of real estate,” and in “doing so, they owed a duty of loyalty not only to Broadmoor, but also to . . . Elite.” The two lawyers not only advised Broadmoor not to purchase the property, but they also failed to state that they had a financial interest in Elite purchasing the property. Thus, the Iowa Supreme Court found that by failing “to disclose the degree of conflict posed by this situation,” and by “not ensuring that Broadmoor’s representative understood their personal interest in Elite,” the lawyers engaged in a conflict of interest.

Likewise, the duo violated Rule 32:1.4, which governs the communication responsibilities lawyers have with their clients. The rule states that when an attorney represents a client, the attorney must properly inform the client of his or her rights and interests in the matter. In this case, Qualley and Bleyhl failed to inform the client, Broadmoor, of their interest and conflict in representing both parties in the real estate transaction. More specifically, they failed to inform Broadmoor of their connection with Elite, and the financial interest they had in the company. The lawyers also failed to inform Broadmoor with regard to the accounting of the judgment—and the exclusion of the accruing homeowners’ fees and attorney’s fees as part of that judgment. As such, the Court found that “[t]he actions of Qualley and Bleyhl represented more than mere negligence. They did not exercise sufficient diligence to ensure Broadmoor could make informed decisions.” Thus, they were in violation of the rules regarding client communications.

The Board also alleged Qualley and Bleyhl engaged in improper fee arrangements in violation of Rule 32:1.5(b). Under this rule, “the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.” However, the Court found insufficient evidence to support this claim, noting that Broadmoor understood the fee structure and arrangement, and “paid the invoices without expressing concerns regarding [its] structure.”

Lastly, the Court reviewed the claim that Qualley and Bleyhl engaged in acts of dishonesty, fraud, deceit, or
misrepresentation. Here, Qualley and Bleyhl made inaccurate statements, failed to provide billing records or accounting for funds as Broadmoor requested, and failed to notify Broadmoor of the financial interest they had in Elite. Even though the testimony showed that Qualley and Bleyhl “intended to help Broadmoor, while simultaneously helping themselves,” the lawyers were still responsible for zealously representing their client. The Court held that it did “not believe this [arose] to the level of dishonesty, fraud, deceit, or misrepresentation required to prove a violation of rule 32:8.4(c).”

After considering the mitigating and aggravating circumstances, the Court held that because the duo violated multiple provisions of the Iowa Rules of Professional Conduct, and that their licenses should be suspended for sixty days. Interestingly, the Court staggered the suspensions, so as not to unreasonably harm their practice.

Iowa Supreme Court Attorney Disciplinary Board v. Rasmussen, 823 N.W.2d 404 (Iowa 2012)

This case involved a complaint filed against Jeffrey Rasmussen, alleging several violations of the Iowa Rules of Professional Conduct. The Iowa Supreme Court held that no violations occurred. Thus, the case was dismissed.

Rasmussen was licensed to practice law in the state of Washington and in the Sac and Fox Tribes located in Iowa, but not in the state of Iowa. The facts leading up to this proceeding dealt with Rasmussen’s contact with a represented party, and unlawful removal of a computer server containing software in which his client had a security interest. In order to remove the property, Rasmussen falsely claimed he was visiting the opposing party’s site to make sure the server was still in the opposing party’s possession; however, Rasmussen’s true intent was to obtain a copy of the software by removing a server.

As such, the Iowa Supreme Court Attorney Disciplinary Board (Board) filed multiple ethical violations against Rasmussen, including violations of Rules 32:8.4(c) (engaging in misrepresentation), 32:5.1(a) (knowingly making a false statement of fact or law), 32:4.2(a) (communicating with an unrepresented party when representation is known), 32:8.4(d) (engaging in conduct prejudicial to the administration of justice), and 32:8.4(b) (criminal acts adversely demonstrating the lawyer’s lack of honesty, trustworthiness, and fitness as a lawyer).

In opposition to the claims, Rasmussen argued that the tribal disciplinary rules, not the Iowa disciplinary rules, should apply, because the server removed was connected to a tribal court dispute. Regardless, the Iowa Supreme Court held no ethical violations occurred because the opposing party appeared without an

933 Id. at 291–92.
934 Id. at 292.
935 Id. at 293.
936 Id. at 294.
937 Id. at 294–95 (noting that Qualley and Bleyhl are the only partners in their firm).
938 Iowa Supreme Ct. Att’y Disciplinary Bd. v. Rasmussen, 823 N.W.2d 404, 405 (Iowa 2012).
939 Id. at 406.
940 Id.
941 Id.
942 Id. at 407.
943 Id.
attorney at meetings with Rasmussen’s client. Additionally, there was evidence that the opposing party told his client that he was engaging in negotiations and conversations with Rasmussen’s client; and the attorney did not object. Likewise, even after the removal of the property, the opposing party continued to communicate directly with Rasmussen’s law firm.

Additionally, Rasmussen’s conduct in removing the property did not constitute misconduct for acts of dishonesty because that duty only applies when there is a duty to disclose. Here, the Court held that no duty existed because Rasmussen was given permission to enter the premises and that the record did not reflect an affirmative misleading act by Rasmussen. Thus, the Court held Rasmussen did not violate the rule regarding acts of dishonesty. Similarly, the Court held that Rasmussen did not violate the ethical rule of committing criminal acts that reflect adversely on the lawyer’s honest, trustworthiness, or fitness. Here, Rasmussen did not commit trespass or theft as alleged by the Board; rather, he entered the property with permission and did not take the property in a way that meets the elements of theft—Rasmussen’s client was actually in possession of the sever when it was taken because the opposing party had defaulted. Lastly, the Court held that Rasmussen did not violate Rule 32:8.4(d) because the Court could not “conclude the exercise of a self-help remedy in lieu of a court-provided remedy is prejudicial to the administration of justice.” Rather, there was no evidence of a breach of peace by Rasmussen’s self-repossession of the server.

Because the Court found no ethical violations occurred, the Court dismissed the disciplinary case.

Iowa Supreme Court Attorney Disciplinary Board v. Rhinehart, 827 N.W.2d 169 (Iowa 2013)

This attorney disciplinary action involved a two-count complaint against Richard Rhinehart, which alleged he violated several rules of professional conduct. The violations included: “extrinsic fraud [in] responding to his wife’s discovery in his own protracted martial dissolution proceeding” and a “billing dispute with his clients in a residential construction defect case.” The Court held that “Rhinehart violated two of the three rules charged by the [Iowa Supreme Court Attorney Disciplinary Board (Board)],” and thus suspended his license for sixty days.

The first violation at issue “involve[d] Rhinehart’s failure to disclose two contingent-fee cases in his own dissolution proceeding.” After the final decree was in place, Rhinehart’s wife filed a petition to correct, vacate, or modify the decree, claiming Rhinehart committed extrinsic

944 Id. at 408–09.
945 Id.
946 Id. at 409.
947 Id.
948 Id.
949 Id.
950 Id. at 410.
951 Id.
fraud with regard to the decree.\textsuperscript{959} One of the disputed issues in the divorce proceeding was the value of Rhinehart’s law practice, and his wife argued that Rhinehart’s failure to disclose pending cases changed the value of marital property.\textsuperscript{960}

The cases that Rhinehart failed to disclose were two siblings’ child sex abuse claims against the Sioux City Catholic Diocese.\textsuperscript{961} Rhinehart claimed that he chose not to disclose the cases because he promised his clients complete confidentiality and he had done little work for them—simply corresponding with the counsel for the diocese.\textsuperscript{962} However, as part of the firm’s cleanup at the end of the year, Rhinehart contacted the siblings again to ask whether the case should be closed or not.\textsuperscript{963} At that time, Rhinehart encouraged the siblings to continue on with their case, and the next month (the same month the divorce petition was filed), the siblings signed the contingency-fee agreement with Rhinehart.\textsuperscript{964}

At his deposition for his own divorce proceeding, the wife’s counsel requested Rhinehart “bring certain information regarding his law practice, . . . including ‘a list of all plaintiffs, workers’ comp, personal injury, and contingent fee cases of every kind that are currently open at his firm.’”\textsuperscript{965} The purpose for collecting these documents was to figure out the value of the law practice, and the wife’s attorney assured Rhinehart that confidentiality of clients’ information would be preserved.\textsuperscript{966}

Just after the deposition, Rhinehart met yet again with the siblings and wrote a letter on their behalf with a settlement demand.\textsuperscript{967} But, Rhinehart did not supplement his discovery responses with regard to the divorce deposition requests.\textsuperscript{968} At trial, Rhinehart also made several statements about his willingness to be forthcoming about his law practice’s value.\textsuperscript{969} Meanwhile, the wife and her attorney were still unaware of the pending priest sex abuse cases.\textsuperscript{970} Months after the final decree was issued, the wife reopened the case after learning of the concealed contingency fee cases.\textsuperscript{971} At a bench trial, the district court concluded that Rhinehart committed extrinsic fraud by representing clients during the time of discovery and failing to supplement the discovery responses.\textsuperscript{972}

The second violation arose from a dispute with the Merrigan family, who retained Rhinehart for legal counsel in a residential construction defect dispute with a contractor, insurance company, and roofing subcontractor.\textsuperscript{973} The Merrigan’s quickly ran short on money to pay Rhinehart his hourly fee, so they worked out a written contingent-fee agreement that gave Rhinehart one-third of any recovery and stated “fees previously paid to Attorney under prior hourly Attorney Fee Contract will be

\begin{flushleft}
\textsuperscript{959} Id.
\textsuperscript{960} Id.
\textsuperscript{961} Id.
\textsuperscript{962} Id.
\textsuperscript{963} Id.
\textsuperscript{964} Id. (encouraging the siblings based on recent priest sex abuse cases, which have generated several hundreds of thousands of dollars).
\textsuperscript{965} Id.
\textsuperscript{966} Id. at 173.
\textsuperscript{967} Id. (noting that Rhinehart served as the messenger between the siblings and the diocese).
\textsuperscript{968} Id.
\textsuperscript{969} Id.
\textsuperscript{970} Id.
\textsuperscript{971} Id.
\textsuperscript{972} Id. (citing the district court’s fifty-nine page opinion).
\textsuperscript{973} Id. at 174.
\end{flushleft}
deducted from funds received as part of any judgment recovered.”

One defendant settled, and Rhinehart was credited $3330 against the bill already accrued by the Merrigan’s. The other defendants followed suit, offering the Merrigan’s $400,000, but the Merrigan’s rejected that offer and opted for a jury trial—all against the advice of Rhinehart. The jury awarded the Merrigan’s a little more than $33,000, and Rhinehart received his one-third share. However, instead of applying the earnings toward the accrued hourly rate balance, Rhinehart kept the entire one-third for himself, without crediting the Merrigan’s remaining balance. After the commission’s hearing on the matter, Rhinehart agreed to reimburse the Merrigan’s in the full amount owed.

As for count one—the extrinsic fraud claim—the Board alleged Rhinehart violated rules 32:3.3(a)(1), 32:3.3(c), 32:3.4(c), and 32:8.4(d).

Rhinehart challenged the claims, noting that “the Board’s offensive use of issue preclusion is not appropriate . . . because his ‘alleged fraud was neither material nor relevant to the disposition of the property and support issues, nor was it “necessary and essential” to the resulting . . . judgment.’” Rhinehart also claimed that he could not have violated Rules 32:3.3 or 32:3.4, because those rules only apply to an attorney representing a client.

The Iowa Supreme Court first considered issue preclusion: “The Board contend[ed] the district court’s ruling has preclusive effect [under] Iowa Court Rule 35.7(3)” which “allows the Board to invoke issue preclusion in attorney disciplinary proceedings” if its requirements are met. After analyzing the requirements, the Court held that preclusive effect was permissible with regard to the extrinsic fraud finding, and may avoid being re-litigated. Accordingly, the Court held that by committing extrinsic fraud by failing to disclose the contingent-fee cases during the discovery phase of his divorce, Rhinehart violated Rule 32:8.4(c). The Court also held that Rhinehart violated Rule 32:8.4(d) by committing professional misconduct when he failed to supplement his divorce discovery, leading to additional unnecessary court proceedings.

The Iowa Supreme Court also concluded that under the second violation—involving the Merrigan’s—Rhinehart violated Rules 32:1.5(a),

R. PROF’L CONDUCT 32:3.3(a)(1), 32:3.3(a)(3), and 32:3.3).
32:1.15(e), and 32:8.4. 987 “Here, Rhinehart violated [these rules] when he failed to deduct the fees the Merrigan’s had previously paid under the hourly fee agreement, as was required under the subsequent contingent-fee agreement. By failing to deduct this amount, Rhinehart retained fees that he had not earned.”988 Thus, the Court held that Rhinehart violated rules 32:1.5(a) and 32:1.15(e) by making an unreasonable fee arrangement and keeping disputed money separate from undisputed fees.989 However, the Court did not find sufficient evidence that Rhinehart violated Rule 32:8.4(c)—the rule for dishonesty, fraud, and misrepresentation—noting that Rhinehart openly informed the Merrigan’s of his intentions to keep the money at issue.990

After considering the mitigating and aggravating circumstances, the Court held that a sixty-day suspension of Rhinehart’s license was appropriate given the numerous ethical violations and lack of excuses for violating the rules.991

Iowa Supreme Court
Attorney Disciplinary Board
v. Roush, 827 N.W.2d 711 (Iowa 2013)

This disciplinary proceeding involved a criminal defense attorney who was convicted in federal court for the possession of cocaine base. 992 Stanley Roush did not contest the conviction, and admitted to his untreated substance abuse issue; therefore, the issue before the Court was to determine which sanction was most appropriate.993

Roush is a lawyer in Cedar Rapids, and he works primarily in the area of federal criminal defense.994 He has been admitted to the Iowa bar, the U.S. District Courts for the Northern and Southern Districts of Iowa, and to the U.S. Supreme Court.995 Several individuals submitted affidavits in this proceeding, attesting to Roush’s professional, honest legal services and community work.996 However, Roush’s personal addiction problems remained.997

Roush self-reported that he routinely drank to excess and that the alcohol use was a gateway into using marijuana and cocaine.998 In 2002, Roush was arrested in an airport for trying to bring marijuana through airport security.999 Roush self-reported the incident and received a private admonition for the offense.1000 After his conviction on the marijuana charge, Roush’s family life began to deteriorate.1001 On the heels of divorce and losing primary physical custody of his daughter, Roush admitted he began using crack cocaine.1002

In a controlled drug deal, Roush was caught purchasing $200 worth of cocaine, and was charged and convicted in federal court.1003 Roush self-reported

987 Id. at 181.
988 Id.
989 Id. at 181–82.
990 Id. at 182.
991 Id. at 183.
the conviction to the Iowa Supreme Court Attorney Disciplinary Board (Board) and demonstrated a willingness to accept the appropriate sanction from the Board. At the one-day hearing, Roush admitted the factual findings, but noted that none of his drug addiction issues affected his legal work or clients. Roush also sought out and routinely attended treatment sessions on his own, and throughout the proceedings, continued to attend Alcoholics Anonymous meetings to stay on track with his progress.

The Board found several things troubling, including: Roush’s testimony about “put[ting] a hole” in his head when discussing his prospect for staying clean; his previous marijuana conviction; and his possible mental health issues. Nevertheless, the Board found mitigating circumstances were present, such as: Roush passing his mental health evaluation, which deemed him fit to practice law; Roush’s compliance with treatment; Roush’s substance abuse evaluation, which also indicated fitness to practice law; and Roush’s ability to steer clear of toxic people.

The Board suggested and the Grievance Commission (Commission) found that Roush violated Iowa Rule of Professional Conduct 32:8.4(b), which states that it is “professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as lawyer in other respects.” The Court found a clear pattern of drug dependency and abuse, even after receiving an admonition from the Board, despite noting that merely committing a criminal act does not necessarily mean the attorney is unfit to practice law. The Court also noted that “Roush’s course of conduct . . . show[ed] disrespect for the rule of law and for law enforcement officials.” When initially arrested, Roush told the police officers that he swallowed the cocaine, when he had actually hidden the bags in his car.

Ironically, Roush’s law practice included regularly defending the very types of crimes he committed. “Thus, Roush was violating the category of laws that he regularly encountered in his daily work.” Even though Roush claimed his drug addiction never impacted his practice, the Court noted that it was a client who actually informed on him. “This suggest[ed] that down the road, Roush’s illegal drug use could have led to difficult situations in his law practice wherein he represented drug offenders.” Therefore, the Iowa Supreme Court held that Roush’s conduct violated Rule 32:8.4(b).

When determining the appropriate sanction, the Court looks at mitigating and aggravating circumstances. In this case, Roush’s previous admonition for his marijuana conviction demonstrates the aggravating circumstances surrounding the current

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1004 Id. at 714.
1005 Id.
1006 Id. at 714–15.
1007 Id. at 715.
1008 Id.
1009 Id. at 716 (alteration in original) (quoting IOWA R. PROF’L CONDUCT 32:8.4(b)) (internal quotation marks omitted).
1010 Id. at 717.
1011 Id.
1012 Id.
1013 Id.
1014 Id.
1015 Id. at 718.
1016 Id.
1017 Id.
1018 Id. at 718–19.
However, Roush willingly cooperated with the Board and self-reported the convictions. After weighing the appropriate mitigating and aggravating circumstances, the Court concluded that the appropriate discipline for Roush’s conduct was a sixty-day suspension of his law license.

**Iowa Supreme Court**

**Attorney Disciplinary Board v. Stowe**, **830 N.W.2d 737** (Iowa 2013)

In 2011, the Iowa Supreme Court Attorney Disciplinary Board (Board) granted a disability suspension of Stowe’s license and appointed a trustee to oversee his accounts “due to his mental impairment and drug addiction.” Stowe’s license was temporarily suspended in 2012 due to his failure to respond in a timely manner to a query by the Board. Stowe pleaded guilty to possession of methamphetamine. The Board alleged in its complaint that this conviction and a tangentially related forgery conviction “constituted misconduct reflecting adversely on his honesty, trustworthiness, or fitness as a lawyer, in violation of Iowa Rule of Professional Conduct 32:8.4(b).” The Board also alleged that Stowe violated several other Iowa Rules of Professional Conduct and Iowa Court Rules in connection with his “mishandling” of client funds. Finally, the Board alleged that Stowe had practiced law with a suspended license.

After a 2007 trip to Belize, Stowe had developed post-traumatic stress disorder, but he did not seek counseling or treatment. Stowe said that he had been “abducted, beaten, sexually abused, and ransomed” while in Belize, but “other accounts indicate[d] local authorities arrested him for possessing cocaine.” As a result of his PTSD, Stowe “became severely depressed and began suffering from violent nightmares.” Stowe began to self-medicate with methamphetamine in an effort to escape the nightmares. His marriage ended, and he resigned from Finley Law Firm. He eventually lost his job at Thul Law Firm in northern Iowa as well. After that, Stowe was convicted of possession of methamphetamine and two counts of felony forgery. Stowe forged checks he had stolen from a client. The grievance commission recommended that Stowe’s license be revoked.

The issue in this case was whether Stowe’s license should be revoked. The Iowa Supreme Court concluded that Stowe’s license should be revoked and that Stowe violated Rule 32:8.4(b).
The Court applied a de novo standard of review. The Court also pointed out that the Board has the burden of proving disciplinary violations by “a convincing preponderance of the evidence.” Any facts an attorney admits in an answer to a Board complaint are “established, regardless of the evidence in the record.” In this case, Stowe admitted that four of the counts against him were true. The Court emphasized that “[t]he primary purpose of lawyer disciplinary proceedings is to protect the public, not punish the lawyer.”

The Court only addressed Stowe’s conversion of client funds. Attorneys who convert funds when they do not have “a colorable future claim to the funds” generally have their licenses revoked. This is because stealing is a serious offense. The Court found that, because Stowe had a “compelling personal need for money to feed his severe methamphetamine addiction, to pay off his drug dealer who was blackmailing him, and to support himself,” his misconduct was “motivated by a desire for financial gain.” The Court also noted that a felony conviction is sufficient cause for suspension or revocation of an attorney’s license.

The Court highlighted the seriousness of forgery, stating that the offense “strikes at the very heart of an attorney’s trustworthiness and honesty.” Discipline in this situation is therefore justified because of the strong link between the criminal conduct “and the attorney’s ability to function as a lawyer . . . .” Finally, the Court noted that attorneys who commit multiple acts of forgery normally have their licenses revoked.

Iowa Supreme Court Attorney Disciplinary Board v. Stowers, 823 N.W.2d 1 (Iowa 2012)

This disciplinary case involved Dean Stowers, who allegedly violated four rules of professional conduct when he sent several threatening emails in connections with his wife’s employment lawsuit. The Iowa Supreme Court found that Stowers’s emails constituted contempt of a protective order in that action, and that his license be suspended for ninety days.

Stowers’s now former wife previously worked for Care Initiatives as the Chief Operating Officer. In 2005, she filed a complaint with the Iowa Civil Rights Commission and made a formal internal complaint against the president of the company, claiming sexual harassment, retaliation, and wrongful termination. Care Initiatives placed

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1039 Id. at 739.
1039 Id. (citing Iowa Sup. Ct. Att’y Disciplinary Bd. v. McCarthy, 814 N.W.2d 596, 601 (Iowa 2012)).
1040 Id.
1041 Id. at 740.
1042 Id. at 740.
1043 Id. (citing Comm. on Prof’l Ethics & Conduct v. Tullar, 466 N.W.2d 912, 913 (Iowa 1994)).
1044 Id. at 741.
1045 Id.
1046 Id. at 742 (“A license to practice law is not a license to steal.”).
1047 Id.
1048 Id. at 743.
1049 Id. (citing Iowa Sup. Ct. Bd. of Prof’l Ethics & Conduct v. Lyzenga, 619 N.W.2d 327, 332 (Iowa 2000)).
1050 Id.
1051 Id.
1052 Iowa Sup. Ct. Att’y Disciplinary Bd. v. Stowers, 823 N.W.2d 1, 3 (Iowa 2012).
1053 Id. at 3–4.
1054 Id. at 4.
1055 Id.
Stowers’s ex-wife on administrative leave, and then eventually fired her.  

As part of the lawsuit, the parties (including Stowers) agreed to a protective order, which “provided that all documents designated as confidential shall be used ‘only for the purposes of this litigation and for no other purpose, except as otherwise provided.’”  

Care Initiatives settled with Stowers’s ex-wife, and the settlement agreement required that all documents be returned to Care Initiatives, except for payroll records, the personnel file, and medical and mental health records of the employee (Stowers’s ex-wife). In the meantime, Stowers began representing his wife, and the confidential documents remained in his ex-wife’s possession.  

Stowers then sent the threatening emails, which are the subject of this complaint.

In February 2008, Stowers sent the first email to the Senior Vice President and Chief Financial Officer of Care Initiatives, with the subject line of “Your Resignation.” In this email, Stowers urged the employee to resign from his position under the threat of violating Titles 18 and 26 of the U.S. Code. The next day, Stowers sent an email to a lawyer and member of the Care Initiatives board of directors, with the subject line “Your Time Is Up.” This email threatened the harm the reputation and “to seek complete vindication,” unless the board member resigned and made a personal cash donation in the name of the ex-wife and to a charity of the ex-wife and Stowers’s choosing in the amount equal to that paid to him as a board member for the last several years.

The next day, the attorney for Care Initiatives sent a letter to Stowers referencing the protective order. Stowers replied by email, disputing his obligations under the protective order, and Stowers stated he intended to keep the documents that were supposed to be turned over, in order to “preserve evidence for federal investigations and until ‘Care Initiatives cleaned house.’” After several email exchanges, Care Initiatives filed an application for contempt, claiming that Stowers’s emails violated the protective order by sending emails related to the confidential information contained in the documents that Stowers and his ex-wife improperly retained. The district court found Stowers and his ex-wife in contempt of court for violating the protective order, finding “Stowers was “using” the documents to gain a tactical advantage over Care Initiatives’ and did so ‘in an attempt to exert influence and pressure on a Care Initiatives’ CFO, board member, and attorney.”

The Iowa Supreme Court Attorney Disciplinary Board (Board) alleged that Stowers violated Iowa Rule of Professional Conduct 32:3.4(c) by using confidential information in threatening emails. This Rule states that a lawyer shall not disobey the rules.

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1056 Id.
1057 Id. (quoting the protective order’s language).
1058 Id. at 5.
1059 Id.
1060 Id.
1061 Id.
1062 Id.
1063 Id.
1064 Id. at 5–6 (noting that the cash donation would need to be about $100,000).
1065 Id. at 6.
1066 Id. (quoting Stowers’s email to Care Initiatives’ counsel).
1067 Id. at 6–7.
1068 Id. (quoting Reis v. Iowa District Court, 787 N.W.2d 61, 71 (Iowa 2010)).
1069 Id. at 7.
of a court. Here, Stowers knowingly violated the court-ordered protective order. Even though Stowers argued that he did not violate the protective order, the Iowa Supreme Court held that Stowers was not permitted to “relitigate whether the emails contemptuously violated the protective order.” Thus, the Court held Stowers violated rule 32:3.4(c).

The Board also alleged Stowers violated Rule 32:4.2(a), which states that a lawyer shall not communicate with a represented party unless the lawyer has consent. Because the board member-lawyer and the CFO were “constituents” of Care Initiatives, Stowers effectively communicated with parties who were represented by counsel. Here, Stowers was representing himself and his then-wife through the email communications. Stowers was also communicating to the Care Initiatives employees “pursuant to his attorney-client relationship with [his then-wife].” Likewise, Stowers “had an ongoing dispute with Care Initiatives over the return of confidential documents pursuant to the settlement agreement,” and “[t]his was not an innocuous communication with a represented client over housekeeping matters,” but rather “a contentious adversarial dispute over confidential documents.” As such, the Court held that Stowers’s emails constituted improper communications with a represented party in violation of rule 32:4.2(a).

The Court also concluded that Stowers engage in extortion, which violated Iowa Rule of Professional Conduct 32:8.4(b). The Rule states that a lawyer engages in misconduct when he commits a criminal act that reflects adversely on the honesty, trustworthiness, and fitness of the lawyer. Here, Stowers made threats to publicly ridicule and harm the professional reputation of at least one employee of Care Initiatives, thus, committing extortion. Even though Stowers claimed “he was acting as a husband and not as an attorney at the time he send the email” in question, the Court noted that “lawyers are required to obey the disciplinary rules when acting pro se or in a personal capacity.” Therefore, Stowers violated Rule 32:8.4(b).

Additionally, the Court found that Stowers engaged in conduct that was prejudicial to the administration of justice, in violation of Rule 32:8.4(d). The Rule states that it is professional misconduct to improperly impede the efficient and proper operation of the court system. Here, Stowers used threats of public and “legal persecution in order to obtain a private benefit,” which is “clearly an abuse prejudicial to the administration of justice.” The emails sent by Stowers “violated the court’s protective order and triggered a series of unnecessary court proceedings,

1070 Id.
1071 Id. at 8–9.
1072 Id. at 9.
1073 Id.
1074 Id. at 9–10 (citing IOWA R. PROF’L CONDUCT 32:4.2(a)).
1075 Id. at 10.
1076 Id.
1077 Id.
1078 Id. at 10–11.
1079 Id. at 11–12.
1080 Id. at 12.
1081 Id.
1082 Id. at 12–13.
1083 Id. at 13.
1084 Id. at 15.
1085 Id.
1086 Id.
1087 Id. (quoting the Grievance Commission’s conclusions).
including rulings by the district court, court of appeals, and [the Iowa Supreme Court].”

Stowers claimed that his sanction should be mitigated by his extensive criminal defense appointment and service on various boards and committees; however, the Court noted Stowers’s inability to take responsibility for his conduct. After considering the mitigating and aggravating circumstances, the Court suspended Stowers’s license to practice law indefinitely with no possibility of reinstatement for ninety days.

**Iowa Supreme Court Attorney Disciplinary Board v. Wheeler, 824 N.W.2d 505 (Iowa 2012)**

This disciplinary case involved Ronald Wheeler, who pled guilty to knowingly making a false statement to a financial institution regarding a mortgage application. After his guilty plea, the Iowa Supreme Court Attorney Disciplinary Board (Board) filed a complaint alleging Wheeler violated several rules of professional conduct. The Iowa Supreme Court held that Wheeler violated the alleged rules, and suspended his law license for six months.

Wheeler moved to Iowa in 1978, after working in Los Angles as a district attorney. In Iowa, Wheeler served as a prosecutor for Polk County, then he went into private practice, followed by his election as county attorney for Clarke County. Throughout Wheeler's career, he actively participated in community service, and he created an intrafamily sex abuse program to treat victims and predators, which is still used today. However, in 2006, Wheeler served as a “straw man” for a client who wanted to purchase a house. It is unknown why the buyer wanted to conceal his identity, but nevertheless, Wheeler executed a loan application and obtained a mortgage for $796,000 from a local bank.

Wheeler’s application contained several errors. Wheeler claimed a monthly income of $30,000, when his true monthly income was about $8000. He also claimed more than $500,000 in checking and savings accounts, but in reality, he had about $5000 in checking and savings. In addition, Wheeler claimed he was using the property for his personal residence, but he actually had no intentions of ever living there. Then, a month later, Wheeler obtained a second mortgage for the client in the amount of $484,000, and again, misstated his income, savings, and intentions for the property.

Shorting after the sale closed, the client took possession of the house and made the monthly mortgage payments. “After one year, [the client] intended to refinance the

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1088 *Id.*
1089 *Id.* at 16–17.
1090 *Id.* at 17.
1091 *Iowa Sup. Ct. Att’y Disciplinary Bd. v. Wheeler, 824 N.W.2d 505, 507 (Iowa 2012).*
1092 *Id.*
1093 *Id.* at 508.
1094 *Id.*
1095 *Id.*
1096 *Id.*
1097 *Id.*
1098 *Id.*
1099 *Id.*
1100 *Id.*
1101 *Id.*
1102 *Id.*
1103 *Id.* at 508–09.
1104 *Id.* at 508.
property and transfer it to his name.” 1105 The client was giving money to Wheeler, and “Wheeler claimed he was not paid for his services as a straw man but he did receive a $7400 check from [the client] during the time period.” 1106 Wheeler claimed his money was given for attorney’s fees and consultation fees. 1107 The client also donated $2000 to Wheeler’s campaign for county attorney. 1108

One year after obtaining the first mortgage, the client approached Wheeler again to obtain a $3 million loan, but Wheeler refused and asked the client to remove his name from the property. 1109 The client soon disappeared, and Wheeler was left making mortgage payments. 1110 Wheeler eventually filed for bankruptcy, and the FBI began investigating the loans. 1111 Wheeler pled guilty to making a false statement to a financial institution, and he was placed on supervised release for five years, ordered to perform 200 hours of community service, and required to pay more than $800,000 in restitution. 1112 As such, the Board filed a complaint, alleging Wheeler violated Iowa Rule of Professional Conduct 32:8.4(b), which prohibits an attorney from engaging in criminal activity that reflects adversely on the attorney’s honesty, trustworthiness, and fitness to practice law. 1113

The Iowa Supreme Court noted that commission of a crime alone does not necessarily mean a lawyer is unfit to practice law. 1114 Rather, the illegal conduct must also reflect adversely on the fitness to practice, and there must be some rational connection between the offense and the lawyer’s fitness. 1115 “Here, the criminal act is connected to fitness to practice law. The actions by Wheeler were dishonest, and they victimized the bank in a substantial manner.” 1116 By making false statements to the bank, Wheeler engaged in conduct that reflected adversely on his ability to act as a fit lawyer. 1117 Additionally, the Board alleged that Wheeler violated Rule 32:8.4(c), which prohibits lawyers from engaging in conduct that is dishonest, involves fraud or deceit, and misrepresents the truth. 1118 Here, Wheeler pled guilty to knowingly making a false statement to the bank, and thus, engaged in conduct that misrepresented the truth. 1119 Likewise, the Board claimed Wheeler violated Rule 32:8.4(d), which prohibits conduct that is prejudicial to the administration of justice. 1120 An act is prejudicial to the administration of justice when it “impedes ‘the efficient and proper operation of the courts or of ancillary systems upon which the courts rely.’” 1121 Since Wheeler’s dishonest act involved a bank, and not the courts, the Board failed to prove Wheeler violated this rule.

The Iowa Supreme Court analyzed the mitigating and aggravating circumstances in order to determine which sanction was most appropriate for

1105 Id.
1106 Id.
1107 Id.
1108 Id.
1109 Id. at 509.
1110 Id.
1111 Id.
1112 Id.
1113 Id. (citing IOWA R. PROF’L CONDUCT 32:8.4(b)).
1114 Id. at 510.
1115 Id.
1116 Id. at 511.
1117 Id.
1118 Id.
1119 Id.
1120 Id.
1121 Id.
In this case, Wheeler’s actions were intended to misrepresent and obtain a loan, but not to cause the bank to lose money. He also had the courage to say “no” to the client when the client wanted him to obtain a third mortgage on the property. Wheeler had a clean disciplinary record, and he actively participated in community service. Additionally, Wheeler was remorseful for his actions, he understood the severity of his conduct, and was forthcoming about his involvement. Therefore, the Iowa Supreme Court held that the recommendation of suspension for six months is appropriate, and suspended Wheeler’s license to practice law for six months.

Iowa Supreme Court Attorney Disciplinary Board v. Yang, 821 N.W.2d 425 (Iowa 2012)

In Yang, the attorney allegedly violated multiple Iowa Rules of Professional Conduct with regard to his representation of a client in an immigration proceeding. The Iowa Supreme Court ultimately found that Yang violated several rules and issued a public reprimand.

The alleged violations of professional conduct stemmed from the 2001 representation of Donald Baudilio Escalante-Silva and his wife, Vilma. Ta-Yu Yang was initially retained by Donald to assist with his immigration proceedings; however, he agreed to represent Vilma, as well, upon their detention for improper and illegal entry into the United States. Donald and Vilma’s removal proceedings were closed in 2006, pending a request for relief under the Nicaraguan Adjustment and Central American Relief Act. However, both Donald and Vilma’s cases were re-opened, and scheduled for a pretrial conference in spring 2009.

Prior to the pretrial conference, Yang successfully moved for a telephone appearance on behalf of Donald, so Yang assumed a telephone appearance was also permitted for the pretrial conference. Yang did not receive any calls from the court on the day of the pretrial conference. When Yang called the immigration office thereafter, the office informed him that his failure to appear would be treated as a “no-show,” or default. In response, Yang moved to reopen the removal hearing and rescind the removal order. However, the court denied Yang’s motion, noting that an appropriate motion to appear by telephone at the pretrial conference was required in

1122 Id. (noting that Donald was involved in a deportation proceeding).
1123 Id. (“While his removal proceeding was still pending, Donald returned to El Salvador in the summer of 2002 and married Vilma. When Donald and Vilma subsequently reentered the United States without proper documentation, they were detained.”).
1124 Id. at 427–28.
1125 Id. at 428.
1126 Id.
1127 Id.
1128 Iowa Sup. Ct. Att’y Disciplinary Bd. v. Ta–Yu Yang, 821 N.W.2d 425, 427 (Iowa 2012) (finding that Yang failed to inform his client that a motion for reconsideration upon an adverse immigration finding could include ineffectiveness of counsel).
The court also informed Yang that his “incorrect and unauthorized instructions’ would be ‘more properly advanced through a motion to reopen [by] asserting ineffective assistance of counsel.”

Rather than informing Donald of his ineffective representation, Yang sought review of the immigration court’s ruling. Meanwhile, Donald hired a new attorney, and that attorney alleged ethical misconduct by Yang. The Iowa Supreme Court Attorney Disciplinary Board (Board) subsequently filed a complaint against Yang, asserting that he engaged in conduct resulting in misrepresentation, which violates Rule 32:8.4(c). The Board also claimed that Yang violated Rule 32:1.7(a)(2), by continuing to represent Donald when a significant risk remained that such representation would be materially affected by Yang’s personal interests as a lawyer. Likewise, the Board accused Yang of failing to properly explain the situation to his client, violating Rule 32:1.4(b), and therefore, resulting in ineffective assistance of counsel. Lastly, the Board claimed Yang possessed a conflict of interest, and failed to give notice in writing to the client of such interest, thus violating Rule 32:1.7(b).

Yang denied intentional misrepresentation, and denied violation of other professional conduct rules, stating that, “his representation of Donald was not ineffective under the circumstances.” After a Grievance Commission (Commission) hearing on the matter, the Commission found that the Board failed to prove all alleged violations, but did find that Yang engaged in misrepresentation by repeatedly (and inaccurately) making a factual assertion.

In determining the sanctions for ethical violations by attorneys, the Iowa Supreme Court is not bound by the recommendations of the Commission; rather, they are simply mindful of its findings and suggestions. Here, the Court found that Yang did make a misrepresentation on appeal to the immigration court by inaccurately making assertions, known by the court to be untrue. The Court also found that Yang violated Rule 32:1.4(b), by failing to explain to Donald the grounds and plausibility for claiming ineffective assistance of counsel. Additionally, the Court found Yang “ignored a

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1137 See id.
1138 Id.
1139 Id. at 428–29.
1140 Id. at 429.
1141 See id.
1142 Id. (noting that “by failing to withdraw as Donald’s counsel after [the immigration court judge’s] ruling revealed that a motion to reopen asserting Yang’s ineffective assistance could be filed,” constitutes a violation of the rules of professional conduct).
1143 Id.
1144 Id. (finding a conflict of interest where Yang continued to represent Donald in the appeal of the immigration court judge’s ruling, despite gaining the client’s informed consent).
1145 Id.
1146 Id. at 430 (noting that even after the immigration court raised the issue of the inaccurate factual assertion, Yang continued to misrepresent).
1147 Id. (“Although we give respectful consideration to the commission’s findings and recommendation for sanction, we are not bound by them.”).
1148 Id. (noting that Yang’s assertion that he had received notice of the May 2009 hearing from the court was inaccurate and misleading).
1149 Id. (“Although Yang asserts he did not explain this option to Donald because he was confident based on his considerable professional experience as an immigration lawyer that [the judge’s] ruling would be reversed on appeal, [the court] concludes that Yang owed his client an explanation of the alternative course of action . . . .”).
significant risk that the representation would be materially limited” by his personal interests “in avoiding a potential ethical complaint.”

As part its overall analysis as to what sort of punishment is deserved for violating the rules of professional conduct, the court looks at mitigating and aggravating circumstances. Based on Yang’s prior disciplinary record and exemplary public service, the Court concluded that “the commission’s recommendation of a public reprimand [was] most appropriate.”

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1150 Id. (noting that “by continuing to represent Donald without disclosure and informed consent,” Yang engaged in a conflict of interests).
1151 See id. at 430–31.
1152 Id. at 431.
Right to Counsel


In this case the Respondent sought a writ of habeas corpus arguing that “the state courts violated his Sixth Amendment right to effective assistance of counsel by declining to appoint an attorney to assist in filing a motion for new trial notwithstanding his three prior waivers of the right to counseled representation.” The Ninth Circuit granted relief holding that his claim was supported by clearly established federal law; however the Supreme Court disagreed and reversed.

The state of California charged Otis Rodgers with making criminal threats, assault with a firearm, and being a felon in possession of a firearm and ammunition. Before arraignment, Rodgers executed a valid waiver of his Sixth Amendment right to counsel and continued pro se. However, Rodgers changed his mind at his preliminary hearing and retained counsel. Approximately two months later, Rodgers fired his attorney and once again waived his right to counsel. Rodgers later changed his mind two more times and finally went to trial pro se. Rodgers was found guilty of all charges.

Rodgers then asked the trial court to appoint an attorney to help him file a motion for a new trial. The trial judge deferred a ruling on this motion, which Rodgers later renewed in writing. Rodgers never gave a reason for his request for counsel, and the trial court denied it. The trial court then denied Rodgers’s pro se motion for a new trial. The state appellate court affirmed Rodgers’s convictions, holding that Rodgers’s repeated vacillating and his insistence that he could do the motion himself justified the trial court’s denial of his post-trial request for counsel.

Rodgers then filed a habeas petition, arguing that his Sixth Amendment right to counsel had been violated. The federal district court denied Rodgers’s petition. The Ninth Circuit, citing its own precedent and precedent from other circuits, identified two clearly established principles: (1) that a defendant who waives his right to counsel may choose to exercise that right “at a later critical stage of the prosecution, absent proof by the State that the reappointment request was made in bad faith;” and (2) that a motion for a new trial constitutes a “critical stage.” Based on these principles, the Ninth Circuit concluded that Rodgers had a clearly established right to have counsel appointed for his new trial motion.

The Supreme Court granted certiorari to decide (1) whether, after a defendant waives his right to counsel, a post-trial motion for a new trial...
constitutes a critical stage of the prosecution, and (2) whether, after a defendant waives his right to counsel, the judge "has discretion to deny the defendant's later request for reappointment of counsel." 1170 The Supreme Court of the United States determined that the California courts' conclusion that there was no Sixth Amendment violation did not contradict "clearly established federal law." 1171

The Supreme Court began by identifying clearly established federal law from its own decisions that governed Rodgers's claims. 1172 The Sixth Amendment guarantees the defendant a right to counsel at all critical stages of the criminal process. 1173 However, a defendant may proceed without counsel "when he voluntarily and intelligently elects to do so." 1174 The Court concluded that the Ninth Circuit erroneously looked to other circuits "to determine whether a particular rule of law is so widely accepted among the Federal Circuits that it would, if presented to this Court, be accepted as correct." 1175 Therefore, the Court reversed the Ninth Circuit's ruling. 1176

1170 Id.
1171 Id. at 1451 (quoting 28 U.S.C. 2254(d)(1)).
1172 Id. at 1449.
1173 Id. (quoting Iowa v. Tovar, 541 U.S. 77 (2004)).
1174 Id. (quoting Faretta v. California, 422 U.S. 806, 807 (1975)).
1175 Id. at 1451.
1176 Id.
Search and Seizure

**Bailey v. United States, 133 S. Ct. 1031 (2013)**

In this case the Supreme Court considered whether “the seizure of [a] person was reasonable when he was stopped and detained at some distance away from . . . premises to be searched when the only justification for the detention was to ensure the safety and efficacy of the search.”

The Court held that although such a search can be justifiable based on law enforcement interests, after an individual “has left the immediate vicinity of a premises to be searched. . . detentions must be justified by some other rationale.”

Because the district court mentioned that the seizure of the person may have been justified under *Terry*, but did not explore the issue fully, the Court remanded the case for the district court to explore that rationale.

Based on a tip from a confidential informant, police obtained a warrant to search a basement apartment at on Lake Drive in Wyandanch, New York, for a handgun. While the search unit prepared to execute the warrant, two detectives watched the exterior of the apartment from an unmarked car. The detectives saw two men, Chunon Bailey and Bryant Middleton, leave the apartment and enter a car parked nearby. Both of these men matched the confidential informant’s description of the handgun’s owner. According to the Supreme Court, “[t]here was no indication that the men were aware of the officers’ presence or had any knowledge of the impending search.”

The detectives waited for the vehicle to travel several hundred yards down the street before following it with intent to detain the men. After a few minutes of following, the detectives stopped Bailey and Middleton, ordered them out of the car, and frisked them. Bailey told the detectives he was coming from his home. According to Bailey’s driver’s license, he lived in Bayshore, New York; the confidential informant had communicated that the handgun’s owner previously lived in Bayshore. The detectives cuffed Bailey and Middleton, informing them that they were being detained incident to the execution of a search warrant for the Lake Drive apartment. Bailey then told the detectives he did not live there and that anything they would discover in the apartment did not belong to him. By the time Bailey, Middleton, and the detectives returned to the apartment, the search team had already found a gun and drugs. The police arrested Bailey and Middleton, seizing Bailey’s ring of keys — one of which unlocked the apartment door — incident to the arrest.

Bailey was charged with possession of cocaine with intent to distribute, possession of a firearm by a felon, and possession of a firearm in furtherance of a drug trafficking

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1178 Id. at 1042-43.
1179 Id.
1180 Id. at 1036.
1181 Id.
1182 Id.
1183 Id.
1184 Id.
1185 Id.
1186 Id.
1187 Id.
1188 Id.
1189 Id.
1190 Id.
1191 Id.
1192 Id.
Bailey moved to suppress the keys and the statements he made during the stop. The district court denied Bailey’s motion, holding that his detention was a reasonable as a detention incident to the execution of a search warrant under Michigan v. Summers. The district court also held that the stop was alternatively “lawful as an investigatory detention supported by reasonable suspicion under Terry v. Ohio . . . .” Bailey was convicted on all counts. The Second Circuit affirmed, holding that Bailey’s detention was allowable under Summers; the Second Circuit did not address the Terry question.

The Supreme Court granted certiorari to resolve a split among the circuits about “whether . . . Summers justifies the detention of occupants beyond the immediate vicinity of the premises covered by a search warrant.” Moreover, the Supreme Court sought to resolve the question of whether such a detention is reasonable “when [the detainee was] stopped and detained at some distance away from the premises to be searched when the only justification for the detention [is] to ensure the safety and efficacy of the search.”

The law enforcement interests that justified the detention in Summers do not apply to this case. Once a person leaves “the immediate vicinity of a premises to be searched,” some other rationale must justify that person’s detention. In general, the Fourth Amendment requires that a seizure be based on probable cause to believe that someone has committed a crime. Summers announced an exception to this rule by allowing “officers executing a search warrant to detain the occupants of the premises while a proper search is conducted.” The Summers rule does not require the detaining officers to have particularized suspicion toward the person or persons to be detained. According to Muehler v. Mena, “[a]n officer’s authority to detain incident to a search is categorical . . . .” Summers allows detention in this situation because the detention represents a small intrusion, while the justification for detention is significant. The Court analyzed the case in terms of three law enforcement interests recognized in Summers: “officer safety, facilitation the completion of the search, and preventing flight.”

In preserving their own safety, officers who are executing a search warrant may need to detain occupants in order to secure the premises. Detention may be necessary to prevent the occupants from disrupting the search or endangering the officers. The Court noted that “there is no established principle . . . that allows the arrest of anyone away from the premises

1193 Id.
1194 Id.
1195 Id. at 1036–37 (citing Michigan v. Summers, 452 U.S. 692 (1981)).
1196 Id. at 1037 (citing Terry v. Ohio, 392 U.S. 1 (1968)).
1197 Id.
1198 Id.
1199 Id.
1200 Id. at 1035.
1201 Id. at 1041.
1202 Id. at 1043.
1203 Id. at 1037 (quoting Dunaway v. New York, 442 U.S. 200 (1979)).
1204 Id. (quoting Summers, 452 U.S. at 705 (1981)) (internal quotation marks omitted).
1205 Id. at 1037–38 (citing Muehler v. Mena, 544 U.S. 93 (2005)).
1206 Id. at 1038 (quoting Muehler, 544 U.S. at 98) (internal quotation marks omitted).
1207 Id. (citing Muehler, 544 U.S. at 98).
1208 Id. (citing Summers, 452 U.S. at 702–03).
1209 Id.
1210 Id.
who is likely to return.” Moreover, the risk that one of the occupants could return to the premises during the search is significant. Therefore, the Court reasoned, if police could detain occupants who were off the premises, “the authority to detain incident to the execution of a search warrant would reach beyond the rationale of ensuring the integrity of the search by detaining those who are in fact on the scene.” The Court determined that the Summers rule should only apply “to those who are present when and where the search is being conducted” because extending the rule beyond the premises might allow the police to detain “anyone in the neighborhood who could alert occupants that the police are outside, all without individualized suspicion . . . .”

The enforcement interest in executed the search efficiently is based on the rationale that occupants who are allowed to wander freely around the premises could disrupt the search in many different ways. An occupant who leaves the premises before the search begins — as Bailey did — does not present such a risk. Law enforcement officers also have a significant interest in preventing occupants from “leaving with the evidence being sought or the means to find it.” Detaining an off-premises occupant “could facilitate a later arrest should incriminating evidence be discovered,” but the efficiency cannot be the sole justification for disregarding the Fourth Amendment.

The Court also pointed out that a public detention of an occupant away from his home is highly intrusive because it “resemble[s] a full-fledged arrest.” The detention in this case was more intrusive than a typical detention incident to a search because the detectives stopped Bailey’s car, ordered him to step out of the car, handcuffed him, and transported him back to his apartment in a marked police car.

The Court concluded that limiting the Summers rule to “the area in which an occupant poses a real threat to the safe and efficient execution of a search warrant ensures that the scope of the detention incident to a search is confined to its underlying justification.” Other law, such as Terry, would control an officer’s detention of an occupant away from the immediate vicinity.

**Florida v. Harris, 133 S. Ct. 1050 (2013)**

In this case the Supreme Court considered whether “the ‘alert’ of a drug-detection dog during a traffic stop provides probable cause to search a vehicle.” The Court held that the Florida Supreme Court’s holding that “the State must in every case present an exhaustive set of records, including a log of the dog’s performance in the field, to establish the dogs reliability,” was “inconsistent with the ‘flexible, common-sense standard’ of probable cause.”

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1211 *Id.* at 1039.
1212 *Id.*
1213 *Id.*
1214 *Id.* at 1040.
1215 *Id.*
1216 *Id.*
1217 *Id.*
1218 *Id.* at 1041 (quoting Mincey v. Arizona, 437 U.S. 385 (1978)).
1219 *Id.*
1220 *Id.*
1221 *Id.* at 1042.
1222 *Id.*
1224 *Id.* (citations omitted).
William Wheetley, a K-9 officer, was on a routine patrol with his canine partner Aldo, “a German shepherd trained to detect certain narcotics . . .”.\(^{1225}\) Wheetley stopped Clayton Harris’s truck because its license plate was expired.\(^{1226}\) Wheetley noticed that Harris was nervous.\(^{1227}\) He also saw an open beer can Harris’s cup holder.\(^{1228}\) Harris would not give consent for Wheetley to search the truck.\(^{1229}\) Wheetley walked Aldo around the truck for a sniff.\(^{1230}\) Aldo alerted at the handle of the driver’s side door.\(^{1231}\) Wheetley used this alert as probable cause to search the truck.\(^{1232}\) The search did not reveal any drugs of the types Aldo was trained to detect, but Wheetley did find several ingredients commonly used for making methamphetamine.\(^{1233}\) Wheetley then arrested Harris, who confessed (after being given Miranda warnings) that he regularly cooked and used methamphetamine.\(^{1234}\)

Harris was charged with possession of pseudoephedrine for use in manufacturing methamphetamine.\(^{1235}\) Later, while Harris was out on bail, Wheetley pulled him over again — this time for a broken brake light.\(^{1236}\) Wheetley had Aldo sniff the outside of the truck again, and Aldo alerted at the same place at which he had alerted previously.\(^{1237}\) Wheetley again searched the truck, but he found no contraband.\(^{1238}\)

Harris moved to suppress all the evidence Wheetley found in his truck, arguing that Wheetley did not have probable cause to search the truck.\(^{1239}\) Wheetley testified about his and Aldo’s drug detection training at the hearing.\(^{1240}\) Wheetley and Aldo had gone through several courses, some together and some separate, and Aldo had earned a certification.\(^{1241}\) Wheetley also testified that Aldo had performed well in his training exercises.\(^{1242}\) The State introduced Aldo’s monthly training logs, which showed satisfactory performance.\(^{1243}\)

Harris’s attorney did not argue the quality of Aldo’s training; instead, she focused on the certification and Aldo’s field performance.\(^{1244}\) Wheetley conceded that Aldo’s certification expired before he stopped Harris, but he also noted that Florida law did not require the certification.\(^{1245}\) He also admitted that he “did not keep complete records of Aldo’s performance in traffic stops or other field work; instead, he maintained records only of alerts resulting in arrests.”\(^{1246}\) However, Wheetley argued that Aldo’s alerts on Harris’s truck were the result of Harris leaving some “residual odor” of methamphetamine on the door handle.\(^{1247}\)

The trial court denied the motion to suppress, and Harris entered a nolo contendere plea while reserving his right

\(^{1225}\) Id.
\(^{1226}\) Id.
\(^{1227}\) Id.
\(^{1228}\) Id.
\(^{1229}\) Id.
\(^{1230}\) Id. at 1053-54.
\(^{1231}\) Id. at 1054.
\(^{1232}\) Id.
\(^{1233}\) Id.
\(^{1234}\) Id.
\(^{1235}\) Id.
\(^{1236}\) Id.
\(^{1237}\) Id.
\(^{1238}\) Id.
\(^{1239}\) Id.
\(^{1240}\) Id.
\(^{1241}\) Id.
\(^{1242}\) Id.
\(^{1243}\) Id.
\(^{1244}\) Id.
\(^{1245}\) Id.
\(^{1246}\) Id.
\(^{1247}\) Id.
to appeal.\textsuperscript{1248} The appellate court affirmed.\textsuperscript{1249} The Florida Supreme Court reversed, holding that the state “needed to produce a wider array of evidence” in order to prove that the dog was reliable.\textsuperscript{1250} The Florida Supreme Court emphasized the need to show evidence of the dog’s field performance, including “false positives” — situations in which the dog alerted but no contraband was found.\textsuperscript{1251}

The Supreme Court heard this case to define the rule a court should use when deciding “if the ‘alert’ of a drug-detection dog during a traffic stop provides probable cause to search a vehicle.”\textsuperscript{1252} The Court determined that the Florida Supreme Court’s ruling was “inconsistent with the ‘flexible, common-sense standard’ of probable cause.”\textsuperscript{1253} The record supported the trial court’s ruling that Aldo’s alert gave Wheetley probable cause to search Harris’s truck.\textsuperscript{1254}

An officer has probable cause to search when the available facts would cause a reasonable person to believe that some sort of contraband or other evidence of crime is present.\textsuperscript{1255} Probable cause requires a fair probability on which a reasonable person would act.\textsuperscript{1256} The Court emphasized that probable cause is a fluid concept based on the totality of the circumstances.\textsuperscript{1257}

\textsuperscript{1248} Id. at 1054–55.
\textsuperscript{1249} Id. at 1055.
\textsuperscript{1250} Id.
\textsuperscript{1251} Id.
\textsuperscript{1252} Id. at 1053.
\textsuperscript{1253} Id. (quoting Illinois v. Gates, 462 U.S. 213 (1983)).
\textsuperscript{1254} Id. at 1058.
\textsuperscript{1255} Id. at 1055 (quoting Texas v. Brown, 460 U.S. 730 (1983)).
\textsuperscript{1256} Id. (quoting Gates, 462 U.S. at 238, 231).
\textsuperscript{1257} Id. at 1055–56.

The Court admonished the Florida Supreme Court’s approach, which created a “strict evidentiary checklist” in contravention of the accepted meaning of probable cause.\textsuperscript{1258} The state court’s focus on performance records was the antithesis of “totality of the circumstances.”\textsuperscript{1259} The Court discounted the importance of field performance data, noting that it would not capture a dog’s “false negatives.”\textsuperscript{1260} Moreover, if a dog alerts on a car containing narcotics, but the officer’s search does not uncover any, the dog might not necessarily have been wrong; the drugs may simply have been too well hidden for the officer to find them.\textsuperscript{1261} A false positive might also be the result of drugs having been recently in the car or on the suspect’s person.\textsuperscript{1262} The Court concluded that evidence of a dog’s reliability is more likely to come from “controlled testing environments.”\textsuperscript{1263} Thus, “evidence of a dog’s satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert.”\textsuperscript{1264} Law enforcement agencies have an incentive to train drug-sniffing dogs well in order to avoid “incurring unnecessary risks or wasting limited time and resources.”\textsuperscript{1265}

A defendant has an opportunity to challenge evidence of a dog’s reliability, which may make evidence of the dog’s field performance relevant.\textsuperscript{1266} Even if a dog is normally reliable, the circumstances surrounding a certain

\textsuperscript{1258} Id. at 1056.
\textsuperscript{1259} Id.
\textsuperscript{1260} Id.
\textsuperscript{1261} Id.
\textsuperscript{1262} Id.
\textsuperscript{1263} Id. at 1057.
\textsuperscript{1264} Id.
\textsuperscript{1265} Id.
\textsuperscript{1266} Id.
alert might weaken the state’s case for probable cause. The court should weigh the evidence presented by both sides in light of the totality of the circumstances when determining whether the dog is reliable.

Even though Aldo’s certification had expired, he underwent the required continued training, as did Wheelley. The evidence also showed that Aldo “always performed at the highest level” in training settings. Harris, meanwhile, failed to challenge the adequacy of Aldo’s training at trial. Harris’s cross-examination of Wheelley also failed to rebut the state’s case. The Court determined that the evidence bore out Wheelley’s theory about why Aldo alerted. The Court also emphasized that no circumstances in this case gave Wheelley a reason to doubt Aldo.

**Florida v. Jardines, 133 S. Ct. 1409 (2013)**

This case involved the investigation of Joelis Jardines’s home by a drug-sniffing dog and whether that investigation constituted a “search” within the meaning of the Fourth Amendment. The U.S. Supreme Court held that this type of invasion was a “search.”

In 2006, a detective received a tip that Jardines was producing marijuana in his home. The investigation started by watching Jardines’s home, looking for unusual activity or certain vehicles, but detectives discovered nothing and could not see inside the house. The detectives approached the house with a K-9 unit that was trained to detect the presence of drugs. Soon after, while attached to a six-foot leash, the K-9 detected a strong odor and sat down (the trained behavior of the dog once the strong site has been detected). Based on this information, the detective got a warrant to search the residence. When that warrant was executed, Jardines attempted to flee, but was caught and arrested.

At trial, Jardines sought to suppress the evidence arguing that the K-9 unit’s dog sniff was an unreasonable search of his home. The trial court granted the motion, the state court of appeals reversed, and the Florida Supreme Court quashed the appellate decision and approved the district court ruling. The U.S. Supreme Court granted certiorari to determine “whether the officer’s behavior was a search within the meaning of the Fourth Amendment.”

The Court began by noting that the Fourth Amendment protects the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” It specifies certain
protections in “persons, houses, papers, and effects.” The “very core” of the provision calls for the home to be “free from unreasonable governmental intrusion.” Included in the “home” is “the area immediately surrounding and associated with the home.”

In this case, the officers’ investigation began in a constitutionally protected area of the house, but the question was whether it included an “unlicensed physical intrusion.” It is well established that officers need not “shield their eyes when passing by the home on public thoroughfares,” but the situation can be more problematic when an officer enters onto protected areas. However, there may be a license implied, allowing an officer to enter constitutionally protected premises. “This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly, . . . and then . . . leave.” The Court reasoned that “[t]he scope of the license—express or implied—is limited not only to a particular area but also to a specific purpose.”

In this case, a trained police dog was purposefully placed near the home in a constitutionally protected area for the purpose of discovering incriminating evidence. “Here, the background social norms that invite a visitor to the front door do not invite him there to conduct a search.”

The Court found that “the officers learned what they learned only by physically intruding on Jardines’s property to gather evidence,” and that “is enough to establish that a search occurred.” Thus, the use of a K-9 unit to investigate a home and its immediate surroundings constitutes a “search” within the meaning of the Fourth Amendment and its protections.


This case arose from a rape in Salisbury, Maryland, in 2003, in which the perpetrator was not identified, but his DNA was gathered. In 2009 Alazono King was arrested for first- and second-degree assault in Wicomico, Maryland, and was required to give a DNA sample via buccal swab as part of routine booking for serious crimes pursuant to the Maryland DNA Collection Act (Act). Through a database, the DNA sample taken from King was matched with that of the perpetrator of the 2003 rape and King was charged and convicted of the rape. The Court of Appeals of Maryland reversed and set aside the conviction holding that the DNA sample

1287 Id. (citing U.S. CONST. amend. IV).
1288 Id. (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)) (internal quotation marks omitted).
1289 Id. (quoting Oliver v. United States 466 U.S. 170, 180 (1984)) (internal quotation marks omitted).
1290 Id. at 1415.
1291 Id. (quoting California v. Ciraolo, 476 U.S. 207, 213 (1986)) (internal quotation marks omitted).
1292 Id.
1293 Id.
1294 Id. at 1416.
1295 Id.
1296 Id.
1297 Id. at 1417.
1298 Id. at 1417–18.
1300 Id. at 1965–66.
1301 Id. at 1965.
was an unreasonable seizure, but the Supreme Court reversed.\textsuperscript{1302}

The Maryland Act in this case allowed law enforcement to collect DNA samples from individuals charged with crimes of violence including murder, rape, first-degree assault, kidnapping, arson, and sexual assault.\textsuperscript{1303} Samples collected were placed in a database after arraignment (for identification purposes only) and were destroyed if the charges were found unsupported by probable cause, there was no conviction, or the conviction was reversed or vacated.\textsuperscript{1304}

Collection of DNA through a buccal swab involves rubbing a Q-tip against the inside of an individual’s cheek, which is quick, painless, and minimally intrusive.\textsuperscript{1305} The database utilized is called the Combined DNA Index System (CODIS) and is a part of a nationwide system authorized by Congress and supervised by the Federal Bureau of Investigation.\textsuperscript{1306}

The Court quickly pointed out that the framework for deciding this issue is well established, even though the question as to the DNA swab procedure is new. There is no doubt that a buccal swab of an arrestee’s cheek is a search and is protected by the Fourth Amendment.\textsuperscript{1307} As a search under the Fourth Amendment, the Court must determine if conducting the search without a warrant was reasonable.\textsuperscript{1308}

When a warrant is not required, a search must be reasonable in scope and manner of execution.\textsuperscript{1309} “This application of the ‘traditional standards of reasonableness’ requires a court to weigh ‘the promotion of legitimate governmental interest’ against ‘the degree to which [the search] intrudes upon an individual’s privacy.’”\textsuperscript{1310}

In applying this balancing test, the Court found several legitimate government interest served by the Maryland Act — primarily “the need for law enforcement officers in a safe and accurate way to process and identify the persons and possessions they must take into custody.”\textsuperscript{1311} Law enforcement may search a person incident to lawful arrest for safety or evidentiary purposes.\textsuperscript{1312} When an individual is placed in custody, law enforcement interests extend to identification purposes and knowledge about an arrestee’s criminal history is an important part of that identification.\textsuperscript{1313} Such information is routinely obtained through techniques such as photographs and fingerprinting and that information is compared with records that are not necessarily evidence of any particular crime.\textsuperscript{1314} In addition to safety and identification purposes, the Government has an interest in ensuring that those who are accused of crimes are available for trials.\textsuperscript{1315} Past criminal history also

\begin{itemize}
  \item \textsuperscript{1302} Id. 1965–66.
  \item \textsuperscript{1303} Id. at 1967.
  \item \textsuperscript{1304} Id.
  \item \textsuperscript{1305} Id. at 1967–68.
  \item \textsuperscript{1306} Id. at 1968 (discussing the scientific reasons why the technology used in CODIS is particularly accurate).
  \item \textsuperscript{1307} Id. at 1968–69 (citing Schmerber v. California, 384 U.S. 757, 770 (1966)).
  \item \textsuperscript{1308} Id. at 1969.
  \item \textsuperscript{1309} Id.
  \item \textsuperscript{1310} Id. at 1970 (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999)).
  \item \textsuperscript{1311} Id.
  \item \textsuperscript{1312} Id. at 1971 (citing United States v. Robinson, 414 U.S. 218, 224, (1973)).
  \item \textsuperscript{1313} Id. (pointing out that in some instances, some of the most dangerous criminals have been initially detained for minor offenses) (citing Hiibel v. Sixth Judicial Dist. Ct. of Nev., 542 U.S. 177, 191 (2004)).
  \item \textsuperscript{1314} Id. at 1971–72.
  \item \textsuperscript{1315} Id. at 1972–73 (noting that if an arrestee knows his responsibility for other crimes that he has not been charged with, he or she may be more inclined to flee) (citing Bell v. Wolfish, 441 U.S. 520, 534 (1979)).
\end{itemize}
plays a roll in the appropriateness of releasing an arrestee on bail.\textsuperscript{1316} Lastly, prompt DNA testing can rectify wrongful arrest.\textsuperscript{1317}

Taking a buccal swab during booking procedures fosters all of these Government interest and because there are so many legitimate Government interest furthered by similarly minimally intrusive procedures, the court has been “reluctant to circumscribe the authority of police to conduct reasonable booking searches.”\textsuperscript{1318}

“A significant government interest does not alone suffice to justify a search” and as such the Court considered the arrestee’s interests in the minimal intrusiveness of a buccal swab for DNA testing.\textsuperscript{1319} The Court began by pointing out that an arrestee has an expectation of privacy that is of “diminished scope” compared to that of the general public and that “extensive explorations” of a detainee’s person have been upheld.\textsuperscript{1320} The Court found buccal swabs to be minimally intrusive because they do not involve pain or a risk to the arrestee’s health.\textsuperscript{1321} The Court also did not find that the CODIS technology was intrusive on privacy because the DNA identification did not reveal any genetic traits about the arrestee and was limited to uses of identification only.\textsuperscript{1322}

As a result of balancing the Government’s interest and the arrestee’s interest in this case, the Court reversed the judgment of the Court of Appeals of Maryland and held that a cheek swab of an arrestee’s DNA is reasonable under the forth amendment as a police booking procedure.\textsuperscript{1323}

\textbf{Missouri v. McNeely, 133 S.Ct. 1552 (2013)}

In this case the Court considered “whether the natural metabolization of alcohol in the bloodstream presents a per se exigency that justifies an exception to the Fourth Amendment’s warrant requirement for nonconsensual blood testing in all drunk-driving cases.”\textsuperscript{1324} The Supreme Court held “that it does not, and . . . consistent with general Fourth Amendment principles, that exigency in this context must be determined case by case based on the totality of the circumstances.”\textsuperscript{1325}

An officer stopped Tyler McNeely after seeing him speeding and crossing the centerline.\textsuperscript{1326} The officer saw some signs of intoxication: McNeely’s eyes were bloodshot, his speech was slurred, and his breath smelled of alcohol.\textsuperscript{1327} McNeely failed field sobriety tests and declined a breathalyzer test.\textsuperscript{1328} The officer arrested McNeely.\textsuperscript{1329} When McNeely again refused to provide a breath sample, the officer drove McNeely to a local hospital for a blood test.\textsuperscript{1330} At the hospital, the officer asked

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\textsuperscript{1316} \textit{Id.} at 1973 (citing United States v. Salerno, 481 U.S. 739, 749 (1987)).

\textsuperscript{1317} \textit{Id.} at 1974.

\textsuperscript{1318} \textit{Id.} (emphasizing that minimally intrusive DNA testing such as that in this case was merely an extension of things such as photographing and fingerprints, and that the capabilities of police authorities should be permitted to expand as technology advances).

\textsuperscript{1319} \textit{Id.} at 1977.

\textsuperscript{1320} \textit{Id.} (citations omitted).

\textsuperscript{1321} \textit{Id.} at 1979 (citations omitted).

\textsuperscript{1322} \textit{Id.} at 1980 (for example, medical information can be kept private).

\textsuperscript{1323} \textit{Id.}

\textsuperscript{1324} Missouri v. McNeely, 133 S. Ct. 1552, 1556 (2013).

\textsuperscript{1325} \textit{Id.}

\textsuperscript{1326} \textit{Id.}

\textsuperscript{1327} \textit{Id.}

\textsuperscript{1328} \textit{Id.} at 1556-57.

\textsuperscript{1329} \textit{Id.} at 1557.

\textsuperscript{1330} \textit{Id.}
McNeely if he would consent to a blood test.\textsuperscript{1333} The officer told McNeely that “under state law refusal to submit voluntarily to the test would lead to the immediate revocation of his driver’s license for one year and could be used against him in a future prosecution.”\textsuperscript{1332} McNeely still refused.\textsuperscript{1333} A hospital technician, at the officer’s direction, took a blood sample, which showed that McNeely’s BAC was 0.154.\textsuperscript{1334}

McNeely was charged with driving while intoxicated.\textsuperscript{1335} He moved to suppress the blood test results, arguing that the blood sample was forcibly obtained without a warrant in violation of his Fourth Amendment rights.\textsuperscript{1336} The trial court granted the suppression motion, holding that there were no circumstances suggesting an emergency that made it impracticable for the officer to obtain a warrant.\textsuperscript{1337} The Missouri Supreme Court affirmed, holding that Schmerber v. California, “requires more than the mere dissipation of blood-alcohol evidence to support a warrantless blood draw in an alcohol-related case.”\textsuperscript{1338}

The Supreme Court agreed to hear this case to decide whether “the natural metabolization of alcohol in the bloodstream represents a per se exigency that justifies an exception to the warrant requirement.”\textsuperscript{1339}

The Court held that the natural metabolization of alcohol, by itself, is not an exigency that justifies an exception to the warrant requirement.\textsuperscript{1340}

A warrantless search of a person “is reasonable only if it falls within a recognized exception” to the warrant requirement.\textsuperscript{1341} This case presents an intrusion into “bodily integrity,” which “implicates an individual’s most personal and deep-rooted expectations of privacy.”\textsuperscript{1342} One exception to the warrant requirement is a situation in which the needs of law enforcement are so compelling that a warrantless search is objectively reasonable.\textsuperscript{1343} One such exigency is the need to prevent “imminent destruction of evidence.”\textsuperscript{1344} In an “exigent circumstances” situation, there must be “compelling need for official action and no time to secure a warrant.”\textsuperscript{1345}

The Court emphasized the need to look at the totality of the circumstances in determining whether the officer’s conduct in this case was justified.\textsuperscript{1346} The Court noted that its holding in Schmerber was confined to that case’s facts.\textsuperscript{1347} The State argued for “a per se rule for blood testing in drunk-driving cases,” allowing exigent circumstances to exist in every such case.\textsuperscript{1348} Since a person’s alcohol level gradually decreases after he or she stops drinking, “a significant delay in testing will negatively affect the probative value

\begin{footnotes}
\footnotetext{[1331]} \textit{Id.}
\footnotetext{[1332]} \textit{Id.}
\footnotetext{[1333]} \textit{Id.}
\footnotetext{[1334]} \textit{Id.}
\footnotetext{[1335]} \textit{Id.}
\footnotetext{[1336]} \textit{Id.}
\footnotetext{[1337]} \textit{Id.}
\footnotetext{[1338]} \textit{Id.} (quoting Schmerber v. California, 384 U.S. 757 (1966)).
\footnotetext{[1339]} \textit{Id.} at 1556 (italics in original).
\footnotetext{[1340]}\textit{See id.} at 1558.
\footnotetext{[1341]} \textit{Id.}
\footnotetext{[1342]} \textit{Id.} (quoting Winston v. Lee, 470 U.S. 753 (1985)) (internal quotation marks omitted).
\footnotetext{[1343]} \textit{Id.} (quoting Kentucky v. King, 131 S. Ct. 1849 (2011)).
\footnotetext{[1344]} \textit{Id.} at 1559 (citing Cupp v. Murphy, 412 U.S. 291 (1973)).
\footnotetext{[1345]} \textit{Id.} (quoting Michigan v. Tyler, 436 U.S. 499, 509 (1978)) (internal quotation marks omitted).
\footnotetext{[1346]} \textit{Id.}
\footnotetext{[1347]} \textit{Id.} at 1560.
\footnotetext{[1348]} \textit{Id.} (italics in original).
\end{footnotes}
of the results.” This fact, the Court noted, was essential to the holding of *Schmerber*. The Court also noted that a drunk driving suspect does not have control over the disposal of the evidence, because BAC evidence “naturally dissipates over time in a gradual and relatively predictable manner.” Furthermore, some delay between the incident in question and the time of the test is inevitable even if a warrant is not required. In general, warrants can now be processed much more efficiently than they could when *Schmerber* was decided.

The Court rejected the State’s argument against the usual case-by-case rule, stating that “an overly broad categorical approach . . . would dilute the warrant requirement” and that fact-intensive analysis is common in Fourth Amendment jurisprudence. The Court acknowledged that the problem with drunk driving is significant and that states have a compelling interest in dealing with it. However, “the general importance of the government’s interest in this area does not justify departing from the warrant requirement without showing exigent circumstances that make securing a warrant impractical in this case.” The Court expressed confidence that it’s ruling in this case would not hamper law enforcement because most states restrict warrantless blood draws.

**State v. Baldon, 829 N.W.2d 785 (Iowa 2013)**

In 2003, Isaac Baldon was sentenced to a prison term after he was convicted of possession of controlled substances with intent to deliver and possession of a firearm by a felon. Five years later, Baldon was granted parole. Baldon and his parole officer, signed a parole agreement with seventeen standard conditions and five special ones. One of the standard conditions, also known as “paragraph P,” was that Baldon would submit to a search at any time without a warrant or probable cause.

The Bettendorf Police Department “implemented a protocol to check the Traveler Motel in Bettendorf several times each day as part of a routine patrol,” because it was “the single highest crime location in Bettendorf.” Pursuant to this protocol, an officer would run the plates on all the vehicles in the motel parking lot. If the officer found a vehicle that belonged to a probationer or parolee, the officer contacted the vehicle owner’s parole officer “either to obtain consent to search the parolee or to invite the parole officer to join the police officer in a search of the parolee.” The officer would talk to the motel desk attendant to find out whether the parolee is checked into the motel and the room in which he or she is staying.

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1349 *Id.* at 1561.
1350 *Id.*
1351 *Id.*
1352 *Id.*
1353 *Id.*
1354 *Id.* at 1564.
1355 *Id.* at 1565.
1356 *Id.*
1357 *Id.* at 1566.
1358 *State v. Baldon, 829 N.W.2d 785, 787 (Iowa 2013).*
1359 *Id.*
1360 *Id.*
1361 *Id.*
1362 *Id.*
1363 *Id.*
1364 *Id.* at 787–88.
1365 *Id.* at 788.
This was the protocol Officer Tripp followed one morning in 2009. Tripp found that a 1996 Oldsmobile in the lot belonged to Baldon. Trip then called Sergeant Piazza and asked him to talk to Baldon’s parole officer. Piazza told the parole officer that Baldon was at the motel, whereupon the parole officer gave permission to search Baldon. However, the parole officer wanted to be involved in the search and asked the police to wait for his arrival.

The parole officer, Tripp, Piazza, and another Bettendorf officer knocked on the door of room 29. Baldwin answered and the officers saw a young woman (whom they later discovered was a minor) sitting on the bed.

The officers did not find anything incriminating in the motel room, but Tripp found a substantial amount of marijuana in Baldon’s car. After Tripp read Baldon his Miranda rights, Baldon said that someone had given him the marijuana to pay off a debt. Baldon was charged with possession of a controlled substance with intent to deliver and possession of an amount of marijuana greater than 42.5 grams.

Baldon moved to suppress the marijuana the police found in his vehicle, arguing that paragraph P of his parole agreement constituted involuntary consent. The State countered that Baldon had “consented to the search by signing the parole agreement and that the consent made the search reasonable.” Baldon was found guilty at a bench trial, and he appealed.

The issue of this case, then, was whether Baldon, by signing the parole agreement, consented to the search. Because Baldon’s claim was constitutionally based, the court reviewed it de novo. The State reiterated its consent argument on appeal. It also argued, in the alternative, that the search was reasonable “because Baldon’s minimal expectation of privacy was outweighed by the interests of society in managing parolees and preventing recidivism, as well as reasonable suspicion.”

Because the State failed to present the alternative argument at trial, the Iowa Supreme Court declined to consider it. However, the Court stressed the need to consider the case under both the Iowa and Federal Constitutions.

The Court noted that warrantless searches are generally unreasonable, “subject only to a few specifically established and well-delineated exceptions.” One such exception is the situation in which someone consents to a search. The Court, citing Zap v.

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1366 Id.
1367 Id.
1368 Id.
1369 Id.
1370 Id.
1371 Id.
1372 Id.
1373 Id.
1374 Id.
1375 Id.
1376 Id.
1377 Id.
1378 Id.
1379 Id.
1380 Id. at 789.
1381 Id. (quoting State v. Dewitt, 811 N.W.2d 460, 467 (Iowa 2012)).
1382 Id.
1383 Id.
1384 Id.
1385 Id. at 790.
1386 Id. at 791 (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973)) (internal quotation marks omitted).
1387 Id. (citing State v. Reinier, 628 N.W.2d 460 (Iowa 2001)).
United States, pointed out that “a person can contract away the constitutional right to be free from unconstitutional searches.” In Zap, the United States Supreme Court upheld a warrantless search of a government contractor who, in his work contract, had “specifically agreed to permit the government to search the account and billing records of his business during the term of the contract.” The Court held that the contract was a valid waiver of the contractor’s privacy rights “because he agreed to permit the search in order to obtain the government’s business.” The Court further held that the search “was not carried out in an unreasonable manner . . .”

In light of Zap, the Court proceeded to analyze whether the consent given in Baldon’s parole agreement was voluntary. Many other courts have held that “consent-search provisions in probation agreements constitute a waiver of search-and-seizure rights.” Some reached the opposite conclusion. Few jurisdictions, however, have considered the same question in the context of a parole agreement context.

In assessing those cases, the Court discounted cases involving probation agreements because of probationers’ superior bargaining power compared to that of parolees. The Court also set aside cases enforcing consent provisions because they “largely undervalue the rights of parolees . . .” The Court found two cases that raised the concern that “suspicionless searches of parolees also impact persons who live with parolees.” Finally, the Court found a set of cases that disapproved of consent provisions because “such a condition of parole is coercive and, therefore, involuntary.”

In terms of Iowa law, the Court noted that it “previously recognized the absence of bargaining power by a parolee in a parole agreement,” in State v. Cullison. From this, the Court concluded that its own precedent and authority from other jurisdictions “has revealed that a consent-to-search clause in a parole agreement would not necessarily satisfy the type of consent to qualify as an exception to the search-and-seizure requirement” under the Iowa Constitution. The Court also discussed secondary sources of authority at length.

Ultimately, the Court phrased the question narrowly, determining “whether the government can conduct the search based solely on consent required to be given by parolees as a condition of release from prison.” The Court pointed out that, unlike the contract in Zap, there was no “benefit of the bargain” for the parolee to be found on the face of the parole agreement.

The Court stressed its refusal “to enforce unconscionable contracts” because of a “strong distaste for the enforcement of unjust terms between

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1388 Id. (citing Zap v. United States, 328 U.S. 624, 628–29 (1947)).
1389 Id. at 792 (citing Zap, 328 U.S. at 627).
1390 Id. (quoting Zap, 328 U.S. at 628) (internal quotation marks omitted).
1391 See id.
1392 Id. at 792–93.
1393 Id. at 793–94.
1394 Id. at 794–95.
1395 Id. at 795.
1396 Id. at 796.
1397 Id.
1398 Id.
1399 Id. at 796.
1400 Id. (citing State v. Cullison, 173 N.W.2d 533, 536–37 (Iowa 1970)).
1401 Id. at 797.
1402 See id. at 797–800.
1403 Id. at 800.
1404 Id. at 801.
parties of grossly disproportionate bargaining power.”

The Court pointed out that parole is often offered early in a prisoner’s sentence. In fact, “the average prospective parolee who committed the same crimes as Baldon would face more than eight additional years in prison if he or she did not sign the parole agreement containing a search provision.” Thus, the Court concluded that “[t]he amount of freedom typically at stake points to the coercive nature of consent searches as a precondition to release.” Moreover, the parolee must agree to the terms of the parole as a condition of release.

From this, the Court concluded that “a parole agreement containing a prospective search provision is insufficient evidence to establish consent.”

**State v. Kern, 831 N.W.2d 149 (Iowa 2013)**

In *Kern*, the Supreme Court of Iowa considered the constitutionality of a search of the home of a parolee that uncovered evidence used to prosecute and convict the parolee of numerous drug offenses. The Court considered this question in light of whether the search was “justified by the doctrines of consent, special needs, exigent circumstances, community caretaking, or general balancing of governmental interest served by the search against the privacy interest of the parolee.” The Court held that the search of the home and the seizure of evidence violated article 1, section 8 of the Iowa Constitution.

Christine Kern was on parole after serving prison time for a conviction of operating a motor vehicle while intoxicated, third offense. As a part of her parole, she signed a parole agreement which stated: “I will submit my person, property, place of residence, vehicle, personal effects to search at any time, with or without a search warrant, warrant of arrest or reasonable cause by any parole officer or law enforcement officer.” Several months into her parole, a child assessment worker with the Iowa Department of Human Services made a visit to Kern’s home (where she lived with her boyfriend), along with two police officers, to investigate allegations of growing and selling marijuana in the house. Such circumstances would endanger Kern’s sixteen-year-old daughter and her infant grandchild. Officers noted that during the visit Kern and her boyfriend were acting “defensive.”

During the course of the visit Kern would not consent to a search of the home, so the child assessment worker removed the children from the home and informed the police officers that Kern was a parolee. After checking with Kern’s probation officer and their superiors, officers proceeded with a search of the home in which they discovered marijuana growing...
operations and large quantities of marijuana. Kern and her boyfriend were arrested and she was charged with:

(1) conspiracy to manufacture a controlled substance in violation of Iowa Code section 124.401(1)(d)(2009), (2) manufacturing a controlled substance in violation of Iowa Code section 124.401(1)(d), (3) possession of a controlled substance with intent to deliver in violation of Iowa Code section 124.401(1)(3), and (4) failure to possess tax stamp in violation of Iowa Code sections 453B.3 and 453B.12.

Kern moved to suppress the marijuana arguing that it was obtained in violation of her constitutional rights under the Fourth Amendment of the United States Constitution and article 1, section 8 of the Iowa Constitution.

The district court denied the motion to suppress. It found:

Kern gave ‘advance consent to search her property without a warrant or without reasonable cause’ by signing the parole agreement. Additionally, it upheld the search as reasonable based on the DHS complaint combined with the police officer’s suspicion derived from the conduct of Kern and [her boyfriend] during the initial encounter. The court also found the search was justified under exigent circumstances and the community caretaking function.

In a trial on the minutes of testimony, the district court found Kern guilty of all four counts. Kern appealed.

Upon review the Court first determined whether there was sufficient evidence presented at trial for a fact finder to find Kern guilty beyond a reasonable doubt, because “the Double Jeopardy Clause would not permit retrial of the charges if there was insufficient evidence of guilty presented at trial.” Such challenges are reviewed for corrections of errors at law, and evidence presented at trial is viewed in the light most favorable to the State.

The Court only found that one of the four charges — conspiracy to manufacture a controlled substance — was supported by substantial evidence at the trial and the remaining charges were dismissed. With regard to that charge, it was necessary for the State to show:

(1) the defendant agreed with one or more persons that one or both of them would manufacture or attempt to manufacture [marijuana], (2) the defendant entered into such an agreement with the intent to promote or facilitate the manufacture of [marijuana], (3) one of the parties to the agreement committed an overt act to accomplish the manufacturing of [marijuana], and (4) that alleged coconspirator(s) was not a law enforcement agent or assisting

1420 Id.
1421 Id.
1422 Id.
1423 Id.
1424 Id. at 158 (citing State v. Dullard, 668 N.W.2d 585, 597 (Iowa 2003)).
1425 Id. (citing State v. Randle, 555 N.W.2d 666, 671 (Iowa 1996)).
1426 Id. (citing State v. Torres, 495 N.W.2d 678, 681 (Iowa 1993)).
1427 Id. at 163.
law enforcement when the conspiracy began.\textsuperscript{1428} The Court found that Kern had an agreement with her boyfriend with intent to promote the manufacture of marijuana as evidenced by circumstantial evidence (e.g., that Kern knew that marijuana was being manufactured in her home).\textsuperscript{1429} On this point, the Court held that a fact finder relying on this information could rationally find beyond a reasonable doubt that Kern intended to promote or facilitate the manufacturing of marijuana.\textsuperscript{1430}

The Court went on to explain that the additional three charges — possession of controlled substance with intent to deliver, manufacturing a controlled substance, and failure to attach a tax stamp — were not supported by evidence at trial. The Court considered whether Kern could be found guilty of possession of controlled substance either through actual or constructive possession. To prove actual possession "[u]nder the statute, the State must prove the accused ‘exercised dominion and control over the contraband, had knowledge of the contrabands presence, and had knowledge the material was a narcotic,” but in this case, there was no marijuana on Kern’s person, so she could not be in actual possession of marijuana.\textsuperscript{1431} “To prove constructive possession, the State must show ‘the defendant had knowledge of the controlled substance as well as the authority or right to control it.’”\textsuperscript{1432} Because such a showing is based on inferences, it is necessary to evaluate additional proof in addition to the presence of drugs found on a jointly occupied premise such as:

1. incriminating statements made by a person; 2. incriminating actions of the person upon the police’s discovery of a controlled substance amount or near the person’s personal belongings; 3. the person’s fingerprints on the packages containing the controlled substances; and 4. any other circumstances linking the person to the controlled substance.\textsuperscript{1433}

The Court concluded:

[T]here was no evidence that Kern was more than an agreeable bystander to a vast operation she permitted to take place . . . [and that the] inference that Kern conspired with [her boyfriend] . . . cannot be extended to also support an inference that Kern exercised dominion and control over the marijuana, without some evidence pointing to dominion and control.\textsuperscript{1434}

With regard to the charge of manufacturing a controlled substance, the Court again agreed with Kern in that there was insufficient evidence to support the conviction.\textsuperscript{1435} The Court emphasized that “manufacturing [is] an active concept, requiring more than . . . mere passive knowledge” and that the state failed to produce an affirmative act of manufacturing.\textsuperscript{1436} Finally, as to the charge of failure to possess a tax stamp, the Court held that because the crime was based on possession and there was

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{1428} Id. (citations omitted).
\item \textsuperscript{1429} Id. 159–60 (citations omitted).
\item \textsuperscript{1430} Id. at 160.
\item \textsuperscript{1431} Id. at 160–61 (quoting State v. Dewitt, 811 N.W.2d 460, 474 (Iowa 2012)).
\item \textsuperscript{1432} Id.
\item \textsuperscript{1433} Id. at 161 (citing State v. Maxwell, 743 N.W.2d 185, 194 (Iowa 2008)).
\item \textsuperscript{1434} Id. at 162.
\item \textsuperscript{1435} Id.
\item \textsuperscript{1436} Id.
\end{enumerate}
\end{footnotesize}
insufficient proof for that charge, evidence also did not support a conviction for failure to affix a drug tax stamp.\textsuperscript{1437}

After concluding that the conspiracy charge was the only charge supported by the evidence presented at trial, the Court ordered dismissal of the remaining charges and moved on to considered the validity of the search and seizure with regard to that charge.\textsuperscript{1438}

The Court reviewed the potential constitutional violation de novo and based on the totality of circumstances shown by the entire record.\textsuperscript{1439} The Court pointed out that the claim was brought under both the federal and state constitutions and opted to answer the question under the state constitution.\textsuperscript{1440} The test employed under these circumstances has two steps: (1) “the defendant must show that he or she has a ‘legitimate expectation of privacy, in the area searched” and (2) “if so, [the Court] must determine whether the defendant’s rights were violated.”\textsuperscript{1441}

The State argued that some sort of exception was applicable because the search could be justified either through the parole agreement as prospective consent for a warrantless search; or alternatively, it could be justified as a search based on special needs, exigent circumstances, community caretaking, or a generalized balancing test.\textsuperscript{1442}

The Court emphasized that Iowa has elected to “vest parolees with the expectation of privacy enjoyed by persons not convicted of crimes and allows them to object to a search of their home or person” under the Iowa Constitution, despite the fact that the Supreme Court has provided parolees with little or no reasonable expectation of privacy under the Forth Amendment of the United States Constitution.\textsuperscript{1443} The Court then went on to consider the several doctrines that could be implicated in this particular search and seizure.

The Court invalidated the prospective consent provision of the parole agreement, which would have justified the search under the consent to search doctrine.\textsuperscript{1444} As for the special needs doctrine, the Court considered whether the parole system presents circumstances that justify circumventing the warrant and probable cause requirement.\textsuperscript{1445} The issue in such cases is whether seeking a warrant would frustrate the government’s interest in a search.\textsuperscript{1446} In the case of parolees, governmental interest may have to do with supervision or rehabilitation of parolees; however, under Iowa precedent, special needs searches have been limited and status as a parolee, standing alone, has not been a sufficient interest to justify a warrantless search.\textsuperscript{1447} The Court expressly declined to declare this type of special needs exception under article 1, section 8 of the Iowa Constitution.\textsuperscript{1448}

\textsuperscript{1437}Id.
\textsuperscript{1438}Id. at 163.
\textsuperscript{1439}Id. at 164 (citations omitted).
\textsuperscript{1440}Id. (citing State v. Pals, 805 N.W.2d 676, 771 (Iowa 2011), which permits the Court to consider claims brought under the federal and state constitutions in either order or simultaneously).
\textsuperscript{1441}Id. (citing State v. Lowe, 812 N.W.2d 554, 567 (Iowa 2012)).
\textsuperscript{1442}Id.
The Court considered the community caretaking exception under the federal standards, as Iowa does not employ a different standard under the Iowa Constitution for this exception.\textsuperscript{1449} The Court held that the doctrine was not applicable in this case because the search and seizure did not fit within the rationale of the exception, which is based on the need of assistance, totally separate from law enforcement purposes.\textsuperscript{1450} Lastly the Court evaluated whether the search could be justified under the exigent-circumstances exception, which has to do with a situation in which there is “a probability that, unless immediately seized, evidence will be concealed or destroyed.”\textsuperscript{1451} The Court held that the State did not have the requisite level of suspicion to justify any type of exigent circumstances exception.\textsuperscript{1452} The Court concluded that no exception to the warrant requirement justified the warrantless search of Kern’s home under article 1, section 8 of the Iowa Constitution and that the marijuana seized should be suppressed.\textsuperscript{1453} The judgment was reversed and remanded for a new trial on the conspiracy charge.\textsuperscript{1454}

\textbf{State v. Kooima, 832 N.W.2d 202 (Iowa 2013)}

This case arose from a traffic stop of Leon Kooima that was initiated based solely on an anonymous tip that the defendant, who was driving, was intoxicated.\textsuperscript{1455} The tipster reported that he saw the defendant and several other businessmen leave a bar and head to their car and were ready to leave town. During the traffic stop, the Kooima failed one field sobriety test and was arrested for operating while intoxicated.\textsuperscript{1456} His breath specimen indicated that the defendant’s blood alcohol level was .088.\textsuperscript{1457} Kooima was charged with OWI second-offense and moved to suppress all evidence obtained from the stop, arguing that his federal and state constitutional rights were violated because the police acted upon an anonymous tip.\textsuperscript{1458} The district court denied the motion to suppress and this Court denied discretionary review.\textsuperscript{1459} The defendant was found guilty at a bench trial, he appealed and the case was transferred to the court of appeals.\textsuperscript{1460} The court of appeals affirmed and the Court granted the defendant’s application for further review.\textsuperscript{1461} The Court reviewed the issue of whether Kooima’s rights against unreasonable search and seizure were protected.

\begin{itemize}
  \item \textsuperscript{1449} \textit{Id.} at 172.
  \item \textsuperscript{1450} \textit{Id.} at 172–74 (pointing out that if there was any need of assistance, it was for the children in this case, and that need for assistance dissipated once the children were removed from the house).
  \item \textsuperscript{1451} \textit{Id.} at 174 (quoting State v. Naujoks, 637 N.W.2d 101, 108 (Iowa 2001)).
  \item \textsuperscript{1452} \textit{Id.} at 175–76 (explaining that an anonymous tip, refusal to consent, defensive posture, refusal to consent when faced with removing children, and the defendant being a parolee did not provide reasonable suspicion or probable cause).
  \item \textsuperscript{1453} \textit{Id.} at 177.
  \item \textsuperscript{1454} \textit{Id.}
  \item \textsuperscript{1455} State v. Kooima, 833 N.W.2d 202, 204–05 (Iowa 2013).
  \item \textsuperscript{1456} \textit{Id.} at 205.
  \item \textsuperscript{1457} \textit{Id.}
  \item \textsuperscript{1458} \textit{Id.}
  \item \textsuperscript{1459} \textit{Id.}
  \item \textsuperscript{1460} \textit{Id.}
  \item \textsuperscript{1461} \textit{Id.}
\end{itemize}
violated de novo.  The Court decided the case under the Federal Constitution and declined to analyze the case under the Iowa Constitution. Police officers may conduct an investigatory stop of a vehicle if an officer “has a reasonable suspicion supported by articulable facts that criminal activity may be afoot.” An anonymous tip can provide “a sufficient indicia of reliability to give rise to reasonable suspicion for an investigatory stop of a vehicle” under some circumstances. The test for determining whether an anonymous tip is sufficient “depends on the quantity and quality, or degree of reliability, of that information, viewed under the totality of the circumstances.” “If a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable.”

The Court reviewed cases in which anonymous tips have had sufficient indicia of reliability to justify traffic stops, and more narrowly, where the tip has sufficient indicia of reliability as to traffic stops for OWI. The Court identified three common elements of anonymous tips were they contained sufficient indicia of reliability to justify a stop:

[(1)] the tipster gave an accurate description of the vehicle, including its location, so the police could identify the vehicle;

[(2)] the tipster based his or her information on personal, eyewitness observations made contemporaneously with a crime in progress that was carried out in public, identifiable and observable by anyone; [and (3)] the caller described specific examples of traffic violations, indicating the report was more than a mere hunch.

Alternatively, tips have been insufficient and stops have violated the Fourth Amendment when the tip “does not include details pertaining to the tipster’s personal observation of erratic driving, other facts that would lead to a reasonable inference the tipster witnessed an intoxicated driver, or details not available to the general public as to the defendant’s future actions.” Tips that do not provide officers with means to “test the anonymous tipster’s personal knowledge or credibility” do not amount to anything but hunches, which do not have “indicia of reliability in its assertions of illegality.”

The Court distinguished this case from State v. Christoffersen, where the suspect hit an officer’s patrol car, which constituted an “obvious offense committed in the presence of a police officer, which served as the basis for the stop.” The Court overruled the case “to the extent it . . . [stood] for the proposition that a bare assertion by an anonymous tipster reporting drunk driving provides reasonable suspicion to stop a vehicle.”

1462 Id. at 205–06.
1463 Id. at 206 (citing State v. Ochoa, 792 N.W.2d 260, 267 (Iowa 2010)).
1464 Id. (citing U.S. v. Sokolow, 490 U.S. 1, 7 (1989)).
1465 Id.
1466 Id. (citing Alabama v. White, 496 U.S. 325, 330 (1990)).
1467 Id. (quoting White, 496 U.S. at 330).
1468 Id. at 208–09.
1469 Id. at 209 (citations omitted).
1470 Id. at 209–10 (citing Florida v. J.L., 529 U.S. 266 (2000)).
1471 Id. at 210 (quoting State v. Christoffersen, 756 N.W.2d 230 (Iowa Ct. App. 2008)).
1472 Id.
In analyzing the facts of this case the Court held:

[A] bare assertion by an anonymous tipster, without relaying to the police a personal observation of erratic driving, other facts to establish the driver is intoxicated, or details not available to the general public as to the defendant’s future actions does not have the request indicia of reliability to justify an investigatory stop.\textsuperscript{1473}

In this case, the tipster did not observe erratic driving and stated a predictive fact that would be known to the general public - that the vehicle was ready to leave town.\textsuperscript{1474} Additionally, there was not any intimate knowledge in the fact that the well-known businessmen in the vehicle would be heading home from the bar at about 11:30 on Wednesday night.\textsuperscript{1475} The Court vacated the decision of the court of appeals and reversed and remanded the district court judgment.\textsuperscript{1476}

\textbf{State v. Tyler, 830 N.W.2d 288 (Iowa 2013)}

In this case the Iowa Supreme Court decided “whether law enforcement had probable cause to believe that an equipment violation was occurring under Iowa Code section 321.37(3), which prohibits an owner of a motor vehicle from placing a frame around a license plate that obstructs the view of the plate.”\textsuperscript{1477} The Court held the officer in this case “did not have probable cause or reasonable suspicion” to stop the vehicle.\textsuperscript{1478}

On October 13, 2010, Officer Lowe was sitting in his patrol car by the side of Merle Hay Road in Des Moines Iowa, when he saw Tommy Tyler drive past in his SUV.\textsuperscript{1479} Lowe thought the SUV had a tinted license plate cover on the front plate.\textsuperscript{1480} He pulled into the road to follow Tyler and noticed the same tinted license plate cover on the back.\textsuperscript{1481} Lowe recognized this vehicle as the same one he had pulled over two days previously for the same reason.\textsuperscript{1482} Because he had difficulty running the plate, Lowe stopped Tyler’s vehicle.\textsuperscript{1483} However, after making the stop, but before making contact with Tyler, Lowe was able to read the state and number on the plate and relay the information to dispatch.\textsuperscript{1484} After telling Tyler why he stopped him, Lowe noticed that Tyler’s speech was slow and that Tyler’s breath smelled of alcohol.\textsuperscript{1485} A breathalyzer test showed that Tyler had a BAC of 0.147.\textsuperscript{1486}

Tyler moved to suppress the evidence of his BAC, arguing that Lowe had neither reasonable suspicion nor probable cause to stop him.\textsuperscript{1487} At the hearing, Lowe testified that he could not read the plate clearly when he first turned on his lights, although he

\begin{itemize}
\item \textsuperscript{1473} \textit{Id.} at 210–11.
\item \textsuperscript{1474} \textit{Id.} at 211.
\item \textsuperscript{1475} \textit{Id.} (drawing comparisons between this case and \textit{J.L.}, where the tipster only reported that the defendant was a young man, wearing a plaid shirt at a particular bus stop, but did not have the intimate knowledge necessary predict the defendant’s future behavior).
\item \textsuperscript{1476} \textit{Id.}
\item \textsuperscript{1477} State v. Tyler, 830 N.W.2d 288, 290 (Iowa 2013) (or alternatively, whether the officer had reasonable suspicion to justify the stop).
\item \textsuperscript{1478} \textit{Id.} at 299.
\item \textsuperscript{1479} \textit{Id.} at 290.
\item \textsuperscript{1480} \textit{Id.}
\item \textsuperscript{1481} \textit{Id.}
\item \textsuperscript{1482} \textit{Id.}
\item \textsuperscript{1483} \textit{Id.}
\item \textsuperscript{1484} \textit{Id.} at 290–91.
\item \textsuperscript{1485} \textit{Id.} at 291.
\item \textsuperscript{1486} \textit{Id.}
\item \textsuperscript{1487} \textit{Id.}
\end{itemize}
acknowledged that he could read the plate once he had stopped Tyler.\footnote{Id.} After the trial court denied Tyler’s motion to suppress, Tyler was convicted of OWI.\footnote{Id.} Tyler appealed, arguing that the trial court had incorrectly denied his suppression motion.\footnote{Id.} After the court of appeals affirmed, the Iowa Supreme Court agreed to hear the case.\footnote{Id.}

The initial issue in this case was whether Officer Lowe had probable cause to believe there was an ongoing equipment violation under section 321.37(3).\footnote{Id.} If Lowe did not have probable cause, then the issue would become “whether reasonable suspicion of [an] equipment violation is sufficient to support a traffic stop.”\footnote{Id.}

Tyler argued that his state and federal constitutional rights to be free from unreasonable search and seizure were violated.\footnote{Id.} The Court applied a de novo standard of review to these constitutional claims.\footnote{Id.} The Court decided to apply Supreme Court case law in order to interpret Tyler’s state constitutional claims because Tyler did not propose an alternative method of interpretation.\footnote{Id.}

A traffic stop, the Court noted, is clearly a seizure under the Fourth Amendment.\footnote{Id.} Because people travel in vehicles so frequently, the Court noted that some protection against unreasonable searches and seizures must be afforded to them.\footnote{Id.} If an officer witnessed a traffic violation, then the state has established probable cause for the stop.\footnote{Id.} This is so even if the officer made “a reasonable mistake of fact.”\footnote{Id.} However, it is less clear whether reasonable suspicion always justifies a traffic stop.\footnote{Id.} A stop based on reasonable suspicion, also known as a Terry stop is meant to investigate a crime.\footnote{Id.} On the other hand, a probable cause stop is meant to “seize someone who has already committed a crime.”\footnote{Id.}

The Court explained that the state must carry the burden of proving that the officer had probable cause to stop by a preponderance of the evidence.\footnote{Id.} The Court noted that “[t]he existence of probable cause for a traffic stop is evaluated from the standpoint of an objectively reasonable police officer.”\footnote{Id.} Here, the only basis for the stop was that Lowe allegedly observed a violation of section 321.37(3).\footnote{Id.} While an objectively reasonable mistake of fact may still justify a traffic stop, a mistake of law may not.\footnote{Id.} Here, the Court determined that the state failed to meet its burden of proving that Lowe had probable cause to stop Tyler’s vehicle because section 321.37(3) does not prohibit tinted license plate covers.\footnote{Id.} Therefore, a mistake of law occurred.\footnote{Id.}

\footnote{1499 Id. (citing State v. Tague, 676 N.W.2d 197, 201 (Iowa 2004)).}
\footnote{1500 Id. (citing State v. Lloyd, 701 N.W.2d 678, 680–81 (Iowa 2005)).}
\footnote{1501 Id.}
\footnote{1502 Id. at 293.}
\footnote{1503 Id.}
\footnote{1504 Id. (citing State v. Louwrens, 792 N.W.2d 649, 651 (Iowa 2010)).}
\footnote{1505 Id. at 293–94 (quoting Ornelas v. United States, 517 U.S. 690, 696 (1996)) (internal quotation marks omitted).}
\footnote{1506 Id. at 294.}
\footnote{1507 Id.}
\footnote{1508 Id.}
\footnote{1509 Id. at 296.}
The Court also noted that the State provided no evidence “as an alternative reason for Tyler’s seizure.” \textsuperscript{1510} The State also failed to provide any evidence regarding alternative factual theories about why the license plate might have been obstructed.\textsuperscript{1511} Lowe’s testimony that the license plate was blurry or giving off a glare was not sufficient to give him a reason to stop Tyler. \textsuperscript{1512} The Court emphasized that the test of \textit{Terry} involves “balancing the governmental interest advanced by the seizure against the ‘intrusion upon the constitutionally protected interests of the private citizen’ to be free from unnecessary seizure.”\textsuperscript{1513} A \textit{Terry} stop is an “investigatory” stop.\textsuperscript{1514} The Court, looking to a LaFave treatise, noted that “[i]f reasonable suspicion exists, but a stop cannot further the purpose behind allowing the stop . . . it cannot be a valid stop.\textsuperscript{1515} The officer must also have “a legitimate expectation of investigatory results . . . .”\textsuperscript{1516} Once Lowe could see the plate clearly, the original reason for the stop ended and there was no need for further investigation. \textsuperscript{1517} The State failed to show that Lowe was attempting to investigate an ongoing crime.\textsuperscript{1518}

The Iowa Supreme Court concluded that Lowe did not have probable cause to stop Tyler due to Lowe’s mistake of law.\textsuperscript{1519} The Court also held that Lowe did not have reasonable suspicion to stop Tyler, either. \textsuperscript{1520} Because of this, the Court determined that Tyler’s constitutional rights were violated and that the evidence in question was not admissible.\textsuperscript{1521}

\textsuperscript{1510} \textit{Id.} at 295.
\textsuperscript{1511} \textit{Id.}
\textsuperscript{1512} \textit{Id.} at 296.
\textsuperscript{1513} \textit{Id.} at 297 (quoting \textit{Terry v. Ohio}, 392 U.S. 1, 21 (1968)).
\textsuperscript{1514} \textit{Id.} at 298.
\textsuperscript{1515} \textit{Id.} (quoting 4 Wayne R. LaFave, \textit{Search and Seizure: A Treatise on the Fourth Amendment} § 9.3(a), at 482 (5th ed. 2012)) (internal quotation marks omitted).
\textsuperscript{1516} \textit{Id.} (quoting 4 Wayne R. LaFave, \textit{Search and Seizure: A Treatise on the Fourth Amendment} § 9.3(a), at 482 (5th ed. 2012)) (internal quotation marks omitted).
\textsuperscript{1517} \textit{Id.}
\textsuperscript{1518} \textit{Id.}
\textsuperscript{1519} \textit{Id.} at 294.
\textsuperscript{1520} \textit{Id.} at 298.
\textsuperscript{1521} \textit{Id.}
Self-Incrimination

State v. Washington III, 832 N.W.2d 650 (Iowa 2013)

The issue in Washington, was “whether the sentencing court improperly penalized the defendant for invoking his Fifth Amendment right against self-incrimination.” The Court held “that when the district court asks the defendant a question at sentencing and then imposes an adverse sentencing consequence unrelated to any legitimate penological purpose of the inquiry because the defendant invoked his Fifth Amendment rights, the defendant has been improperly penalized.”

The issue in this case rose at a sentencing hearing for Kenneth Washington after he pled guilty to possession of marijuana. At the hearing, where the State had agreed to recommend 50 hours of community service, one year of probation, and a $500 civil penalty for a deferred judgment, the court inquired about whether the defendant would test positive if he was given a drug test. When the defendant invoked his Fifth Amendment right to remain silent, the court went along with the State’s recommendation, but imposed 250 hours of community service, instead of the recommended 50 hours (the court also imposed a lower fine due to the defendant’s lack of employment). The court required that the community service be completed in 150 days and that 50 hours be completed within 30 days.

In response to the community service hours imposed, Washington’s counsel inquired about the necessity of that number of hours, since that number of hours was not a typical resolution for deferred judgments in similar cases. The court stated that it “believe[d] that Mr. Washington would benefit by the community service” and invited his counsel to “look at the orders that were entered, [the day before, claiming that] there were several [community services hours] in that range that involved deferred judgments.”

Washington’s counsel did look at the sentencing orders from the previous day and found that of the twenty-nine defendants who received sentences for possession of controlled substance first offense, eleven received deferred judgments. Eight defendants were ordered to provide urine samples prior to imposing sentence and the six of those who tested negative received a deferred judgment without community service. One of the two defendants who tested positive was ordered to a ten-day jail sentence and the other received 200 hours of community service within 100 days. The only other defendant to receive community service was ordered to 150 hours within 90 days.

Washington filed a motion to take judicial notice of the sentencing orders and court files in those twenty-nine cases, which was filed with the appeal.

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1523 Id. at 652.
1524 Id.
1525 Id.
1526 Id.
1527 Id.
1528 Id. at 654.
1529 Id.
1530 Id.
1531 Id. at 654–55
1532 Id. at 655.
1533 Id. at 654–55.
1534 Id. at 655.
The Court’s review of this Fifth Amendment constitutional issue was de novo and the Court resolved the case under the federal constitution. The Court first ruled on the motion to take judicial notice of the other court files. Iowa Rule of Evidence 5.201 allows judicial notice to be taken on appeal where it is relevant to facts “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned,” but it is typically not allowed without an agreement of the parties. The Court agreed with the State’s argument that there are too many individual differences in the files for the Court to take judicial notice of the sentences for comparison purposes, and moved forward considering the appeal strictly based on Washington’s proceedings.

The Court declined to resolve the case under Mitchell v. United States, as suggested by the defendant. The Court admitted that the specific issue of whether the “Fifth Amendment precludes a sentencing court from considering the defendant’s refusal to answer a question about uncharged conduct in deciding whether to defer judgment or impose other conditions.” It analyzed what a sentencing court is able to consider in terms of pre-sentence investigation reports and rehabilitation-type questions under Mitchell. The Court noted that it has been acceptable for the sentencing court to consider a defendant’s silence during a pre-sentence investigation report with regard to admitting guilt relating to sex-offender treatment programs because acknowledging responsibility can serve rehabilitative purposes. The Court noted that there might be tough choices for inmates, but that the key question is “whether the choice arose as a result of the defendants conviction within the criminal justice system and whether imposing the choice serves a proper goal of that system.”

The Court pointed out that in this case, additional community service is not related to rehabilitation services in the same way that something like drug treatment would be if the defendant was not able to submit a clean urine. In this instance, the defendant received a deferred judgment, despite invoking his right to remain silent, so the Court only had to decide whether “the [sentencing] court imposed additional community service hours to penalize him for invoking his right to remain silent” and if so, resentencing is required.

In holding that the sentencing court did penalize the defendant for invoking his right to remain silent, the Court found the exchanges between the court and defense counsel on the record informative. Particularly, the Court noted that when the defendant first

1535 Id. (pointing out that because the case was resolved under the Fifth Amendment, it did not need to reach a claim under the Iowa Constitution).
1536 Id. (citing Leuchtenmacher v. Farm Bureau Mut. Ins. Co., 460 N.W.2d 858, 861 (Iowa 1990)).
1537 Id.
1538 Id. at 656–57 (distinguishing this case from Mitchell v. United States, because the defendant here was seeking a benefit of a lenient sentence, so the court had a legitimate interest in his drug use after the crime; while in Washington, the Court held that the use of silence could not establish an element necessary for minimum sentencing. 526 U.S. 314 (1999)).
1539 Id. at 660.
1540 Id. at 659–60 (citing McKune v. Lile, 536 U.S. 24, 36 (2002) and State v. Iowa Dist. Ct., 801 N.W.2d 513, 527–28 (2011)).
1541 Id. (quoting Iowa Dist. Ct., 801 N.W.2d at 527–28).
1542 Id. at 661.
1543 Id.
invoked his right to remains silent, the sentencing court reacted stating that the court “didn’t have to defer judgment” and that the defendant “can take the conviction.” In light of this reaction and the five-fold increase in community service, the explanation that the court “believes that Mr. Washington would benefit by the community service, as would the community, in light of the deferred judgment being granted in this matter” unsatisfactory. Additionally, there was “no evidentiary support in the record for the district court’s assertion that the 250 hours of community service was in the ‘range’ of other orders entered the previous day.” “In absence of any other plausible explanation proffered” the Court found the additional community service was retaliatory and remanded the case for resentencing.

1544 Id. at 662.
1545 Id.
1546 Id.
1547 Id.
Sentencing

Alleyne v. United States, 133 S.Ct. 2151 (2013)

In this case the Court considered whether it would overrule Harris v. United States, in which it held that “judicial factfinding that increases the mandatory minimum sentence for a crime is permissible under the Sixth Amendment.” The Court overruled Harris. It found that the “distinction between facts that increase the statutory maximum and facts that increase only the minimum” established in Harris was inconsistent with Apprendi v. New Jersey. The Court held that “any fact that, by law, increases the mandatory minimum is an ‘element’ that must be submitted to the jury” and found beyond a reasonable doubt.

In this case, petitioner Allen Ryan Alleyne was facing “multiple federal offenses, including robbery affecting interstate commerce, 18 U.S.C. § 1951(a), and using or carrying a firearm in relation to a crime of violence, § 924(c)(1)(A).” Section 924 prescribes different minimum punishments depending on whether a firearm was “brandished” during the crime. The mandatory minimum for using a firearm was five years while the mandatory minimum for brandishing a firearm was seven. Because the jury did not find brandishing beyond a reasonable doubt, Alleyne objected to the presentence report that recommended the seven-year mandatory minimum sentence instead of the five-year sentence. He argued that “raising his mandatory minimum sentence based on a sentencing judge’s finding that he brandished a firearm would violate his Sixth Amendment right to a jury trial.” The district court overruled Alleyne’s objection based on Harris, reasoning that “brandishing was a sentencing factor that the court could find by a preponderance of the evidence without running afoul of the Constitution” and the Court of Appeals affirmed.

In analyzing this case, the U.S. Supreme Court first reviewed the history behind defining crimes, and what facts must be submitted to a jury for proof beyond a reasonable doubt to comply with the Sixth Amendment and Due Process Clause. The Court first noted a distinction between “sentencing factors” and elements first established in McMillian v. Pennsylvania. In that case the Court stated that sentencing factors “refer to facts that are [defined by legislatures, and] not found by a jury but can still increase the defendant’s punishment” as defined in. Since making the distinction between sentencing factors and elements of a crime, which must be found by a jury, the Court has worked to find the boundaries of sentencing factors. It was not until the Court considered Apprendi, almost 15 years

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1549 Id.
1550 Id. (citing Apprendi v. New Jersey, 530, U.S. 466 (2000)).
1551 Id.
1552 Id.
1553 Id. at 2155–56.
1554 Id.
1555 Id. at 2156.
1556 Id.
1557 Id.
1558 Id.
1559 Id. (citing McMillian v. Pennsylvania, 477 U.S. 79, 86 (1986)).
1560 Id.
1561 Id.
later that such boundaries became clearer. In *Apprendi*, the Court focused on the historical link between crime and punishment and found that “there was no ‘principled basis for treating’ a fact increasing the maximum term of imprisonment differently than the facts constituting the base offense.” *Apprendi* only considered statutory maximum increases, and the issue of whether increases to statutory minimums were facts that should be considered by the jury did not arise until *Harris*. In *Harris*, the Court found that increasing mandatory minimums “did not implicate the Sixth Amendment” as it was a part of the judges’ discretion, and not a fact that had to be found by the jury.

In this case the Court, in agreeing with *Alleyne*, held that *Apprendi* and *Harris* were irreconcilable. The Court noted that facts like those in *Harris* that increase mandatory minimum sentences and facts like those in *Apprendi* that increase mandatory maximum sentences both “alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment.” “Facts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt.” The Court explained the historical importance of connecting crime and punishment as defined by common law and then the evolution of including that connection in indictments so that criminal defendants could prepare their defense with appropriate notice.

Logically then, it followed that it was “impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime” as was set out in *Harris*. Increasing the sentencing floor is an “essential ingredient” of a crime, which has to be submitted to a jury in the same way that facts increasing the maximum punishment have to be.

The Court made an effort to mention that this ruling did not influence judicial discretion — not all facts that influence judicial decision making have to be submitted to a jury, nor does “sentencing discretion, informed by judicial fact finding,” violate the Sixth Amendment.

The Fourth Circuit’s holding was reversed and the case was remanded for findings consistent with this opinion. Particularly, that the seven-year mandatory minimum sentence imposed by a finding by the district that a firearm was “brandished” by preponderance of the evidence, was inappropriate, and should be a fact submitted to the jury to be found beyond a reasonable doubt.

**Descamps v. United States, 133 S.Ct. 2276 (2013)**

This case arose over a sentencing issue — particularly, the test used for determining whether a defendant qualifies for an increased sentence under the Armed Career Criminal Act (ACCA or Act) based on three prior convictions for a violent felony such as burglary, arson or extortion. When
determining whether a past conviction is for one of those crimes, a court usually employs one of two tests. Under the “categorical approach” the court compares the statute under which the defendant was convicted with the elements of the “generic crime.” If the statute’s elements are the same as, or narrower than, those of the generic offense,” the prior conviction qualifies as an ACCA predicate. Under the “modified categorical approach” the court considers “divisible” statutes where an element may represent alternative ways to commit an offense. The court is permitted to refer to limited documents such as indictments and jury instructions to determine which alternative provided the basis for the conviction and then make the same assessment as the categorical approach.

In this case the Court considered whether limited documents should be consulted with regard to “indivisible” statutes — those that don’t have alternative elements, but that “criminalize a broader swath of conduct than the relevant generic offense.” In other words, under this test courts would be able to decide whether the based on “the underlying facts, that a defendant’s prior conviction qualifies as an ACCA predicate” despite the inability of the statute to meet the categorical test. The Court held that this approach is inappropriate and held that “sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements.”

Petitioner Michael Descamps was convicted of being a felon in possession of a firearm and the Government sought to enhance his sentence under ACCA, based partially on a prior conviction for burglary in California. The California statute under which he pleaded guilty defined burglary broadly, providing “that a ‘person who enters’ certain locations ‘with the intent to commit grand or petit larceny or any felony is guilty of burglary.’” Despite Petitioner’s arguments that the broad law prevented inclusion as an ACCA predicate, the District Court used the modified categorical approach to examine the record of the plea colloquy and concluded that Petitioner had admitted to the elements of generic burglary, and used the prior conviction as an ACCA predicate to enhance his sentence. The Court of Appeals for the Ninth Circuit affirmed.

In its analysis the Court reviewed the rationale behind the categorical approach through precedent. In Taylor v. United States, the Court adopted the categorical approach, establishing the rule that sentencing courts can only look at the statutory elements and not the particular facts of prior convictions. In Shepard v. United States, the Court first considered “divisible” statutes

1574 Id.
1575 Id. (for example, a burglary statute may have an element that involves entry into a building, or alternatively, entry into an automobile).
1576 Id.
1577 Id. 2281—2282.
1578 Id. at 2282.
1579 Id.
1580 Id.
1581 Id. (citing CAL. PENAL CODE ANN. § 459 (West 2010) (noting that this definition goes beyond the normal, generic definition of burglary which would generally require unlawful entry and/or breaking and entering).
1582 Id.
1583 Id. (relying on United States v. Aguila-Montes de Oca, 655 F.3d 915 (9th Cir. 2011) (en banc) (per curiam)).
1584 Id. at 2283 (citing Taylor v. United States, 596 U.S. 575 (1990)).
which offer alternative versions of crimes but do not alone disclose which alternative has occurred. In *Shepard*, the Court held that a sentencing court could consult limited documents in an effort to determine which version of the crime was committed. Since *Shepard*, the Court has continued to emphasize that this determination of which crime formed the basis of the defendant’s conviction is strictly element-based and not an inquiry into the underlying facts of the crime. The modified approach is meant to serve as a tool, not an exception, to the categorical approach. It follows then, that the modified approach cannot have a role in this case because the broadly sweeping California statute cannot fit the categorical approach, even after looking at limited documents. Looking at limited documents would be a fact-based investigation, which is inconsistent with the underlying principals of the categorical approach.

The Court pointedly discounted the Ninth Circuit’s reasoning and the Government’s argument separately in its analysis. The Ninth Circuit relied on its decision in *United States v. Aguila-Montes de Oca*, in reaching its conclusion in this case. In that case, the Ninth Circuit found that investigating documents for the purposes of determining whether a prior conviction was an ACCA predicate was appropriate; however, a review of documents in cases where the conviction falls under a statute broader than a generic offense requires inquiring into the underlying facts of the prior conviction. The Court found this approach inappropriate and upheld the elements-based categorical approach because “it comports with ACCA’s test and history; it avoids Sixth Amendment concerns that would arise from sentencing courts’ making findings of fact that properly belong to juries; and it adverts ‘the practical difficulties and potential unfairness of a factual approach.’” The Court limited the modified categorical approach to divisible statutes “because only divisible statutes enable a sentencing court to conclude that a jury (or a judge at a plea hearing) has convicted the defendant of every element of the generic crime.”

The Government offered a “purportedly narrower theory” by

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1585 Id. (citing *Shepard v. United States*, 544 U.S. 13 (2005)).
1586 Id. at 2283–2284.
1587 Id. at 2284 (citing *Nijhawan v. Holder*, 557 U.S. 29 (2009); *Johnson v. United States*, 559 U.S. 133, 144 (2010)).
1588 Id. at 2285 (noting that the central feature of focusing on and comparing the elements is preserved through the modified approach).
1589 Id. at 2285–86.
1590 Id.
1591 Id. at 2283 (citing *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc) (per curiam)).
arguing that “although an indivisible statute that is ‘truly missing’ an element of the generic offense cannot give rise to an ACCA conviction, California’s burglary law can do so because it merely ‘contains a broader version of the [generic] element of the unlawfulness of entry.’" The argument did not carry weight with the Court because it assumed that the sentencing court could consider judicial rulings interpreting a statute and there was some sort of “possessory right” that was invaded as a part of the generic crime of burglary. Additionally, the argument assumed that a distinction could be made between statutes that are missing elements and those that are just overly broad, which the Court did not deem possible. Further, either problem creates difficulty in the categorical approach because of the mismatch of elements between the statute and the generic crime.

The Court reversed the decision of the Ninth Circuit and held that the modified categorical approach is not applicable to statutes “that contain a single, ‘indivisible’ set of elements sweeping more broadly than the corresponding generic offense.”

Lowery v. State, 822 N.W.2d 739 (Iowa 2012)

In this case, the Iowa Supreme Court considered “the effect of the governor’s commutation of an inmate’s sentencing on the inmate’s accumulation of earned time credit under Iowa Code chapter 903A (2011). The Court held that “the governor’s commutation order [did] not entitle Lowery to an immediate discharge” of his sentence as he proposed, and that earned time should be accumulated from the date of commutation forward.

John Lowery was convicted of first-degree armed robbery when he was eighteen years old. The governor commuted his sentence in 2011. The governor listed several reasons for the commutation, like “Lowery’s young age when he committed the crime and his prior history of drug and alcohol abuse.” The governor also emphasized that Lowery was not an active participant in the assault in question; he was merely an accomplice.

Thereafter, Lowery petitioned for postconviction relief, “seeking recalculation of his earned time to comply with the governor’s commutation of the mandatory minimum portion of his sentence.” Lowery argued that, since the governor had commuted away the mandatory minimum part of his sentence, “he was entitled to accumulate earned time at a faster rate than had been available to him under the original sentence . . . .” Lowery argued that this would entitle him to immediate release. The trial court denied Lowery’s application, holding that the governor’s commutation only changed his parole conditions.

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1597 Id. at 2291 (citations omitted).
1598 Id. at 2291–92.
1599 Id. at 2292.
1600 Id.
1601 Id. at 2283.
eligibility date, not the sentence.\textsuperscript{1611} Lowery appealed.\textsuperscript{1612}

The Iowa Supreme Court reviewed the governor’s commutation latter for errors in legal interpretation.\textsuperscript{1613} In general, a commuted sentence replaces the prisoner’s original sentence.\textsuperscript{1614} The governor of Iowa has broad discretion to exercise his commutation power.\textsuperscript{1615} In this case, the Court endeavored to determine “the legal effect of the governor’s commutation of Lowery’s sentence in light of the statutory provisions addressing the accumulation of earned time.”\textsuperscript{1616}

Lowery’s original sentence was a term of twenty-five years with a 70\% mandatory minimum.\textsuperscript{1617} By law, his mandatory minimum “affected the rate at which he could accumulate earned time which would provide for a discharge before he served his full sentence.”\textsuperscript{1618} The statute only allowed him to accumulate 15\% of his total sentence, meaning he would need to serve 85\% of his sentence (or about twenty-one and one-quarter years) before being eligible for discharge.\textsuperscript{1619} On the other hand, if Lowery’s original sentence had come with no mandatory minimum, he would have been entitled to release after eleven and one-third years.\textsuperscript{1620}

In his commutation order, the governor did not address Lowery’s earned time.\textsuperscript{1621} The State argued that, since the governor referred to Lowery being scheduled for a parole hearing, and since the governor wrote a letter to the parole board in support of the commutation order, “the governor had no intention of granting Lowery an immediate release.”\textsuperscript{1622} The State also argued that the court “must assume the governor understood the law and the effect of the statute addressing earned time and therefore would have known that if Lowery accumulated earned time at the accelerated rate, he would have been entitled to an immediate release as a consequence of the commutation order.”\textsuperscript{1623}

The Court agreed that the order and the letter to the parole board, taken together, supported the idea that the governor did not intend to grant Lowery’s immediate release.\textsuperscript{1624} Therefore, the Court held that Lowery’s earned time should be calculated under the “reduced” rate until the date of the commutation order.\textsuperscript{1625} After that date, it held that Lowery was entitled to have his earned time calculated at the “accelerated” rate.\textsuperscript{1626}


In this case the court considered whether “there is an *ex post facto* violation when a defendant is sentenced under [Federal Sentencing Guidelines (Guidelines)] promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the

\textsuperscript{1611} Id.
\textsuperscript{1612} Id.
\textsuperscript{1613} Id.
\textsuperscript{1614} Id.
\textsuperscript{1615} Id.
\textsuperscript{1616} Id.
\textsuperscript{1617} Id.
\textsuperscript{1618} Id.
\textsuperscript{1619} Id. at 741–42.
\textsuperscript{1620} Id. at 742.
\textsuperscript{1621} Id.

\textsuperscript{1622} Id.
\textsuperscript{1623} Id.
\textsuperscript{1624} Id. at 742–43.
\textsuperscript{1625} Id. at 743.
\textsuperscript{1626} Id.
offense.” The Court held that there is.

This case arose from a fraud scheme executed by Petitioner Marvin Peugh and his cousin. Petitioner was found guilty of five counts of bank fraud at trial. The criminal acts occurred between 1999 and 2000, at which time the 1998 version of the Guidelines was in place, but by the time of sentencing in 2010, the 2009 version of the Guidelines had come into effect. The difference in sentencing under the two versions was significant and Petitioner argued “that the Ex Post Facto Clause required that he be sentenced under the 1998 version . . . in effect at the time of his offenses.” Following Seventh Circuit precedent, the district court and the Seventh Circuit denied Petitioner’s ex post facto claim and affirmed his conviction.

To begin its analysis, the Court discussed the purpose of the Guidelines and their role following United States v. Booker, in which the Court held that the Guidelines were not mandatory, but that district courts were required to consult them.

Under 18 U.S.C. § 3553(a)(4)(A)(ii), district courts are instructed to apply the Sentencing Guidelines issued by the United States Sentencing Commission that are ‘in effect on the date the defendant is sentenced, [unless] the Court determines that use of the Guidelines manual in effect on the date that the defendant is sentenced would violated the Ex Post Facto Clause of the United States Constitution, [then] the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.

On appeal, district court sentences are reviewed for reasonableness under an abuse-of-discretion standard and appellate courts may presume that a sentence within the guidelines is reasonable.

There are three categories of ex post facto laws and the one of particular concern in this case has to do with those laws that “chang[e] the punishment, and inflic[t] a greater punishment, than the law annexed to the crime, when committed.” The Court had to consider the risk of violating the Ex Post Facto Clause as a matter of degree and not just merely by considering whether the law must increase the maximum sentence or whether the sentencing judge has discretion.

The Court referred to Miller v. Florida, as an example of a sufficient

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1628 Id.
1629 Id.
1630 Id.
1631 Id.
1632 Id. at 2078–79 (the applicable sentencing range for the 1998 version was 30 to 37 months while the applicable sentencing range for the 2009 version was 70 to 87 months).
1633 Id. at 2079 (citing United States v. Demaree, 459 F.3d 791 (2006)).
1634 Id. at 2078–80 (citing United States v. Booker, 543 U.S. 220, 244 (2005) (noting that subsequent decisions further defined the Guidelines as a starting point in sentencing and that major departures from the Guidelines should be accompanied by significant justification).
degree of risk in which the Court found an *ex post facto* violation.\textsuperscript{1639} In that case Florida law required a “high hurdle” to be cleared before a district court could exercise sentencing discretion.\textsuperscript{1640} This hurdle required judges to provide writing of clear and convincing reasons for departing from the guidelines and sentences within the guidelines were presumed appropriate and non-reviewable.\textsuperscript{1641} In *Miller*, the petitioner was subjected to the new Guidelines and sentenced to a higher sentencing range, which could not be reviewed and did not have to be explained.\textsuperscript{1642} The Court deduced that *Miller* “established that applying amended sentencing guidelines that increase a defendant’s recommended sentence can violate the *Ex Post Facto* Clause, notwithstanding the fact that sentencing courts possess discretion to deviate from the recommended sentencing range.”\textsuperscript{1643} In other words, there was a significant risk that Miller would receive a higher sentence under the Florida law.\textsuperscript{1644}

Like *Miller*, post-*Booker* sentencing creates “hurdles” through the Guidelines; however, they are distinguishable in that the federal courts are not required to presume that a within-Guideline sentence is reasonable, like the laws in Florida.\textsuperscript{1645} Despite the Guidelines not being mandatory though, in “less than one-fifth of cases since 2007 have district courts imposed above- or below-Guidelines sentences absent a government motion.”\textsuperscript{1646} Although district courts are permitted to depart from the Guidelines, the procedural measures adopted by the federal system are “intended to make the Guidelines the lodestone of sentencing . . . [and a] retrospective increase in the Guidelines range applicable to a defendant creates a sufficient risk of a higher sentence to constitute an *ex post facto* violation.”\textsuperscript{1647}

The Court emphasized the Congressional intent behind creating the *Ex Post Facto* Clause in that it is important that “individuals have fair warning of applicable laws and guards against vindictive legislative action.”\textsuperscript{1648} Further, the Court declined the Government’s arguments that an *ex post facto* violation cannot stem from the Guidelines because they are advisory in nature and are not actually laws.\textsuperscript{1649} The Court also did not entertain the argument by the Government that if the Guidelines are binding enough to create an *ex post facto* violation, they are binding enough to violate the Sixth Amendment, which was forbidden by *Booker*.\textsuperscript{1650} The Court stressed that “[t]he *Booker* remedy was designed, and has been subsequently calibrated, to exploit precisely this distinction: it is intended to promote sentencing uniformity while avoiding a Sixth Amendment violation.”\textsuperscript{1651}

\textsuperscript{1639} Id. at 2082 (citing *Miller v. Florida*, 482 U.S. 423 (1987)).
\textsuperscript{1640} Id.
\textsuperscript{1641} Id.
\textsuperscript{1642} Id. (noting the sentence would have only been reviewable had the judge gone below the guidelines and provided clear and convincing reasons for doing so).
\textsuperscript{1643} Id.
\textsuperscript{1644} Id. at 2083.
\textsuperscript{1645} Id. at 2083–84 (noting that instead, post-*Booker* sentencing provides starting points for sentencing judges to create consistency within the system).

\textsuperscript{1646} Id.
\textsuperscript{1647} Id.
\textsuperscript{1648} Id. at 2084–85 (citing *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981)).
\textsuperscript{1649} Id. at 2085–86.
\textsuperscript{1650} Id. at 2087–88.
\textsuperscript{1651} Id. at 2088.
The Court held that the amended Guidelines created a significant risk of a higher sentence for the petitioner in this case and that risk offended the Ex Post Facto Clause. It reversed the Seventh Circuit’s holding.1652

**State v. Allensworth, 823 N.W.2d 411 (Iowa 2012)**

The issue in this case was “whether an offender accrues earned time under Iowa Code section 903A.2 . . . while on supervised probation before his incarceration.”1653 The Court held that the defendant was not entitled to credit for time he spent on supervised probation before incarceration.1654

Allen Allensworth pleaded guilty to possession of more than five grams of a controlled substance with intent to deliver and failure to possess a tax stamp.1655 The district court imposed a suspended sentence of ten years for the first count and another suspended sentence of five years for the second count.1656 These sentences were to run consecutively.1657 The district court also sentenced Allensworth to two years’ supervised probation.1658

At a revocation hearing in 2009, Allensworth stipulated guilty to possession of more than five grams of a controlled substance with intent to deliver and failure to possess a tax stamp.1659 In 2010, after a dispositional hearing, the district court extended Allensworth’s probation by three years and ordered to submit to an in-jail treatment program.1660 Later that year, Allensworth stipulated to more probation violations.1661 About three weeks later, at another disposition hearing, the district court found that Allensworth was still using drugs and that he had not met the requirements of his treatment program.1662 The court revoked his probation and imposed his original fifteen-year sentence.1663

In 2011, the Iowa Supreme Court decided Anderson v. State, “recognizing a probation credit under Iowa Code section 907.3(3) . . . .”1664 Allensworth then filed a “request for time,” taking issue with the Department of Corrections’ calculation of his tentative discharge date.1665 The district court agreed with the Iowa Department of Correction’s (IDOC) calculation.1666 Allensworth then appealed.1667

Section 907.3(3), as amended in 2012, provides: “A person so committed who has probation revoked shall not be given credit for such time served.”1668 Prior to the 2012 amendment, the word “not” was not in the statute.1669 The state, however, agreed that Allensworth was “entitled to a section 907.3(3) credit reducing his prison sentence by each day he spent on supervised probation.”1670

The parties in this case agreed that Allensworth sentence ought to be reduced by three statutory credits (sections 903A.2, 903A.5(1), and 907.3(3)), but they disagreed about the order in which the credits should be

1652 *Id.*
1653 *State v. Allensworth, 823 N.W.2d 411, 412 (Iowa 2012).*
1654 *Id.* at 417.
1655 *Id.* at 412.
1656 *Id.*
1657 *Id.*
1658 *Id.*
1659 *Id.*
1660 *Id.*
1661 *Id.*
1662 *Id.*
1663 *Id.*
1664 *Id.* (citing Anderson v. State, 801 N.W.2d 1, 5 (Iowa 2011)).
1665 *Id.*
1666 *Id.* at 413.
1667 *Id.*
1668 *Id.* (quoting IOWA CODE § 907.3(3) (2012)) (internal quotation marks omitted).
1669 *Id.*
1670 *Id.* at 413–14.
applied. Section 903A.2 applies to “earned-time” credit, section 903A.5(1) covers “jail-time” credit, and section 907.3(3) covers “probation” credit. Allensworth argued that the earned-time credit should apply first, then the jail-time credit, followed by the probation credit. The State, on the other hand, argued that the probation credit should be applied first instead of last.

The Iowa Supreme Court turned first to section 903A.2, which “allows inmates to reduce their sentences for good conduct.” This credit is intended to “encourage prisoners to follow prison rules and participate in rehabilitative programs.” The Court concluded that Allensworth’s “probationary time is ineligible for earned-time credit under the plain language of the governing statute,” because “Allensworth was not an inmate of an IDOC-controlled institution while he was released on supervised probation.” The Court ultimately found “no textual basis” for giving Allensworth any earned-time credit.

The Court also held that “nothing in section 907.3(3) allows earned-time credit to accrue while on probation outside the walls of a jail or other correctional facility.” During his probation, Allensworth was not in such a facility. Finally, the Court held that the rule of lenity does not apply because there is no ambiguity in section 903A.2.

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1671 Id. at 414.
1672 Id.
1673 Id.
1674 Id.
1675 Id.
1676 Id. (quoting Kolzow v. State, 813 N.W.2d 731, 738 (Iowa 2012)).
1677 Id. at 415.
1678 Id.
1679 Id. at 416.
1680 Id.
1681 Id.
Statutes of Limitation

McQuiggin v. Perkins, 133 S. Ct. 1924 (2013)

In this case the Court considered whether a defendant can overcome the time bar of 28 U.S.C. § 2244(d)(1) (Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)) by showing that he or she is actually innocent. The time bar in the statute states that a petitioner is barred from filing a federal habeas petition if the filing does not take place within one year of “the date on which the factual predicate of the claim . . . could have been discovered through the exercise of due diligence.” The Court held that actual innocence is a “gateway through which a petitioner may pass whether the impediment is a procedural bar. . . [but cautioned that] tenable actual-innocence gateway please are rare: “[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.”

In this case the Court vacated the Court of Appeals’ holding that “a federal habeas court, faced with an actual-innocence gateway claim should count unjustifiable delay on a habeas petitioner’s part, not as an absolute barrier to relieve, but as a factor in determining whether actual innocence has been reliably shown.”

This case began with a murder in 1993 for which Floyd Perkins was convicted. During trial there was testimony from several witnesses that Perkins committed the crime; however, Perkins testified on his own behalf and offered an opposing view. The jury convicted Perkins of first-degree murder and he was sentenced to life in prison without the possibility of parole. After exhausting his appeals in the state system, Perkins’s conviction became final in 1997. Section 2244 permits a habeas corpus petition to be filed within one year of newly discovered evidence. Perkins filed a petition in 2008 alleging ineffective assistance by his trial attorney and attempted to overcome AEDPA’s time limitations claiming that three affidavits constituted newly discovered evidence which showed his actual innocence.

The district court held that the affidavits were “insufficient to entitle Perkins to habeas relief . . . [and] even assuming qualifications of the affidavits as evidence newly discovered . . . [the] petitioner [was] untimely under § 2244(d)(1)(D).” Further, the district court held that new evidence may require tolling under exceptional circumstances, and Perkins had not demonstrated exceptional circumstances. Alternatively, court found that Perkins did not meet the standard for actual innocence — “that it is more likely than not that no reasonable juror would have convicted him, or even that the evidence was . . . .

1683 Id. (quoting 28 U.S.C. § 2244(d)(1)(D)).
1685 Id.
new.” The Court of Appeals reversed the district court’s finding that Perkins could present the ineffective-assistance-of-counsel claim “as if it were filed on time” and instructed the court to determine whether “Perkins asserted a credible claim of actual innocence.”

The Supreme Court began its analysis laying out the rule established in *Holland v. Florida*, stating that a “federal habeas petitioner can invoke the doctrine of ‘equitable tolling’” where he shows that “he has been pursuing his rights diligently, and . . . that some extraordinary circumstance stood in his way and prevented timely filing.” The Court did not find extraordinary circumstances here because Perkins waited almost six years after having possession of the affidavits to file his petition. Perkins, though, was arguing for an equitable exception to section 2244(d)(1), not an extension of time. In that regard, the question of whether a “fundamental miscarriage of justice exception” should be granted in habeas cases based on a “freestanding claim of actual innocence” was a matter of first impression for the Court.

The Court rejected the State’s claim that section 2244(d)(1)(D) “foreclose[d] any argument that the habeas petitioner has unlimited time to present new evidence in support of a constitutional claim . . . [because the statute provides] a specific trigger for the precise circumstances presented [in this case]: a constitutional claim based on new evidence.” The Court pointed out that although that argument may be logical, it ignores the fact that “[t]he miscarriage of justice exception . . . applies to a severely confined category in which new evidence shows ‘it is more likely than not that a reasonable juror would have convicted [the petitioner].’” Because it is so confined, it will not undercut the purpose of section 2244. The Court pointed out that Congress chose to constrain the application of the exception by not including it in sections 2244(b)(2)(B) and 2254(e)(2).

Since a petitioner can overcome an untimely federal habeas corpus claim through a “convincing claim of actual innocence,” the Court found that the Sixth Circuit “erred to the extent that it eliminated timing as a factor relevant in evaluating the reliability of the petitioner’s proof of innocence.” The Court held that the miscarriage of justice exception might be invoked if the petitioner shows “that it is more likely than not that a reasonable juror would have convicted him in the light of the new evidence,” and that the timeliness issue may be considered as evidence of actual innocence. “Considering a petitioner’s diligence, not discretely, but as a part of the assessment whether actual innocence has been convincingly shown, attends to the State’s concern that it will be prejudiced by a prisoner’s untoward delay in proffering new evidence.”

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1694 *Id.*
1695 *Id.* (citations omitted).
1696 *Id.* at 1931 (citing Holland v. Florida, 130 S. Ct. 2549 (2010)).
1697 *Id.*
1698 *Id.*
1699 *Id.* (citing Herrera v. Collins, 506 U.S. 390, 404–05 (1993)).
1700 *Id.* at 1933 (citation omitted).
1701 *Id.* (citing Schlup, 513 U.S. at 329 (1995)).
1702 *Id.*
1703 *Id.*
1704 *Id.* at 1935.
1705 *Id.* (quoting Schlup, 513 U.S. at 329).
1706 *Id.* at 1936 (acknowledging the concern that a prisoner could wait indefinitely (e.g., until a witness has died) to bring a habeas claim with regard to his or her conviction).
holding was vacated and the case was remanded for further proceedings.\textsuperscript{1707}

**Nguyen v. State, 829 N.W.2d 183 (Iowa 2013)**

This case was a post-conviction relief proceeding stemming from Phuoc Thanh Nguyen’s first-degree murder conviction.\textsuperscript{1708} The defendant sought relief after the “three-year statute of limitations set forth in Iowa Code Section 822.3 (2009) had expired, but within three years of [the Court’s] decision in *State v. Heemstra*, . . . [and the defendant argued that] it would be unconstitutional not to apply *Heemstra* retroactively to his case.”\textsuperscript{1709} The State was granted summary judgment by the district court, but this Court reversed “because the applicant has raised ‘a ground of fact or law that could not have been raised within the applicable time period.’”\textsuperscript{1710}

Nguyen was convicted of first-degree murder in 1999.\textsuperscript{1711} During the murder trial, the jury was instructed that they could find Nguyen guilty of first-degree murder through premeditated murder or felony murder.\textsuperscript{1712} He lost his appeals with regard to that conviction and on August 22, 2002, Nguyen filed his first application for post-conviction relief.\textsuperscript{1713} The district court granted his application and granted a new trial; however the State appealed and this Court reversed, concluding, “Nguyen had not established the required prejudice to support his ineffective assistance claim.”\textsuperscript{1714}

On August 25, 2006, the Court decided *Heemstra*.\textsuperscript{1715} In that case, the Court held that “if the act causing willful injury is the same act that causes the victim’s death, the former is merged into the murder and therefore cannot serve as the predicate felony for felony-murder purposes.”\textsuperscript{1716} Like in Nguyen’s case, in *Heemstra* the jury was instructed on felony-murder and premeditation and the Court reversed and remanded because they could not determine which basis of guilt the jury used.\textsuperscript{1717} The Court also noted that the new merger rule would only be applicable to “the present case and those cases not finally resolved on direct appeal.”\textsuperscript{1718}

On April 2, 2009, Nguyen applied for post-conviction relief again arguing that *Heemstra* did not permit him to be convicted of felony murder and should be applied retroactively.\textsuperscript{1719} This date was more than three years after procendendo had issued on his direct appeal, but less than three years since *Heemstra*.\textsuperscript{1720} Two court-appointed attorneys moved to withdraw from the
case because they did not find a legal basis on which to proceed; however, the second attorney’s motion was denied. The State moved for summary disposition based on the expiration of the statute of limitations and the district court granted it, reasoning that even thought Heemstra was not in effect during his appeals, the line of cases leading up to it were, and Nguyen could have argued similarly to Heemstra at the time of his own appeals.

The Court reviewed the district court’s holding on “the State’s statute-of-limitations defense . . . for correction of errors of law.” Nguyen urged that the three-year limitations period is not applicable because his option to argue that Heemstra should apply retroactively did not arise until 2006 when the case was decided. The Court declined to analyze the State’s arguments in the context of this case because they were not raised below.

In simplifying Nguyen’s argument the Court indicated that Heemstra lends support to the legal argument that the “jury should not have been instructed on a felony-murder alternative” and that this argument is not untimely due to lack of prior assertion because of Nguyen’s contention that “the decision must be applied retroactively for constitutional reasons.”

In analyzing section 822.3, the Court found that it does not bar Nguyen’s constitutional claims because at the time of his conviction, “a consistent line of authority had upheld the use of a felony-murder instruction even in cases where the felony and the murder were the same act.” Despite being criticized, the use of that instruction was not expressly overruled until Heemstra and “[f]rom 2002, when Nguyen’s conviction became final, until 2005, when the three-year limitations period expired, Nguyen could not have successfully raised the argument in district court that it was improper to instruct the jury on felony-murder, because [the Court] had squarely held to the contrary.” The Court found that although “section 822.3 contemplates that some legal grounds exist that ‘could not have been raised’ within the three-year limitations period . . . [the section] must incorporate the notion that there had to be a possibility of success on the claim.” The Court held that Nguyen’s claim fell into a category of arguments that was “fruitless at the time” it arose, but “became meritorious later on.”

The Court reversed the district court’s dismissal of postconviction relief and remanded for further proceedings on “whether retroactive application of Heemstra is required by the equal protection, due process, and separation of powers clauses of the Iowa Constitution or the Equal Protection Clause of the United States Constitution.”

1721 Id.
1722 Id.
1723 Id. (citing Harrington v. State, 659 N.W.2d 509, 519 (Iowa 2003)).
1724 Id. 186–87 (noting, alternatively, that the statute does not apply because the fact of law was not available during his appeals) (citing IOWA CODE § 822.3).
1725 Id. at 187. (citing DeVoss v. State, 648 N.W.2d 56, 63 (Iowa 2002)).
1726 Id. (noting the argument that the Iowa and federal constitutions require retroactive application of Heemstra was necessary for postconviction relief).

1727 Id. (citations omitted).
1728 Id. at 188.
1729 Id.
1730 Id.
1731 Id. at 189.
Smith v. United States, 133 S. Ct. 714 (2013)

This case arose from a conspiracy in which Petitioner, Calvin Smith, was involved. He was convicted by a jury of several charges including narcotics possession and distribution, conspiracy, and murder. Prior to trial, Smith “moved to dismiss the conspiracy counts as barred by the applicable 5-year statute of limitations, 18 U.S.C. § 3282, because he had spent the last six years of the charged conspiracies in prison for a felony conviction.” The motion was denied and the jury was instructed that the Government had to prove beyond a reasonable doubt that the conspiracies existed, that Smith was a part of them, and that the conspiracy continued to exist within five years before the indictment. Although Smith did not raise the issue at trial, during its deliberations, the jury inquired about withdraws from the conspiracy. The Court instructed the jury that the burden is on the defendant to prove withdrawal by preponderance of the evidence and the jury convicted Smith the counts involving conspiracy. The Court of Appeals affirmed holding that putting the burden on the defendant does not violate the Due Process Clause.

Upon appeal, Smith argued that “once he presented evidence that he ended his membership in the conspiracy prior to the statute-of-limitations period, it became the Government’s burden to prove that his individual participation in the conspiracy persisted within the applicable five-year window.” The Court disagreed with Smith, holding that “[e]stablishing individual withdrawal was a burden that rested firmly on the defendant regardless of when the purported withdrawal took place.”

To begin its analysis, the court pointed out that it is the Government’s burden to prove every element beyond a reasonable doubt, but that “proof of the nonexistence of . . . [an] affirmative defense[] has never been constitutionally required.” Instead, the Government is only prohibited from “shifting the burden of proof to the defendant only ‘when an affirmative defense does negate an element of the crime.’” The Court reasoned that withdrawal does not negate conspiracy because “the essence of conspiracy is ‘the combination of minds in an unlawful purpose.’” Even where a defendant has withdrawn from a conspiracy, he is still guilty of conspiracy, even though he may not bear liability for acts of the conspirators after withdrawal. Similarly, the statutes-of-limitation do not “render the underlying conduct noncriminal,” but only prevent prosecution beyond a certain time frame for policy reasons. “[A]lthough union of withdrawal and a statute-of-limitations defense can free the defendant of criminal liability, it does not place upon the prosecution a

1733 Id. at 717–18.
1734 Id. at 718.
1735 Id.
1736 Id.
1737 Id.
1738 Id. (citing United States v. Moore, 651 F.3d 30, 89-90 (D.C. Cir. 2011)).
1739 Id. at 718–19.
1740 Id. at 719.
1741 Id. (quoting Patterson v. New York 432 U.S. 197, 210 (1977)).
1742 Id. (quoting Martin v. Ohio, 480 U.S. 228, 237 (1987) (Powell, J., dissenting)).
1743 Id. (quoting United States v. Hirsch, 100 U.S. 33, 34 (1979)).
1744 Id.
1745 Id. at 719–20.
constitutional responsibility to prove that he did not withdraw.” 1746 Consistently, Congress has the power to assign the burden of proof and where Congress has not done so, the common rules apply. 1747 Because Congress did not address the burden of proof for withdraw, the Court assumed that the common law rule is applicable and that it is the defendants burden to prove affirmative defenses. 1748 Further, “[i]t would be nearly impossible for the Government to prove the negative that an act of withdrawal never happened.” 1749 The Court affirmed the Court of Appeals’ holding that it was Smith’s burden to prove that he withdrew from the conspiracy. 1750

1746 Id. at 720.
1747 Id.
1748 Id.
1749 Id. 720–21.
1750 Id. at 721.
Statutory Construction

State v. Lindell, 828 N.W.2d 1 (Iowa 2013)

This case discussed “whether a previous conviction for stalking under Iowa Code section 708.11 can be used to establish a course of conduct for a subsequent stalking violation.”\(^{1751}\) The Iowa Supreme Court held that the legislature intended prior convictions under the statute to be considered as evidence of the course of conduct necessary for a subsequent stalking offense.\(^{1752}\)

In the spring of 2010, A.C. and Lindell were involved in a romantic relationship, but in late April 2010, A.C. obtained a permanent protective order against Lindell.\(^{1753}\) In violation of the protective order, Lindell repeatedly called A.C., sent her a handwritten note with flowers, and damaged her personal property.\(^{1754}\) A.C. obtained a second protective order after these violations, and Lindell was charged with stalking, criminal mischief, and other charges.\(^{1755}\) Several months later, Lindell plead guilty to stalking (first offense) and fourth-degree criminal mischief, and he received a deferred judgment.\(^{1756}\) One month later, Lindell was reportedly watching A.C. at work from the parking lot.\(^{1757}\) A.C. reported the protective order violation, but Lindell claimed he had a legitimate reason for being in the parking lot.\(^{1758}\) Nevertheless, Lindell was charged with stalking (second offense).\(^{1759}\)

Lindell filed a motion for a bill of particulars, claiming the trial information and minutes of testimony did not support a violation of the stalking statute.\(^{1760}\) The district court ruled on the motion, ordering the State to file a “bill of particulars specifically stating the two or more occasions that constitute the course of conduct under Iowa Code section 708.11,” and the two or more occasions “shall be separate from those alleged in the Minutes of Testimony” in the prior conviction.\(^{1761}\)

In response, the State failed to follow the order; instead, the State listed additional minutes of testimony, which detailed the prior incidents of stalking with regard to the prior conviction.\(^{1762}\) Lindell replied, arguing that “double jeopardy principles precluded the State from using the prior incidents to establish the course of conduct required in the current stalking charge.”\(^{1763}\) The district court dismissed the action, and the State appealed.\(^{1764}\)

On appeal, the State claimed that “Lindell’s interpretation of the statute would allow those who have stalked a victim before to engage in ‘one free stalk’ of that victim, so long as it occurs after a conviction.”\(^{1765}\) However, Lindell argues the State is subjecting him to double jeopardy “by committing acts which also served as the basis for a prior

\(^{1751}\) State v. Lindell, 828 N.W.2d 1, 2 (Iowa 2013).
\(^{1752}\) Id.
\(^{1753}\) Id. at 3.
\(^{1754}\) Id. (noting that A.C. moved from Polk County to Scott County, and Lindell followed her move).
\(^{1755}\) Id.
\(^{1756}\) Id.
\(^{1757}\) Id.
\(^{1758}\) Id.
\(^{1759}\) Id. (noting his stalking offense was due to the violation of the protective order).
\(^{1760}\) Id.
\(^{1761}\) Id. (quoting the district court’s order ruling on the motion for a bill of particulars).
\(^{1762}\) Id.
\(^{1763}\) Id. at 4.
\(^{1764}\) Id.
\(^{1765}\) Id.
conviction.” On further review, the Iowa Supreme Court examined this case under only the U.S. Constitution. The Court noted the purpose of the Double Jeopardy Clause is to prevent against a “second prosecution for the same offense after conviction” or “acquittal” and to prevent “multiple punishments for the same crime.” At its core, the analysis for the applicability of the Double Jeopardy Clause is rooted in what the legislature intended.

At issue on appeal is the first paragraph of the stalking statute, which requires a “course of conduct.” The “course of conduct” must include “repeatedly maintaining a visual or physical proximity to a person without legitimate purpose or repeatedly conveying oral or written threats, threats implied by conduct, or a combination thereof, directed at or toward a person.” The statute also clarifies that “repeatedly” means “on two or more occasions.”

In this case, the Court held that Lindell was being charged with a subsequent count of stalking, thus, it may be separately punished under the Blockburger test. The Court next discussed whether previous acts can be used as evidence of course of conduct. The central question was “whether the State [could] use proof that Lindell had previously engaged in an action ‘directed at a specific person that would cause a reasonable person to fear bodily injury to, or the death of, that specific person or a member of the specific person’s immediately family’ to establish that he was once again engaging in a course of conduct as described in the stalking statute.”

Historically, the Iowa Supreme Court has held that “proof of prior crimes is admissible if it is relevant.” Here, the question was “whether the legislature intended for the ‘two or more occasions’ language to indicate that the actus reus explicitly requires two or more occasions for each offense, or whether that language was adopted to establish that the initial incident may have been merely an innocent encounter.” The Court held that “[s]ince stalking is a cumulative offense, ‘a mere overlap in proof between two prosecutions does not establish a double jeopardy violation.”

In reviewing the stalking statute’s legislative history, the Court looked at both the Iowa history and the Model Anti-Stalking Code comments for guidance. The Model Anti-Stalking Code directs “severe [sentencing] enhancements [be] available in instances in which the defendant has committed a previous felony or stalking offense against the same victim within a certain number of years.” The Model Anti-Stalking Code details the traumatic experience stalking can have on a victim, noting “[v]ictims often become so traumatized that if affects

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1766 Id.
1767 Id.
1768 Id.
1769 Id.
1770 Id. at 6.
1771 Id. (quoting IOWA CODE § 708.11(1)(b)).
1772 Id. (quoting IOWA CODE § 708.11(1)(d)).
1773 Id. (citing Blockburger v. United States, 284 U.S. 299, 304 (1932)).
1774 Id.
1775 Id. (citing IOWA CODE §§ 708.11.1(b) & 708.11.2(a)).
1776 Id.
1777 Id. at 7.
1778 Id. (quoting United States v. Felix, 503 U.S. 378, 386 (1992)).
1779 Id.
1780 Id. at 8 (alterations in original) (quoting the NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE PROJECT TO DEVELOP A MODEL ANTI-STALKING CODE 50 (Oct. 1993)).
multiple areas of their lives.” 1781 Likewise, “[o]ver time, the stalker’s behavior may have life threatening consequences for the victim,” an the stalkers “uncertain motives” and “obsessive and unpredictable behavior place his victim at great risk of bodily injury or death, as well as psychological trauma.” 1782

In this case, Lindell violated both the Polk County and the Scott County protective orders on six different occasions. 1783 Lindell’s stalking behavior spanned for more than six months, and escalated. 1784 The Iowa Supreme Court concluded that this type of repetitive, escalating stalking behavior was precisely what the legislature intended to prevent when it provided increased protection against stalking. 1785 The Court also held that if it were to exclude evidence of previous convictions for purpose of a present stalking charge, the Court would “essentially be giving a free pass from stalking charges to anyone who chose to engage in stalking behavior that also violated other laws, such as criminal mischief or felony property destruction, as long as they had been convicted of those charges prior to the time the stalking charge was brought.” 1786 In sum, the Court rejected Lindell’s argument and found the State’s claim to be in accordance with the legislative intent in creating the anti-stalking statute. 1787

**State v. Romer, 832 N.W.2d 169 (Iowa 2013)**

This case arose over statutory interpretation of Iowa Code section 709.15(3)(a) and (b), which prohibits sexual exploitation by a school employee. 1788 Brent Romer was convicted of five counts of sexual exploitation of a minor and three counts of sexual exploitation by a school employee and advanced three arguments in his appeal. Those are arguments were: (1) he did not violate the statute because there was no direct-teacher student relationship; (2) there was not evidence produced that he physically touched the students involved in counts seven and eight; and (3) that the district court should have severed the eight counts into five separate trials. 1789

The charges here arose from three incidences. Romer taught at Cumberland and Massena School District and the students involved in the incidences attended Corning Community School District. 1790 The first event included multiple incidences of sexual intercourse with a minor from the time she was sixteen until she was eighteen, whom Romer originally met when he was a substitute teacher or her elementary class. 1791 The second instance involved photographing two teenaged girls, nearly nude, in sexual positions. 1792 The third instance

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1781 *Id.* at 9 (quoting Belinda Wiggins, Note, *Stalking Humans: Is There a Need for Federalization of Anti-Stalking Laws in Order to Prevent Recidivism in Stalking?*, 50 SYRACUSE L. REV. 1067, 1073 (2000)).

1782 *Id.* (quoting the NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE PROJECT TO DEVELOP A MODEL ANTI-STALKING CODE 92, 69 (Oct. 1993)).

1783 *Id.*

1784 *Id.*

1785 *Id.*

1786 *Id.* at 10.

1787 *Id.* at 13.

1788 State v. Romer, 832 N.W.2d 169, 172 (Iowa 2013).

1789 *Id.*

1790 *Id.* at 173.

1791 *Id.*

1792 *Id.*
occurred when Romer photographed three minors in sexual poses during a party at his house, at which alcohol was being served. All of these interactions were revealed after the mother of the minor involved in the first incident discovered the sexual relationship and the minor eventually reported it to police.

After being charged with the counts outlined above, Romer filed a motion to bifurcate the multiple offenses into separate trials; however the district court overruled the motion “on the basis that the alleged acts, if proven, were part of a common scheme or plan and should therefore be tried together.” A motion in limine on the same topic was also denied. In a motion to adjudicate law points, Romer argued that “sexual exploitation by a school employee mischaracterized the intent of Iowa Code section 709.15(3) because Romer did not have a direct teacher-student relationship with the students he was charged with exploiting.” The district court denied this motion finding that this direct relationship was not required.

At the close of evidence, Romer moved for a directed verdict as to counts seven and eight arguing that the state did not prove that Romer engaged in any type of prohibited sexual conduct with the girls in the second two incidences; however this motion was denied as well and Romer was convicted on all counts. Romer appealed, the court of appeals affirmed, and the Court then granted application for further review.

As an issue of first impression, the Court focused on legislative intent in determining whether a contemporaneous teacher-student relationship was required under section 709.15(3). Through this statutory interpretation it analyzed the ordinary and common meaning of the statute, legislative history, and viewed the statute in its entirety. The Court pointed out that it does not “extend, enlarge, or otherwise change the meaning of the statute under the guise of construction.” Additionally the Court “strictly construe[s] criminal statutes and resolve doubts in favor of the accused.”

The Court concluded that “school employees” includes professionals who are not teachers and that many of those individuals may not have a direct student-teacher relationship. The Court determined that it would be an “illogical interpretation to conclude the legislature intended to require an existing teacher-student relationship in order to conclude for a school employee to violate [section 709.15(3)].” In assessing the statute as a whole, the Court contrasted section 709.15(2), which criminalizes sexual conduct with those who are “emotionally dependent.” Because the legislature failed to include this requirement in section 709.15(3), which has much of the same language, the Court assumed this exclusion was intentional and that a direct or current teacher-student relationship was not required.

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1793 Id.
1794 Id.
1795 Id.
1796 Id.
1797 Id.
1798 Id.
1799 Id. at 175
1800 Id. at 176 (citing In re Estate of Bockwoldt, 814 N.W.2d 215, 223 (Iowa 2012)).
1801 Id.
1802 Id. (quoting State v. Adams, 810 N.W.2d 365, 369 (Iowa 2012)).
1803 Id. at 177.
1804 Id.
1805 Id. (referring to patient or client context).
relationship is not necessary to be guilty of the crime.\textsuperscript{1806}

The issue of whether physical contact is required to constitute sexual conduct was also an issue of first impression and the court again focused on legislative intent, as well as whether sufficient evidence existed to support a conviction.\textsuperscript{1807} The Court found that “the jury could have reasonably found not only that Romer both photographed the sexual conduct and orchestrated the posses, but that the photographs were clearly sexual in nature.”\textsuperscript{1808} In terms of statutory construction, the court focused on the definition of “engaged” which means to “employ or involve oneself.”\textsuperscript{1809} It concluded that although the definition of sexual conduct in the statute does not include taking sexual photographs, the “plain words of the statute do not restrict sexual conduct to the actions listed” and that the list specifically says that sexual conduct was “not limited” to those items in the list.\textsuperscript{1810}

With regard to severance of the counts, the defendant “bears the burden of showing prejudice resulting from joinder outweighed the State’s interest in judicial economy.”\textsuperscript{1811} Iowa Rule of Criminal Procedure 2.6(1) allows multiple indictable offenses which arise from the “same transaction or occurrence or from two or more transactions or occurrences constituting parts of a common scheme or plan” to be tried together.\textsuperscript{1812} Events are a part of a “common scheme or plan” when they are “the products of a single or continuing motive.”\textsuperscript{1813} The Court was persuaded by the fact that “[t]he jury, which heard all of the evidence, found that these three counts, which involved all three of the events that generated the criminal activity for which Romer was convicted, were each part of a ‘pattern, practice, or scheme of conduct.’”\textsuperscript{1814} The Court was not convinced by Romer’s argument that not all of the evidence was required to in order to convict him on each individual count, because of the strong interest in judicial economy and the ability to pursue multiple offenses in a single prosecution.\textsuperscript{1815}

The Court affirmed Romer’s convictions. It concluded that Romer “was a school employee under the statute and the minors involved were students within the meaning of Iowa Code Section 709.15(3) . . . [and] that no contemporaneous teacher-student relationship was necessary to violate Iowa Code Section 709.15(3).”\textsuperscript{1816} The Court also found that “Romer’s actions in orchestrating and photographing sexual conduct between minors was sufficient to satisfy the statutory definition for engaging in sexual conduct.”\textsuperscript{1817} And “[f]inally, . . . that the events at issue here all fall within a common scheme or pattern, and thus, it

\begin{flushright}
\textsuperscript{1806} Id.  \\
\textsuperscript{1807} Id. at 178.  \\
\textsuperscript{1808} Id. at 179.  \\
\textsuperscript{1809} Id. (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 751 (unbar. ed. 2002)).  \\
\textsuperscript{1810} Id. (drawing parallels to the statute referencing sexual exploitation of a minor).  \\
\textsuperscript{1811} Id. at 181 (quoting State v. Elston, 735 N.W.2d 196, 198 (Iowa 2007)).  \\
\textsuperscript{1812} Id.  \\
\textsuperscript{1813} Id. (quoting Elston, 735 N.W.2d at 198).  \\
\textsuperscript{1814} Id. at 182 (pointing out that the common scheme was to victimize children to fulfill his sexual desires, that the events were within the same geographic proximity, and that the modus operandi was similar in all crimes because they involved minors).  \\
\textsuperscript{1815} Id. at 183.  \\
\textsuperscript{1816} Id. at 183–84.  \\
\textsuperscript{1817} Id. at 184.
\end{flushright}
was appropriate for the charges to be joined."1818
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