2017-18 IOWA CRIMINAL CASE LAW UPDATE

outline prepared by
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NOTE: All personal opinions expressed in this outline are of the author, and in no way represent the views of the Federal Public Defender or any other person.

I. Constitutional Law 7

I. Constitutional Law

A. Iowa Constitution art. I, section 6 – Privileges and Immunities – Right to Travel.

Behm v. City of Cedar Rapids, _____ N.W.2d _____ (Iowa 2018)
Assuming that the privileges and immunities clause of Iowa Const. art. I, section 6 provides a fundamental right to interstate and intrastate travel, it is not infringed by an Automated Traffic Enforcement system in which speed and red light violations are tracked using privately-owned cameras.

B. Art. I, Section 9 (Iowa Const. art. I, sec. 21) – Ex Post Facto Laws

State v. Lopez, 907 N.W.2d 112 (Iowa 2018)
The Iowa Code § 911.2B surcharge that took effect on July 1, 2015 is an invalid *ex post facto* law where defendant is charged with conduct occurring between April 3 and August 2, 2015 where there is no way to ascertain from the general verdict of guilty whether the defendant was convicted of behavior before or after July 1.

C. Art. VI, cl. 2 (Iowa Const. art. III, section 38A) – Supremacy/Preemption

Behm v. City of Cedar Rapids, _____ N.W.2d _____ (Iowa 2018)
A municipal Automated Traffic Enforcement ordinance which imposes liability on an individual who does not respond the notice of violation or who fails to request that the city institute a municipal infraction proceeding is irreconcilable with the provisions of Iowa Code § 364.22 that establish procedures for municipal infractions.

Behm v. City of Cedar Rapids, _____ N.W.2d _____ (Iowa 2018)
The decision of a municipality to exclude government-owned vehicles from the operation of a Automated Traffic Enforcement system is not irreconcilable with the Iowa Code § 321.230 notion that government-owned vehicles are subject to the rules of the road.

State v. Martinez, 896 N.W.2d 737 (Iowa 2017)
Iowa Code § 715A.2(2)(a)(4), which makes it a class "D" forgery offense to make, etc., a writing purporting to be a document prescribed as evidence for authorized stay or employment in the United States, is facially invalid because it involves subject matter occupied exclusively by the federal government.

State v. Martinez, 896 N.W.2d 737 (Iowa 2017)
The identity theft provision of Iowa Code § 715A.8(2), making it illegal to obtain some benefit using fraudulent identification, is invalid as applied to defendant using false documents to falsely establish legal status in the United States.

– Article VI, cl. 2 of the United States Constitution makes the federal law the supreme law of the land.

Congress is given the authority to "establish a . . . uniform Rule of Naturalization" in U.S. CONST. Art I, §

8, cl. 4. In *Martinez*, Justice Appel discusses the two forms of preemption, the theory enforcing the

Supremacy Clause. Field preemption comes to play when the entire area of law is occupied by federal

law, while conflict preemption exists when a state remedy differs from the federal remedy to the extent that

the federal purpose is frustrated.

Both forms of preemption are in play here.

Justice Appel's opinion follows closely the United States Supreme Court decision in *Arizona v. United States*, 132 S.Ct 2492 (2012). There are few, if any areas of the law in which issues of preemption come into play more prominently than in immigration law.

D. First Amendment – Free Speech – Laws Restricting Internet Use by Sex Offenders

Packingham v. North Carolina, _____ U.S. _____, 137 S.Ct. 1730, _____ L.Ed.2d_____ (2017)
Recognizing the governmental interest in protecting minors from adult sexual predators, a state law criminalizing all access to the social media by registered sex offenders is not narrowly tailored to serve that interest and burdens more speech than necessary to do so.

– The North Carolina act was subject to intermediate scrutiny, and not strict scrutiny, because it purported to be content neutral. One thing that really jumped out at me was the Court's observation that the North Carolina statute applies to about 20,000 people, and has been used since its 2008 passage to prosecute 1,000 people. The total population of North Carolina in 2016 was 10.15 million. That means that two tenths of one percent of the population of North Carolina is on the sex offender registry. But then, Iowa has 5,487 registrants, comprising 1.7 tenths of one percent of our population. Until a more narrowly drawn statute can be passed, they can all go on Twitter. But they wouldn't be the biggest monsters using Twitter today, would they?

E. Fourth Amendment

1. Conflict Between State and Federal Law – Federal Investigation in State Court

State v. Ramirez, 895 N.W.2d 884 (Iowa 2017)
While anticipatory search warrants were held in *State v. Gillespie*, 530 N.W.2d 446 (Iowa 1995) to violate the language of Iowa Code §§ 808.3 and 808.4, they are valid under the Fourth Amendment in *United States v. Grubbs*, 547 U.S. 90 (2006), so evidence validly obtained by federal agents using a valid federal warrant in a federal investigation is admissible in a state prosecution after the federal prosecutors elect to hand the case over to state prosecutors.

– The purpose of the exclusionary rule, to discourage bad behavior by law enforcement, loses its force where agents, acting in their own jurisdiction, are playing by the rules. The outcome of this case might be different if there was collusion between state and federal prosecutors to do an end run around the state restrictions. There was no evidence of that here. It might also be different if anticipatory warrants were found to violate the Iowa Constitution, rather than simply the Iowa

Code.

2. Expectations of Privacy

a. Rental Vehicle

Byrd v. United States, _____ U.S. _____, 138 S.Ct. 1518, _____ L.Ed.2d. _____ (2018)
A driver of a rental vehicle who is not listed on the rental agreement may have a legitimate expectation of privacy in the vehicle provided that the driver's presence in the vehicle was legitimate.

– The case was remanded for more findings. If it was determined that Mr. Byrd was in the vehicle fraudulently or illegally, and his status with the vehicle was no different from being a thief, then he would have no expectation of privacy, and could not challenge the search of it by law enforcement. He might also simply demonstrate that there was probable cause for the search, obviating a finding of whether he held a legitimate expectation of privacy. While litigants often use the term "standing" to characterize whether the party has legitimate expectations of privacy enabling the party to launch a Fourth Amendment challenge, true standing relates to whether the party has standing under Article III of the Constitution to seek relief.

b. Location Information Possessed by Cell Phone Providers

Carpenter v. United States, _____ U.S. _____, 138 S.Ct. 2206, _____ L.Ed.2d _____ (2018)
Because of the very pervasive nature of location information collected by wireless carriers, individuals possessing cellular phones have a reasonable expectation of privacy in that information, and the government must obtain a search warrant to access this very particular form of information.

-- This case, and its numerous separate opinions, is a fascinating primer on many aspects of the Fourth Amendment. It is significant because, expanding on *Katz v. United States*, 389 U.S. 347 (1967), Chief Justice Roberts authors a pro-defendant opinion continuing down the path the Court has followed in which it recognizes that cellular phones are inherently different from virtually every other part of our lives. Every aspect of our personal, professional and financial lives are connected in some form with them and, besides the mere act of powering them up, consumers do nothing to relinquish their expectations of privacy.

But cell phone records are business records in the possession of a third-party, Justice Kennedy responds in his dissent. And the Court has held in *United States v. Miller*, 425 U.S. 435 (1976) and *Smith v. Maryland*, 442 U.S. 735 (1979) that, even where business records contain sensitive and personal information, they may be obtained through compulsory process, using subpoenas. The federal Stored Communications Act, 18 U.S.C. § 2703(d), while not requiring probable cause, provides some protection in that it requires "specific and articulable facts showing that there are reasonable grounds to believe" the records "are relevant and material to an ongoing criminal investigation." *Carpenter v. United States*, 138 U.S. at 2223-35 (Kennedy, J., dissenting).

Justice Thomas, on the other hand, repeats his position that the text of the Fourth Amendment says nothing about reasonable expectations of privacy, and that *Katz* was wrongly decided. *Carpenter v. United States*, 138 U.S. at 2236-46 (Thomas, J., dissenting). Justice Alito's concerns are somewhat similar to Justice Kennedy's. He argues that the Fourth Amendment supports challenges only to one's own persons, houses, papers, etc., and not those of a third party. This decision may wreak havoc on the ability to use compulsory process to conduct investigations. *Carpenter v. United States*, 138 U.S. at 2246-61 (Alito, J., dissenting).

And Justice Gorsuch's dissent sends out some rays of optimism concerning his views on the Fourth Amendment. He is troubled by what occurred in Carpenter's case. And he even suggests that Carpenter may have erred in proceeding under *Katz*. Properly raised, there may be an argument that it wasn't merely Carpenter's reasonable expectations of privacy that were interfered with, but an actual seizure of his "effects." *Carpenter v. United States*, 138 U.S. at 2261-72 (Gorsuch, dissenting).

3. Seizure

a. Reasonable Suspicion – Seizure of Boat

State v. Pettijohn, 899 N.W.2d 1 (Iowa 2017)
Law enforcement had reasonable suspicion to stop a motorboat on a public waterway, where the observation that a passenger was dangling her feet outside the boat perilously close to the propellor potentially placed the driver of the boat in violation of Iowa Code § 462A.12(1), that proscribes operating a vessel in a negligent manner so as to endanger any person.

b. Arrests – Probable Cause

District of Columbia v. Wesby, _____ U.S. _____, 138 S.Ct. 577, _____ L.Ed.2d _____ (2018)
Despite the fact that individuals attending a party in a house owned by a third party claim to have received permission to be there, law enforcement viewing the totality of circumstances has probable cause to arrest them for unlawful entry where the individuals gave inconsistent explanations as to why they were there, where the house appeared in some respects to be abandoned, where some of the individuals scattered when law enforcement arrived and where the woman identified by the individuals as having given then permission to enter the premises was evasive when interviewed by law enforcement and ultimately admitted that she did not possess the authority to grant permission to enter.

– This case is a suit filed by the partygoers under 42 U.S.C. § 1983 against law enforcement who arrested them arguing that, because they believed they had permission to enter the premises, the officers who arrested them lacked qualified immunity. The lower courts sided with the partygoers. Because law enforcement in fact had probable cause, they possessed qualified immunity from suit.

4. Warranted Searches

a. Iowa Code § 808.3 – Search Warrant – Sufficiency

State v. Angel and McDowell, 893 N.W.2d 904 (Iowa 2017)
The requirement that a search warrant applicant supply an oath or affirmation including the grounds supporting probable cause is satisfied when the law enforcement applicant swears under oath before the magistrate, even if the applicant fails to sign the warrant.

– The magistrate also failed to strike out the "do not support" language on the boilerplate form, but this did not invalidate the warrant. Justice Appel wrote a detailed dissent, stressing that issuance of a warrant "which, among other things, may authorize a home invasion by authorities – is among the most delicate and sensitive legal process known under our constitutional system. The process of issuing a valid search warrant is not a bureaucratic bother in which a lackadaisical, close-enough attitude toward legal

requirements is good enough." Justice Appel characterized as the "twin pillars of Iowa search and seizure law" (1) the refusal to consider extrinsic evidence to support warrants, and the examination of the four corners of the warrant to gauge its validity, and (2) Iowa's rejection of the good faith exception to the warrant requirements. Both are endangered by the 4-2 majority's decision.

b. Parcels Belonging to Bystanders

State v. Brown, 905 N.W.2d 846 (Iowa 2018)
Law enforcement violates article I, section 8 of the Iowa Constitution during a warranted search of a premises in searching the purse in the constructive possession of a woman unknown to law enforcement and not mentioned in the warrant, where they have some notice that the purse belongs to the woman and not a named subject of the warrant.

– To address this issue, Ms. Brown suggested to the Court several tests articulated in other jurisdictions for when bystanders are protected from a premises warrant under the Fourth Amendment and its local equivalents. Justice Appel appeared to rely most heavily on Ms. Brown's constructive possession of the purse and the fact that, because her i.d. was near the opening of the purse, law enforcement were on notice that the purse did not belong to a named subject. Ms. Brown made her arguments under both the state and federal provisions. The ruling was only under the state constitution.

c. Wiretap Communications – Federal Search Warrants – Sufficiency

Dahda v. United States, _____ U.S. _____, 138 S.Ct. 1491, _____ L.Ed.2d _____ (2018)
Although 18 U.S.C. § 2518(3) authorizes a judge to issue a warrant to order interception of wiretap communications only "within the territorial jurisdiction of the court in which the judge is sitting," where all of the requirements listed in 18 U.S.C. § 2518(4)(a)-(e) for contents of the order have been met, the warrant order is not "insufficient on its face,' giving rise to suppression under 18 U.S.C. § 2518(10)(a)(ii) simply because the order authorizes interception of communications outside the court's jurisdiction as well as those within the jurisdiction, especially where no communications were actually seized outside of the court's jurisdiction.

5. Warrantless Searches

a. "*Terry* Stops – Park Curfew

State v. Scheffert, 910 N.W. 2d 577 (Iowa 2018)
Law enforcement had probable cause to stop a vehicle on a county conservation property after 10:30 p.m., despite the absence of any signage or other notice of the 10:30 p.m. state park closing time specified under Iowa Code § 461A.46.

– Local authorities may close a park earlier or later but, in such cases, must give notice by signs, etc. The Falls Access area closes at 10:30 p.m., and no signs were posted. So initially the Iowa Court of Appeals ruled that there was no probable cause for the stop, and the Supreme Court affirmed. In a petition for rehearing, however, the state argued, for the first time, that Iowa Code § 350.5, puts county parks and conservation district under § 461A.46. Therefore, the 10:30 closing time was in effect, and law enforcement had probable cause to make the stop.

b. Searches Incident to Arrest – Blood Alcohol Testing

State v. Pettijohn, 899 N.W.2d 1 (Iowa 2017)
Because in most cases where the driver of a boat is stopped on suspicion of operating the boat while intoxicated there is sufficient time, using current technology, to obtain a warrant to obtain chemical samples prior to dissipation of the alcohol, such a stop does not *per se* fall within the search incident to arrest exception to the warrant requirement under article I, section 8 of the Iowa Constitution.

– Applying the Fourth Amendment, the United States Supreme Court in *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016) held that a warrant was necessary to require a suspected drunk driver to submit to a blood test but that the less-intrusive breath tests could be conducted without a warrant as a search incident to arrest. That distinction is eliminated by Justice Wiggins in *Pettijohn* under the Iowa Constitution. There is nothing about Justice Wiggins' reasoning here that would not apply equally in cases involving motor vehicles.

c. Automobile Searches

(1) Automobile Exception

State v. Storm, 898 N.W.2d 140 (Iowa 2017)
Advances in technology have not reached the point at which it is practical to obtain a warrant to search a seized vehicle using remote technology in a reasonable period of time, so the warrantless searches of motor vehicles where there is probable cause remains justified in Iowa under article I, section 8 of the Iowa Constitution.

– Because of the automobile's inherent mobility, the notice to the occupant that there will be a search, and the possibility of the destruction of evidence,

a *per se* exception to the warrant requirement exists, in the absence of other exigent circumstances, where there is probable cause. In *State v. Gaskins*, 866 N.W.2d 1 (Iowa 2015), the Court suggested that it might be time to break from the federal interpretation of the Fourth Amendment and eliminate the categorical automobile exception. The majority in the 4-3 *Storm* decision determined that the time has not come for this, although each of the justices appear to agree that the technology may someday reach the point that it is practical to apply for and obtain a warrant in a reasonable period of time.

Storm and *State v. Pettijohn*, 899 N.W.2d 1 (Iowa 2017) were decided within weeks of each other, yet they seem to project conflicting *levels* of confidence in current technology in determining whether fear of evidence destruction is *per se* an exigent circumstance. Granted, *Pettijohn* deals with searches of boats, while *Storm* addresses motor vehicles. But there is nothing about *Pettijohn* that would limit its reach to boats rather than automobiles.

(2) Automobile Searches – Curtilage Area

Collins v. Virginia, _____ U.S. _____, 138 S.Ct.1663, _____ L.Ed.2d _____ (2018)
Absent some specific exigent circumstance, police may not use the automobile exception to conduct a warrantless search of a motor vehicle, in this case a motorcycle, parked in the curtilage of a residence.

-- In this case, the curtilage was a portion of the driveway next to the house, beyond the front door, contained on two sides by walls and on another side by a gate.

15

d. Implied Consent

State v. Pettijohn, 899 N.W.2d 1 (Iowa 2017)
Because of their inherently coercive nature, submission to the implied consent provisions of Iowa Code § 462A.14A(1), that expose operators of boats to administrative consequences for failure to do so, does not constitute effective consent under Article I, section 8 of the Iowa Constitution, and whether consent has effectively been given is determined by an examination of the totality of circumstances.

– Because the language of § 462A differs from implied consent provisions involving automobiles, Justice Wiggins limited this *Pettijohn* holding to cases involving boats. But the general notion that implied consent warnings may be sufficiency coercive as to vitiate an argument that the defendant gave sufficient consent after submitting to and implied consent request for samples applies to both.

In view of the facts that Mr. Pettijohn was intoxicated when he was stopped by law enforcement, that he was arrested and transported to the police station, that the advised consent advisory notified him of the civil consequences of failure to comply but not that he had a right not to comply, and that the particular advisory read to him stated incorrectly that the suspension of his boating privileges would be as long as the suspension following a criminal conviction, among other things, his consent was not voluntary.

Pettijohn was the last Iowa Supreme Court decision I read from the 2016-17 "term" (or whatever you call it). It is a long decision, involving several major issues. I was, admittedly, ambivalent about investing so much time in reading and analyzing a case about *boats*. The day the decision came down, the attorneys involved in this case engaged, in the social media, in what would be penalized as excessive celebration if this was the NFL.

But then I bit down hard and read the decision. And it is as major victory on several fronts, especially this one. And, like I say above, its implications involve more than just boats.

Excellent work on this by Grant Gangestad and his cohorts.

e. Impoundment Inventory

State v. Ingram, 914 N.W.2d 794 (Iowa 2018)
Impoundment inventories of vehicles are not permissible under article I, section 8 of the Iowa Constitution unless other options, including obtaining consent of the driver or owner or permitting the owner to drive the vehicle away, are explored and are not available.

-- In *Ingram*, the Court uses the Iowa Constitution to join several other jurisdictions that reject the federal interpretation of the Fourth Amendment in *Colorado v. Bertine*, 479 U.S. 367 (1987), and returning the Iowa jurisprudence to what it was pre-*Bertine*. Justice Appel challenges the vitality of each of the rationalizations underlying the impoundment inventory exception to the warrant requirement in the federal caselaw. The interest in using the impoundment inventory to prevent false claims of theft of property is minimal. There is little evidence of false claims of thefts of property held in locked evidence rooms, and an inventory does little to guard against such claims, as the claimant may argue that the inventory is inaccurate or that the theft occurred prior to its preparation. Sealing and storing seized property is equally effective. And, finally, law enforcement are considered involuntary or gratuitous bailees of seized property and, absent a showing of gross negligence, are not liable for its loss. Once property is secured away from the party possessing it, any interest in law enforcement safety is satisfied. As far as the interest in protecting the interests of property owners, obtaining the owner's consent to conduct an inventory is sufficient. *State v. Ingram*, 914 N.W.2d at 817-20.

This is a major step taken by the Court. Assuming the votes were there at the time, it is a step that could have been taken years earlier, had defendants challenged the inventory impoundment exception under the Iowa Constitution rather than under the Fourth Amendment. Justice Appel's opinion begins with a detailed discussion of how state constitutional claims must be preserved to guarantee that they will be considered. *State v. Ingram*, 914 N.W.2d at 799-801.

Joined by Justices Waterman and Zager, Justice Mansfield concurred. The

impoundment inventory in this particular case violated the Fourth Amendment, he acknowledged, because there was no evidence of a local law enforcement policy allowing officers to open the closed container that held the methamphetamine for which Mr. Ingram was arrested. Therefore, there was no need for sweeping constitutional change. A rule that an inventory impoundment is permitted only if no other options are available is unworkable, he argues, because it requires law enforcement to know and offer a wide range of options to the party being searched.

State v. Ingram, 914 N.W.2d 794 (Iowa 2018)
In cases in which impoundment and inventory of a vehicle is warranted under article I, section 8 of the Iowa Constitution law enforcement, in the absence of the consent of the driver or owner, is authorized to inventory closed containers as units but, absent a warrant, may not open them.

f. Community Caretaking Exception

State v. Coffman, 914 N.W.2d 240 (Iowa 2018)
Law enforcement was justified under the "community caretaking function" to the warrant requirement to seize a vehicle pulled over at the side of a public highway at 1:08 a.m. with its brake lights on, where the officer's motivation was not investigatory but rather to check on the welfare of the vehicle's occupants.

-- Justices Appel and Mansfield issued very extensive dueling opinions on whether a community caretaking function even exists in the absence of consent, unusual circumstances or an inventory impoundment. Writing for the majority, Justice Mansfield relied on the three-step analysis of cases such as *State v. Tyler*, 867 N.W.2d 136, 170 (Iowa 2015):

> (1) Was there a seizure within the meaning of the Fourth Amendment?' (2) if so, was the police conduct bona fide community caretaker activity?" and (3) if so, did the public need and interest outweigh the intrusion upon the privacy of the citizen?

Justice Mansfield added one caveat. Under the federal constitutional analysis, the determination of whether the exception applies is solely based upon an objective evaluation of the circumstances of the seizure. Under Iowa Const. art. I, section 8, however, it must be demonstrated both that the seizure was conducted objectively for community caretaking and also that this was the officers' subjective motivation. *State v.*

Coffman, 914 N.W.2d at 257-58.

State v. Smith, _____ N.W.2d _____ (Iowa 2018)
When police receive a report of a vehicle going into a ditch at 4:30 a.m., where they find the vehicle in the ditch, but do not find the driver and see no signs of injury, and where subsequently they observe a second vehicle passing by, registered to the same address as the vehicle in the ditch, the stop of the second vehicle serves an investigatory, and not a community caretaking, function, and is not justified under the community caretaking exception to the warrant requirement.

-- *Smith* followed very rapidly on the heels the decision in *State v. Coffman*, 914 N.W.2d 240 (Iowa 2018), in which the Court articulated a three-pronged test as to when the community caretaking exception was appropriate:

> (1) was there a seizure within the meaning of the Fourth Amendment?; (2) if so, was the police conduct bona fide community caretaker activity?' and (3) if so, did the public need and interest outweigh the intrusion upon the privacy of the citizen?

State v. Coffman, 914 N.W.2d at 245. The second and third prongs were not established in *Smith*. If the driver of the first car was injured or lost, the second vehicle would not have driven by law enforcement, but would have rather requested assistance.

F. Fifth Amendment

1. Double Jeopardy

a, Correction of Illegal Sentence – Credit for Time on Probation.

State v. Jepsen, 907 N.W.2d 495 (Iowa 2018)
As probation is punishment, where defendant is originally placed on probation and then, four years later, the sentencing court discovers that incarceration was required and resentences the defendant to a term of incarceration, the Double Jeopardy clause requires that the defendant receive one day of credit for each day he or she spent on probation.

– Chief Justice Cady answered three key questions in favor of the defendant that are subjects of dispute in other jurisdictions. First, the majority found that probation is punishment. Second, the defendant is entitled to some credit for time spent on probation when the sentence of probation is determined to be illegal. Finally, time spent on probation is equivalent to time spent in custody when calculating the credit.

We'll see if this one is allowed to stand.

b. Matching Elements

Krogmann v. State, 914 N.W.2d 293 (Iowa 2018)
Because, under Iowa law, the offenses of willful injury and attempted murder each have elements the other does not, conviction of both offenses, and the imposition of consecutive sentences for both offenses rising out of the single assault, do constitute double jeopardy.

c. Consent to Multiple Trials

Currier v. Virginia, _____ U. S. _____, 138 S.Ct. 2144, _____ L.Ed.2d _____ (2018)
A defendant who, jointly with the prosecution, had moved for separate trials on, on one hand, burglary and larceny that involved the theft of firearms, and, on the other, being a felon in possession of the firearms taken during the burglaries, has consented to multiple trials for what arguably is the same offense, and the subsequent trial on the felon in possession charge does not violate Double Jeopardy.

-- Four dissenters, led by Justice Ginsburg, argued that trial on the felon in possession charge was barred by the alternative Fifth Amendment theory of issue preclusion. Justice Gorsuch, who wrote the majority opinion rejecting the primary Fifth Amendment claim, was joined by only three justices in his argument that issue preclusion does not apply in criminal law. Justice Kennedy did not. So this issue is not resolved in *Currier*.

2. Self-Incrimination – Civil Forfeiture Proceedings

In the matter of property seized from Herrera, 912 N.W.2d 454 (Iowa 2018)
A party contesting civil forfeiture of property may decline, on Fifth Amendment grounds, to provide information required to be given under Iowa Code §§809A.13(c) and (d) without surrendering his or her claim to the property.

G. Sixth Amendment

1. Right to Counsel

a. Attachment of Right

State v. Green, 896 N.W.2d 770 (Iowa 2017)
The right to counsel under article I, section 10 of the Iowa Constitution does not attach until a complaint has been filed against the defendant, and even the fact that the county attorney is present during a consensual interview between the defendant and law enforcement does not convert an investigation into a prosecution.

Hernandez Ruiz v. State, 912 N.W.2d 435 (Iowa 2018)
The right to counsel does not attach under the Sixth Amendment or article I, section 10 of the Iowa Constitution until a charge has been filed and the defendant makes an initial appearance before the court, so counsel's faulty advice to an immigrant with a pending cancellation of removal, who had applied (also on the advice of counsel) for a driver's license using a different social security number than one previously used, to accompany counsel to the DOT to admit to use fraudulent identification, which resulted in the

client's conviction of a crime of moral turpitude and deportation, did not violate either constitutional provision.

-- Notably, there is a pending federal immigration case against Mr. Hernandez. But the Court followed other jurisdictions that hold that state constitutions do not control federal proceedings. And additionally there is no Sixth Amendment right to counsel in federal immigration cases.

b. Counsel of Choice

State v. Mulatillo, 907 N.W.2d 511 (Iowa 2018)
The district court deprives the defendant of his Sixth Amendment right to counsel of his choice where counsel is informed shortly before trial that the confidential informant against his client was briefly a client of counsel where, despite representations from prosecutors that discussions about cooperation occurred during representation by counsel, counsel testified that the extent of his one-month representation of the informant was a brief single consultation during which there was no discussion about facts of the case and where counsel filed a routine appearance, a not guilty plea, a written arraignment and a motion to produce.

– Representations made by counsel about the extent of his or her contacts with the defendant are given substantial weight. The record in this case did not suggest a potential for conflict.

c. Client's Autonomy in Making Decisions

McCoy v. Louisiana, _____ U.S. _____, 138 S.Ct. 1500, _____ L.Ed.2d _____ (2018)
Where the defendant insists that he is factually innocent of the charged offense, or an element of the offense, and insists that trial counsel not admit at trial that the defendant committed the offense or the element, counsel may not take an inconsistent position and may not admit the defendant's guilt.

– This is one of the decisions that the defendant has the autonomy to make. If defense counsel fails to honor the defendant's wishes, error is structural, and the defendant is not required to demonstrate prejudice.

Where, as in *Florida v. Nixon*, 543 U.S. 175 (2004) the defendant is silent on the issue, and defense counsel makes the decision to admit elements or the offense, the *McCoy* error does not exist.

d. Ineffective Assistance

(1) Breach of Duty

(A) General

Morales Diaz v. State, 896 N.W.2d 723 (Iowa 2017)
Counsel has a duty to a client who is an alien entering a plea of guilty to advise the client of all immigration consequences including, if applicable, immediate removal, the availability or nonavailability of cancellation of removal, detention pending removal, and denial of citizenship.

– Defense counsel told Mr. Morales that he would probably be deported whether or not he was convicted of the forgery charge for which he was arrested. Chief Justice Cady found counsel's duty to be more extensive, and that counsel's ineffective assistance was prejudicial.

The Court decided this case under the federal constitution, but appears to have given a more generous remedy than the federal courts have awarded in the wake of *Padilla v. Kentucky*, 559 U.S. 356 (2010). Following *Morales Diaz*, attorneys who represent aliens in state court are going to have to be more cognizant of federal immigration law to give more effective *Padilla* advice.

State v. Virgil, 895 N.W.2d 873 (Iowa 2017)

In a prosecution for domestic abuse assault, where the central disputed issues of fact were whether the defendant and the victim were cohabiting as household members, defense counsel was ineffective in failing to request a jury instruction defining the terms "cohabiting" and "household member."

– In *State v. Kellogg*, 542 N.W.2d 514 (Iowa 1996), the Court articulated six factors to determine whether the parties were cohabiting for the purpose of a domestic abuse proceeding. Additionally Iowa State Bar Association Uniform Criminal Jury Instruction 830.4 (2015) contains a detailed definition of cohabiting. Virgil's attorney appeared

to be unaware of either. In the Court's unanimous opinion, Justice Waterman stated that defense counsel should be familiar with both.

There was evidence to support conclusions both that Virgil and the victim were cohabiting and that they weren't. The definitional instruction therefore was crucial, and Virgil was prejudiced by his attorney's failure to request it.

Krogmann v. State, 914 N.W.2d 293 (Iowa 2018)
Counsel breached an essential duty to the defendant in failing to obtain a ruling from the district court on the defendant's challenge to the issuance of an order freezing the defendant's assets prior to trial that may be used to pay restitution if the defendant is convicted.

State v. Harrison, 914 N.W.2d 178 (Iowa 2018)
Unlike assault and willful injury, robbery is a separate offense from the homicide that results from it, so the merger doctrine does not preclude felony murder based upon robbery, and counsel is not ineffective in failing to request an instruction informing the jury that the robbery must be a separate act from the killing.

(B) Strategic Decisions of Counsel

State v. Henderson, 908 N.W.2d 868 (Iowa 2018)
There is no rational strategic justification for permitting a case to go to the jury where the elements are not supported by substantial evidence.

– Justice Mansfield cited *State v. Schlitter*, 881 N.W.2d 380. 390 (Iowa 2016) and *State v. Schories*, 827 N.W.2d 659, 664-65 (Iowa 2013) for this point).

(2) Prejudice

(A) General

State v. Gomez Garcia, 904 N.W.2d 172 (Iowa 2017)
Although trial counsel failed to assure that jury trial was waived on the record, as required by Iowa R. Crim.P. 2.17(1), counsel will not be found ineffective absent evidence that waiver was not knowing and voluntary and absent evidence that the defendant was actually prejudiced.

23

State v. Shorter, 893 N.W.2d 65 (Iowa 2017)
The defendant fails to establish prejudice in trial counsel's failure to request the Iowa Bar Association jury instruction on eyewitness identification, where the instruction would in many respects be more damaging to the defendant's case, and where the instruction on witness credibility that was given would be sufficient to allow defense counsel to attack the credibility of the eyewitness in the defendant's case.

State v. Shorter, 893 N.W.2d 65 (Iowa 2017)
The defendant fails to establish prejudice in trial counsel's failure to object to consideration of a jury question in defendant's absence, where the court's answer to the question was that the jury should "reread the instructions," and defendant offers no alternative response that may have been given had the defendant been present.

– Citing *State v. Griffin*, 323 N.W.2d 198, 201 (Iowa 1982), Justice Appel does recognize that, under Iowa R.Crim.P. 2.19(5)(g), the defendant must be present at all such stages of trial, and that violation of the rule is presumed prejudicial "unless the record shows to the contrary."

Jae Lee v. United States, _____ U.S. _____ , 137 S.Ct. 1958, _____ L.Ed.2d _____ (2017)
Where defense counsel explicitly advised the defendant, incorrectly, that his plea of guilty would not result in deportation from the Untied States, the defendant may establish prejudice by showing that, but for counsel's incompetent advice, he would not have pleaded guilty and would have gone to trial, and is not required to show that the ultimate result of trial would be different.

– This result is not limited to cases involving bad advice concerning immigration consequences. Mr. Jae Lee would almost certainly be convicted. But the *Strickland* inquiry into whether the result would have been different applies when there actually is a proceeding. The prejudice to Mr. Jae Lee is that there was no proceeding.

(B) Structural Error

Krogmann v. State, 914 N.W.2d 293 (Iowa 2018)
Where the prejudice resulting from the pretrial issuance of an order freezing the defendant's assets that may be used to pay restitution if the defendant is convicted, whether or not it was sufficiently objected to, is that the defendant was denied the right to have autonomy over his case, as he was unable to post bond, hire additional attorneys and retain a jury selection consultant, then error is structural, and no showing of prejudice is necessary.

-- Justice Appel's theory regarding interference with Mr. Krogmann's autonomy in his case is derived in part from the very recent decision in *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018). Justice Appel appears to utilize a very broad reading of *McCoy*. McCoy's counsel was ineffective because counsel admitted, in a capital murder case, that McCoy killed the victim, and focused his strategy on avoiding the death penalty. Justice Appel appears to read *McCoy* to say that the defendant is the master of all aspects of his or her defense. In my mind, this may run counter to the notion that there are some aspects of the defense of a case that are left to counsel, and some the province of the defendant alone.

And, under article I, section 10 of the Iowa Constitution, Justice Appel determined that a violation of the defendant's autonomy is structural error in postconviction proceedings as well, and the defendant need not make a showing of prejudice at that level.

25

2. Right to Jury Trial – Right to Impartial Jury– Establishing Underrepresentation

State v. Plain, 898 N.W.2d 801 (Iowa 2017)
In establishing the second prong of the three-part test[1] under *Duren v. Mississippi*, 439 U.S. 357 (1979) for a violation of the requirement that the jury represent a fair cross-section of the community, namely that the representation in the jury panel of a distinctive group is not fair and reasonable in relationship to the group's representation in the community, courts should not be limited to the absolute disparity test, but should rely upon a hybrid of (1) the absolute disparity test, (2) the comparative disparity test, and (3) standard deviation.

– This is a major step forward for Iowa, which permitted reliance solely upon the absolute disparity test in *State v. Jones*, 490 N.W.2d 787 (Iowa 1992). The disparity under the absolute disparity test is the proportion of the group in the population of the community minus the proportion of the group in the venire. In a state as homogeneous as Iowa, it is virtually impossible to prevail on a fair cross-section challenge. If a particular group comprises 9 percent of the state's population, and there are zero members of the group in the venire, the absolute disparity is 9 percent, a level not found to be statistically significant. The comparative disparity test, in contrast, requires division of the absolute disparity by the percentage of the group in the population. In the above example, the 9 percent absolute disparity is divided by the 9 percent representation in the population, yielding a 100 percent comparative disparity. This test alone may have the effect of overstating the underrepresentation of the group. Standard deviation measures fluctuations from samples taken of representation in the population, and analyzing them for randomness, etc.

The Court concludes that none of the tests is flawless, and the best solution is to utilize

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[1]A prima facie violation of the fair cross-section requirement is proven when it is demonstrated:

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

Duren v. Mississippi, 439 U.S. at 364.

them in combination. Mr. Plain's conviction is affirmed conditionally, but remanded to the district court to determine, in view of the developments announced in his case, whether he was denied a representative jury.

H. Eighth Amendment

1. Disproportionality

State v. Wickes, 910 N.W.2d 554 (Iowa 2018)
A teacher's acts of engaging in dozens of hugs with a single 17-year-old student while sending the student over a thousand Facebook private messages describing his attraction to her and his interest in becoming intimate with her is exactly the level of behavior anticipated by the legislature in enacting the prohibition of exploitation by a school employee, so the five year prison sentence given for a pattern of activity of exploitation is not grossly disproportionate to the gravity of the offense.

– The Court reached this result applying a three-part test for gross disproportionality adopted in *State v. Bruegger*, 773 N.W.2d 862 (Iowa 2009) to address both Eighth Amendment and Iowa Costitution, art. I, § 17 challenges. Under the first prong, the Court balances the gravity of the offense against the severity of the sentence to determine whether an inference of gross disproportionality is appropriate. If the inference does apply the court then conducts an intrajurisdictional analysis of sentences imposed within Iowa for similar conduct. Finally, the Court conducts an interjurisdictional review. It was unnecessary for the Court to reach the second and third prongs of of the *Bruegger* test.

Concurring in the result only, and joined by two justices, Justice Appel cautioned against assuming that *Bruegger* is necessarily the test under article I, section 17. It was the test utilized in that case because, while the attorneys argued for a more favorable disposition under the Iowa Constitutional provision, what they really asked for was a better result following the federal test. A better test could be adopted under state law, but the Court will not do so if they're not asked. This is important dicta.

2. Actual Innocence.

Schmidt v. State, 909 N.W.2d 778 (Iowa 2018)
Because under article I, section 17 of the Iowa Constitution the conviction of an innocent defendant is disproportionately cruel and unusual punishment and under Article I, section 9 is a violation of substantive Due Process, a freestanding claim of actual innocence is available under Iowa Code §§ 822.2(1)(a) and 822.2(1)(d) to a defendant who pleaded guilty where evidence that could not have been discoverable at the time of the plea and sentencing amounts to clear and convincing evidence in view of which no jury could have found him or her guilty beyond reasonable doubt.

3. Juvenile Offenders

a. Offenses Committed Under the Age of 14

State v. Crooks, 911 N.W.2d 153 (Iowa 2018)
Application of the Iowa Code § 232.45(7)(a) procedure under which the court may treat a defendant who is fifteen years or younger as a youthful offender, who may be waived to adult court at the age of 18, that results in a defendant who murders his mother at the age of 13 being sentenced at the age of 18 on a charge of murder in the second degree to a term of not to exceed 50 years, with no mandatory minimum sentence, does not violate the Iowa Const. article 1, section 17 proscription against cruel and unusual punishment, where the sentencing court had the discretion under the act to continue the defendant's deferred judgment, or to suspend sentence and impose probation with a variety of terms.

b. Waiver to Adult Court

State v. Crooks, 911 N.W.2d 153 (Iowa 2018)
Waiver of a juvenile to adult court is not punishment, so the Iowa Code § 232.45(7)(a) procedure in which the court may treat a defendant who is fifteen years or younger as a youthful offender, who may be waved to adult court at the age of 18, does not constitute punishment and thus is not cruel and unusual punishment under article I, section 17 of the Iowa Constitution.

c. Mandatory Minimums

State v. Zarate, 908 N.W.2d 831 (Iowa 2018)
The sentencing court abuses its discretion in sentencing defendant convicted of committing a first degree murder before the age of eighteen to life imprisonment with no possibility of parole for 25 years to assure "that you serve what I believe should be the minimum period of time for somebody that takes the life of another individual," because under *State v. Lyle*, 854 N.W.2d 378 (Iowa 2014) and Iowa Code § 902.1(2)(b)(2) the court must consider the mitigating factors relating to the defendant's youth and must not allow them to be overwhelmed by the circumstances of the offense.

–Three justices would support a holding that any minimum on parole for offenses committed as juveniles violates the Cruel and Unusual Punishment provision of article I, section 17 of the Iowa Constitution. Mr. Zarate lodged multiple categorical challenges to § 901.1(a) and its application to his case. Justice Zagar and the majority agreed with

only one.

In response to a claim that any sentence of life, even with the possibility of parole, is effectively a life sentence because the Parole Board rarely grants parole to even eligible defendants, Justice Zagar responded that the claim is not ripe, and must be raised and considered by defendants who arguably are eligible candidates, but are denied parole, when that day comes.

State v. White, 903 N.W.2d 331 (Iowa 2017)
In sentencing the defendant who committed three robberies as a juvenile to concurrent terms of ten years incarceration, with a minimum of seven years before consideration for parole, the defendant is entitled to resentencing where the sentencing court did not fully take into account developments in brain science and conducted "a more rigorus and careful analysis of the relevant sentencing factors."

– This decision is extremely murky. Three justices essentially support a holding that any mandatory minimum on a sentence imposed for behavior committed as a juvenile violates article I, section 17 of the Iowa Constitution, Iowa's counterpart to the Eighth Amendment. Chief Justice Cady is not willing to do this. As Justice Mansfield points out in his dissent, the opinion leaves no clue as to where the threshold is to satisfy *State v. Roby*, 897 N.W.2d 127 (Iowa 2017).

State v. Roby, 897 N.W.2d 127 (Iowa 2017)
Article I, section 17 of the Iowa Constitution does not prohibit the district court from imposing any minimum sentence on a defendant who committed his or her offense prior to the age of 18.

– Chief Justice Cady went on to hold that the district court, while applying the analysis of *Miller v. Alabama*, 567 U.S. 460 (2012) in sentencing Roby to a 17 1/2 year minimum, misapplied the *Miller* test, so Roby was entitled to resentencing. It is difficult to ascertain how much of Chief Justice Cady's plurality is controlling precedent. Justice Hecht concurred in the result only, and would hold that all minimums are invalid. Joined by Justice Wiggins, Justice Appel suggested that, in the future, he may side with Justice Hecht. This is a question, therefore, that should be raised in the future.

d. Life With Parole

State v. Harrison, 914 N.W.2d 178 (Iowa 2018)
A sentence of life imprisonment with the immediate possibility of parole for a defendant who commits the offense of felony murder prior to the age of 18 is not cruel and unusual punishment under article I, section 17 of the Iowa Constitution.

-- Justice Mansfield found that such a sentence was not grossly disproportionate where the minor simply aided and abetted a robbery that resulted in death, so it was not necessary to consider whether there are inter- and intrajurisdictional disparities in sentences for this offense (the other two prongs in the three-pronged inquiry in proportionality challenges). As the Court has done in the past, it declined to decide the Mr. Harrison's as-applied challenge, in which he pointed out that, in reality, the Iowa Parole Board is unlikely to release him. This challenge will be ripe when Mr. Harrison reaches an age that he is able to demonstrate that he has been rehabilitated.

e. Denial of Probation and Deferred Judgments for Forcible Felonies

State v. Propps, 897 N.W.2d 91 (Iowa 2017)
The Iowa Code §§ 901.5(14) and 907.3 denial of probation or a deferred judgment in cases involving forcible felonies is not cruel and unusual punishment for offenses committed by defendants who had not yet reached the age of 18, and the sentencing court is not required to articulate *Miller v. Alabama*, 567 U.S. 460 (2012) reasons for sentencing.

– Justice Zagar's plurality opinion in *Propps* garnered only three votes but, together with Chief Justice Cady's concurrence, the basis for the holding appears to be that , while prison is mandatory, a youthful defendant at least has the opportunity *ab initio* to demonstrate that he or she should be released.

f. Lifetime Parole for Sex Offenses

State v. Graham, 897 N.W.2d 476 (Iowa 2017)
The special sentence of lifetime supervision under Iowa Code § 903B1 for defendants convicted of certain sexual offenses does not violate the Eighth Amendment with respect to defendants who committed their offenses as juveniles because such defendants are eligible for release from the special sentence by the parole board.

– There is a mandatory minimum period before the defendant is eligible release, but Chief Justice Cady indicated that Mr. Graham did not challenge this aspect of his sentence. Additionally, the question might be revisited if, as a matter of policy, the

parole board was found to systematically refuse to release defendants from the special sentences.

I. Fourteenth Amendment

1. Substantive Due Process

a. Sexually Violent Predator Commitment – Return to Transitional Release

In re the detention of Anderson, 895 N.W.2d 131 (Iowa 2017)
To revoke conditional release of an individual originally found to be a sexually violent predator, substantive due process requires the State to prove by a preponderance of the evidence that the person "violated the terms of release, that additional treatment is necessary, and the community is no longer safe with the person in release with supervision."

– While explicit findings were not made, Justice Zagar found that each of these elements had been established in returning Mr. Anderson from release to supervision to the transitional release program. Considering all the factors concerning procedural due process, (1) the private interest of the individual, (2) the risk of erroneous deprivation of that interest, and (3) the interest of the state, Mr. Anderson's return to the transitional release program did not violate procedural due process.

b. Felony Murder – Juveniles

State v. Harrison, 914 N.W.2d 178 (Iowa 2018)
Application of the felony murder rule in cases involving defendants who commit offenses as juveniles does not violate fundamental fairness or due process under either the Iowa or federal constitutions.

-- Mr. Harrison utilized a multi-pronged attack on the felony murder rule. He cited the line of cases following *Miller v. Alabama*, 567 U.S. 460 (2012) discussing the lessened culpability of juvenile offenders, arguing that juveniles are less likely to anticipate the consequences of their participation in the underlying felonies, and their diminished impulse control. Youth is a mitigating factor, not an excuse, Justice Mansfield points out. Harrison was able to realize the danger of participating in the robbery that resulted in the victim's death.

Justice Mansfield repeated in *Harrison* the holding of *Conner v. State*, 352 N.W.2d 449 (Iowa 1985) that the felony murder theory does not involve a mandatory

presumption that the essential first-degree murder elements of willfulness, deliberation and premeditation are met by the commission of the forcible felony. Instead, the legislature acted within its authority in substituting commission of the forcible felony for these elements.

c. Mobile Speed and Red Light Cameras

Behm v. City of Cedar Rapids, _____ N.W.2d _____ (Iowa 2018)
The use and administration of an Automated Traffic Enforcement system, in which speed and red light violations are tracked using privately-owned cameras, is not arbitrary and unrelated to the governmental interest of promoting public safety nor does its application shock the conscience to the extent that it violates substantive due process.

2. Procedural Due Process

a. Vagueness

State v. Ortiz, 905 N.W.2d 174 (Iowa 2017)
While there may be some ambiguity in the robbery statute as to what degree of robbery the defendant has committed, where the statute gives sufficient notice that the defendant's conduct subjects him to punishment the statute is not constitutionally vague.

– So defense counsel is not ineffective in failing to advance a vagueness argument. The Court found no exception to the rule that, where the statute is not vague as applied, the defendant lacks standing to argue the statute unconstitutional on its face.

b. Presumption of Innocence – Return of Restitution and Fees after Reversal

Nelson v. Colorado, _____ U.S. _____, 137 S.Ct. 1249, _____ L.Ed.2d _____ (2017)
Procedural due process requires that fees, costs and restitution paid by the defendant upon conviction be returned to the defendant when the conviction is reversed, as there is no valid criminal conviction and the presumption of innocence is restored.

– Colorado argued that the only vehicle for return of funds is through their Exoneration Act, and that this should be sufficient. But the Exoneration Act requires defendants to prove their actual innocence by clear and convincing evidence. Justice Ginsburg rejected this, as the defendant has no burden of proof where there is no valid conviction. The big point of contention here is whether, under these circumstances, the Court applies the *Mathews v. Eldridge*, 424 U.S. 319 (1976) test for a procedural due process violation, or the test of *Medina v. California*, 505 U.S. 437 (1992). In a concurring opinion, Justice Alito argued for application of *Medina*, under which the Court determines

whether the defendant was exposed to some procedure that offends a fundamental principle of justice. Justice Ginsburg utilized *Mathews*, which considers (1) the private interest at play, (2) the risk that utilizing the principles in question will result in erroneous deprivation of that private interest, and (3) the nature of the governmental interest.

The question in my mind is whether *Nelson* might be utilized in Iowa to obtain the return of court-appointed attorneys fees. Attorneys fees are viewed differently, since returning fees paid by indigent clients is viewed as inequitable with respect to defendants who pay non-appointed attorneys out of their own pocket, and do not recoup their investment after acquittal.

3. Mobile Speed and Red Light Cameras

Behm v. City of Cedar Rapids, _____ N.W.2d _____ (Iowa 2018)
The provision of a municipal Automated Traffic Enforcement ordinance that permits vehicle owners to request the city to request a municipal infraction and a hearing in small claims court comports with procedural due process.

-- Justice Appel does see a problem in that it is burden of the vehicle owner to request a hearing.

But it is not a heavy burden, and the penalty for the violation is not a great one.

II. Substantive Offenses

A. Accomplice Liability – Aiding and Abetting – Sufficiency

State v. Huser, 894 N.W.2d 472 (Iowa 2017)
Evidence is sufficient to convict defendant as an aider and abetter of the individual who murdered the boyfriend of his wife where, among other circumstances, the wife had the relationship with the victim, the defendant communicated vicious threats concerning the victim, the defendant and the individual who committed the murder were acquaintances and were seen together before and after the murder, the other individual was aware of the defendant's animosity towards the victim, the defendant had inquired into whether the other individual's expertise with guns, etc., was "for real," and where both the defendant and the other individual made statements, before and after the killing, that connected them with each other and to the offense.

B. Burglary – Elements – Intent to Commit a Felony (Sexual Abuse)

State v. Kelso-Christy, _____ N.W.2d _____ (Iowa 2018)
Because a victim does not consent to sexual relations when she is tricked into believing she is having them with a different person the trickery is fraud in the act, and not fraud in the inducement, so the sex act is "against the will of the other" and therefore sexual abuse, and the defendant who enters the premises to perpetrate it does so with the intent to commit a felony.

– Chief Justice Cady distinguishes between fraud in the inducement and fraud in the act. The former is a misstatement concerning issues collateral to the victim's decision, while the latter involves the decision itself. The example cited in the opinion is the physician who inappropriately touches the genitals of the patient. If the physician informs the patient that he or she intends to handle the patient's genitals but falsely claims having a legitimate purpose, then the physician has committed fraud in the inducement. If the physician tells the patient he or she is going to perform a procedure that does not involve handling the genitals, but then does so, the physician has committed fraud in the act. While the former is wrong, and potentially illegal, it is not done without the patient's consent.

C. Child Endangerment – Sufficiency

State v. Benson, _____ N.W.2d _____ (Iowa 2018)
Where defendant strikes his fiance's child on the back of his upper legs with a broom handle, leaving a bruise consistent with a high acceleration/deceleration injury, and where the defendant admits he selected this manner of punishment because the children had laughed at him when he attempted to discipline them with his bare hand, evidence is sufficient to establish that his actions were calculated to cause pain or injury, and exceeded acceptable punishment, and thus there is sufficient evidence to support his convictions of child endangerment and assault.

D. Criminal Liability – Multiple Theories – Submission of Unsupported Theory

State v. Shorter, 893 N.W.2d 65 (Iowa 2017)
Where a prosecution for murder is submitted to the jury under multiple theories of direct killing, aiding and abetting, and joint criminal conduct, and the latter is unsupported by the evidence, the defendant is unentitled to a new trial where there was a single offense, and no likelihood that the jury would have convicted the defendant based upon an offense unrelated to the one that resulted in death.

– Mr. Shorter was a participant in a group assault that resulted in the death of Richard Daughenbaugh. In *State v. Tyler*, 873 N.W.2d 741 (Iowa 2016), the second-degree murder conviction of Kent Tyler was reversed under similar circumstances. The evidence showed that Tyler assaulted Mr. Daughenbaugh. The group assault that resulted in Mr. Daughenbaugh's death occurred shortly thereafter, and there was no evidence that Mr. Tyler participated in that assault. His conviction was reversed because of the possibility that he was convicted in Mr. Daughenbaugh's death for acts that did not cause it.

In contrast, there was some evidence that Mr. Shorter actually participated in the second assault, and no evidence that he was involved in any separate assault. Even if joint criminal conduct was submitted improperly, there was no danger that he was convicted based upon a public offense unrelated to Mr. Daughenbaugh's death.

E. Domestic Abuse – Cohabiting – Defined

State v. Virgil, 895 N.W.2d 873 (Iowa 2017)
The five factors articulated in *State v. Kellogg*, 542 N.W.2d 514 (Iowa 1996) to determine in a domestic abuse prosecution whether the defendant and the victim were "cohabiting" are:

1. Sexual relations between the parties while sharing the same living quarters.
2. Sharing of income or expenses.
3. Whether the parties hold themselves out as husband and wife.
4. The continuity of the relationship.
5. The length of the relationship.

F. Driving Offenses

1. Implied Consent – Validity of Consent – Boating

State v. Pettijohn, 899 N.W.2d 1 (Iowa 2017)
Because of their inherently coercive nature, submission to the implied consent provisions of Iowa Code § 462A.14A(1), that expose operators of boats to administrative consequences for failure to do so, does not constitute effective consent under Article I, section 8 of the Iowa Constitution, and whether consent has effectively been given is determined by an examination of the totality of circumstances.

2. Operating While Intoxicated – Controlled Substances – Non-Impairing Metabolites of Marijuana

State v. Childs, 898 N.W.2d 177 (Iowa 2017)
A conviction of operating while intoxicated, under Iowa Code § 321J.2(1)(c), is established by the presence of any detectible amount of a controlled substance in a defendant's bloodstream, even if all that is present is a non-impairing metabolite of marijuana.

– The Court previously reached the same decision in *State v. Comried*, 693 N.W.2d 773 (Iowa 2005). In *Comried*, the Court relied upon the analysis of the Arizona Court of Appeals in *State v. Phillips*, 873 P.2d 706 (Ariz. Ct. App. 1994). In 2014, however, the Arizona Supreme Court distinguished *Phillips*, in *State ex rel. Montgomery v. Harris*, 322 P.3ed 160 (Ariz. 2014) and held that a driving under the influence conviction may not be based upon the presence of a non-impairing metabolite. Childs seized upon this change in Arizona law as the basis for an argument that Iowa should follow suit.

Childs did not advance a constitutional challenge that, for example, a statute that allows the defendant to be convicted of operating while impaired when he or she, in fact, is not impaired violates due process. The district court, however, had ruled solely upon unadvanced constitutional claims. Childs did not move for a decision on the statutory claims he had raised.

Justice Waterman assumed that the district court considered the statutory claims in deciding the case. Even the state agreed that the issue was not waived for appeal. The majority then elected not to follow the lead of the Arizona Supreme Court. The legislature in Iowa "chose to cast a wider net," criminalizing driving with any amount of prohibited substances in one's body, including the nonimpairing metabolite in issue commonly found in urine after marijuana use.

In separate dissents, Justices Appel and Hecht argued that further review was granted improvidently and that the issue was not preserved sufficiently below. Justice Appel continued with a persuasive argument that due process is offended by a statutory interpretation that permits a defendant who is not impaired to be convicted of a criminal offense.

3. Evidence – Preliminary Breath Test

State v. Ness, 907 N.W.2d 484 (Iowa 2018)
The Iowa Code § 321J.5(2) prohibition on the use of a preliminary screening test in any court action is not just limited to cases in which the preliminary test was used in an implied consent context, and applies where the test is administered by the defendant's parole officer investigating a violation of conditions of release.

State v. Ness, 907 N.W.2d 484 (Iowa 2018)
Despite other formidable evidence that the defendant was driving while intoxicated, the erroneous admission of the results of a preliminary breath test are prejudicial where video evidence is equivocal and because of the important role breath tests play in OWI prosecutions.

– Justice Mansfield cited language in *State v. Moorehead*, 699 N.W.2d 667, 673 (Iowa 2005) that the Court "presume[s] prejudice unless the record affirmatively establishes otherwise" when preliminary breath tests are admitted erroneously.

4. Habitual Driving While Barred – Elements – Mailing of Suspension

State v. Williams, 910 N.W.2d 586 (Iowa 2018)
The statutory elements of driving while barred are that the defendant (1) operate a motor vehicle and (2) operate the vehicle while the defendant's license was barred, and the state does not have to establish that the notice of barment was mailed to the defendant.

– In his dissent, Justice Wiggins agrees that these are the elements, but the element that the defendant was barred requires proof that notice of barment be mailed to the defendant as mandated under Iowa DOT rules.

5. Sentencing – Habitual Offender

Noll v. Iowa District Court, ____ N.W.2d ___{Iowa 2018)
A defendant who is convicted of a third and subsequent offense of operating while intoxicated is sentenced under the habitual OWI provision of Iowa Code § 321J.2(5), and not the general habitual offender provisions of Iowa Code §§ 902.9(3) and (5).

-- In 1991, the Court found in *Bown v. State* that Chapter 902 habitual offender enhancements applied to repeat OWI offenders. What distinguished the law at that time from the current formulation it that, prior to 2002, a repeat offender was an habitual offender, but no mandatory maximum or minimum sentences were prescribed. The statute now provides that an habitual offender is subject to a maximum sentence of not to exceed five years and a minimum sentence of 30 days.

6. Automated Traffic Enforcement (ATE) Systems

a. Sufficiency of Evidence

City of Cedar Rapids v. Leaf, _____ N.W.2d _____ (Iowa 2018)
Substantial evidence supports determination made from an Automated Traffic Enforcement system that the driver was speeding where the driver admits driving the vehicle and, notwithstanding testimony from the driver and a passenger that the driver was not speeding, the properly-calibrated equipment recorded the vehicle speeding.

-- Justice Appel responded to Ms. Leaf's due process challenges to the administrative process in ATE cases by noting that she was able to challenge the infraction in a full-blown trial in small claims court, where she received complete due process. The administrative procedure is optional and exists for the convenience of the driver. The fact that the initial screening to determine that an infraction has occurred is done by non-law enforcement personnel, and that non-judges hear the administrative proceedings, is not an improper delegation of police powers. The ultimate decision to send out the notices is done by law enforcement officials. The hearing officers, Justice Appel found, exercise no judicial functions.

b. Unjust Enrichment

Behm v. City of Cedar Rapids, ____ N.W.2d ____ (Iowa 2018)
To the extent that a theory of unjust enrichment by voluntary payment is recognized in Iowa, it does not apply where there is an allegation of a violation of a statute.

-- If *Behm* doesn't set the record for the largest number of diverse challenges to a single criminal statute, it certainly holds the 2018 record. On countless constitutional, statutory and equitable grounds, Behm challenged the employment in Cedar Rapids of an Automated Traffic Enforcement system, using fixed cameras to monitor traffic violations. He succeeded in one Iowa Const. art. III, section 38A preemption challenge, in which Justice Appel found that the imposition of liability on an individual who does not respond a notice of violation or who fails to request that the city institute a municipal infraction proceeding is irreconcilable with Iowa Code § 364.22 procedures for municipal infractions.

Other holdings arising from *Behm* are scattered throughout this outline.

G. Forgery and Identity Theft – Federal Preemption

State v. Martinez, 896 N.W.2d 737 (Iowa 2017)
Iowa Code § 715A.2(2)(a)(4), which makes it a class "D" forgery offense to make, etc., a writing purporting to be a document prescribed as evidence for authorized stay or employment in the United States, is facially invalid because it involves subject matter occupied exclusively by the federal government.

State v. Martinez, 896 N.W.2d 737 (Iowa 2017)
The identity theft provision of Iowa Code § 715A.8(2), making it illegal to obtain some benefit using fraudulent identification, is invalid as applied to defendant using false documents to falsely establish legal status in the United States.

H. Homicide – Murder in the First Degree – Felony Murder

1, Juveniles

State v. Harrison, 914 N.W.2d 178 (Iowa 2018)
Application of the felony murder rule in cases involving defendants who commit offenses as juveniles does not violate fundamental fairness or due process under either the Iowa or federal constitutions.

2. Predicate Offenses – Robbery

State v. Harrison, 914 N.W.2d 178 (Iowa 2018)
Unlike assault and willful injury, robbery is a separate offense from the homicide that results from it, so the merger doctrine does not preclude felony murder based upon robbery.

-- And counsel is not ineffective in failing to request an instruction informing the jury that the robbery must be a separate act from the killing.

3. Jury Instructions

State v. Harrison, 914 N.W.2d 178 (Iowa 2018)
The creation, after completion of defendant's trial, of a misdemeanor third-degree robbery alternative that is not a forcible felony predicate to felony murder, did not change the law prior to its adoption so the district court does not err, in instructing the jury on the elements of the offense, in failing to note that third-degree robbery is not a basis for felony murder committed before the change.

I. Immigration Offenses – 18 U.S.C. § 1425(a) (procuring naturalization contrary to law)

Maslenjak v. United States, _____ U.S. _____, 137 S.Ct. 1918, _____ L.Ed.2d _____ (2017)
To convict a defendant under 18 U.S.C. § 1425(a) of procuring, contrary to law, his or her naturalization, the government must establish not only that the defendant committed an illegal act while applying for naturalization but also that the illegal act was material to the decision to grant naturalization.

– To provide guidance to future practitioners in drafting jury instructions, etc., Justice Kagan goes on and explains that a conviction might be obtained if the dishonesty in the application process, which is the illegal act, would in itself constitute a reason to deny naturalization. In the alternative, the state may have established that (1) revelation of the false fact might lead the government to conduct further investigation, (2) the further investigation would likely result in rejection of citizenship, and (3) the applicant is unable to show he or she qualifies for naturalizaton.

In the first writing that I have seen from rookie Justice Neil Gorsuch, he concurs in the holding but not the instructive dicta. The somewhat preachy concluding paragraph provides perhaps a glimpse into what we can expect to see in coming years from Justice Gorsuch. Either that or Justice Gorsuch has raided his library of flowery prose, expending an undue portion of it in a relatively inconsequential concurring opinion.

> Respectfully, it seems to me at least reasonably possible that the crucible of adversarial testing on which we usually depend, along with the experience of our thoughtful colleagues on the district and circuit benches, could yield insights (or reveal pitfalls) we cannot muster guided only by our own lights. So while I agree with the Court that the parties will need guidance about the details of the statute's causation requirement. . . I have no doubt that the Court of Appeals, with aid of briefing from the parties, can supply that on remand. Other circuits may improve that guidance or time too. And eventually we can bless the best of it. For my part, I believe it is work enough for the day to recognize that the statute requires some proof of causation, that the jury instructions here did not, and to allow the parties and courts of appeals to take it from there as they usually do. This Court often speaks most wisely when it speaks last.

I get his point. As much as possible, we defer to the lower courts. Every Justice who has served on the Court understands this. Do they need a lecture on this from a member who has sat on the bench for

a period of hours? We know you're a smart man. We know your judicial philosophy. Who are you writing this for? Maybe he's saying, "Thank you, Mister Trump, for thinking of me."

J. Robbery

1. First Degree Robbery – Use of a Weapon – Sufficiency

State v. Henderson, 908 N.W.2d 868 (Iowa 2018)To convict an aider and abetter of robbery in the first degree under the use of a weapon alternative, the government must prove that the defendant had knowledge that the firearm would be used in the robbery, and it is not enough that it be reasonably foreseeable that a firearm would be used.

– This is a major difference between aiding and abetting and joint criminal conduct. The latter occurs when the defendant participates in an offense and it is reasonably foreseeable that a difference offense will arise from its commission. A defendant aids and abets an offense when he participates knowing that the elements will be committed.

Trial counsel did not move for judgement of acquittal on this ground. Justice Mansfield found that trial counsel was ineffective in failing to move for what would have been a successful judgment of acquittal. To convict an aider and abetter of robbery in the first degree under the use of a weapon alternative, the government must prove that the defendant had knowledge that the firearm would be used in the robbery, and it is not enough that it be reasonably foreseeable that a firearm would be used.

2. Robbery in the Second Degree – Sufficiency

State v. Ortiz, 905 N.W.2d 174 (Iowa 2017)
Where there is no evidence that the defendant in a prosecution for robbery committed anything more than a simple assault, there is insufficient evidence to support the defendant's conviction of robbery in the second degree, and the Court must enter a conviction to robbery in the third degree.

– In 2016, the legislature created a third degree of robbery in Iowa Code § 711.3A. The new aggravated misdemeanor is committed where the assault giving rise to the robbery is a simple assault. All other levels of assault support a conviction of second-degree robbery. The marshaling instructions in *Ortiz* did not make it clear that the assault element of second degree robbery was not satisfied by a simple assault, and the jury was not required to find a higher level of assault.

40

K. Sexual Offenses

1. Indecent Exposure – "Exposure" – Sufficiency

State v. Lopez, 907 N.W.2d 112 (Iowa 2018)
A person "exposes" him- or herself, for the purpose of committing indecent exposure under Iowa Code § 709.9, when he or she directly exposes his or her genitals, etc., to another person, and does not occur where the person transmits a photograph of them.

– Justice Hecht recognizes that the statute is ambiguous, but finds that this interpretation is consistent with other statutes. Counsel was ineffective in not raising this as a ground for judgment of acquittal. Justice Hecht limits the holding to transmission of existing photographs, and declines explicitly to rule on whether it applies to in-time transmissions such as Skype and Facetime. *State v. Lopez*, 907 N.W.2d at 122 (fn. 8). In a special concurrence, Justice Mansfield takes the majority to task for not resolving this issue. *State v. Lopez*, 907 N.W.2d at 124 (Mansfield, J., concurring).

2. Sexual Exploitation by a School Employee

a. Sexual Conduct – Sufficiency

State v. Wickes, 910 N.W.2d 554 (Iowa 2018)
While reassuring and congratulatory hugs of a student by a school employee do not constitute sexual conduct under the Iowa Code § 709.15(3)(a) prohibition of sexual exploitation of a school employee, where a teacher engages in dozens of hugs with a 17-year-old student while sending the student over a thousand Facebook private messages describing his attraction to her and his interest in becoming intimate with her, the conduct is for the purpose or arousing or satisfying the sexual desires of the teacher and/or the student and amounts to sexual exploitation under the statute.

– For the uninducted, Justice Zager includes in his majority opinion a detailed discussion of what a Facebook message actually is.

> Facebook Messenger is a mobile tool that allows users to instantly send chat messages to friends on Facebook. . . Facebook users can receive these messages via their computer or any other mobile or electronic device when they are logged onto their Facebook accounts. . . Essentially, Facebook Messenger operates the same way mobile texting does, as only the persons sending and receiving the messages can view them and partake in the conversation.

It is a very educational footnote. I would be interested in reading the opinion had the defendant and the victim interacted by telephone, to see how Justice Zager explains the magic of telephonic communication.

State v. Wickes, 910 N.W.2d 554 (Iowa 2018)
A "pattern or practice or scheme of conduct" which enhances a conviction of sexual exploitation by a school employee under Iowa Code § 709.15(3)(a) does not require multiple victims, but is established where a teacher engages in dozens of hugs with a single 17-year-old student while sending the student over a thousand Facebook private messages describing his attraction to her and his interest in becoming intimate with her.

b. Sentencing – Ineligibility for Probation

State v. Wickes, 910 N.W.2d 554 (Iowa 2018)
While sexual exploitation by a school employee is excluded expressly from the definition of what constitutes a forcible felony, the provision of Iowa Code § 907.3 that violations of Iowa Code § 709 by defendants who are mandatory reporters excludes such defendants from consideration for deferred judgment, deferred sentence and suspended sentence and unambiguous, and thus the sentencing court does not abuse its discretion in denying probation to a teacher who is a mandatory reporter.

2. Sex Offender Registration

a. Temporary Residence --Time to Register

State v. Coleman, 907 N.W.2d 124 (Iowa 2018)
Where a registered sex offender leaves the residence at which he is registered and moves into a temporary residence, Iowa Code § 692A.105 requires registration within five business days of the move, and does not allow for an additional five day grace period before the registration period begins to run.

– The parties agreed that the statute, that requires the sex offender to register "within five days of a change. . .when away from the principal residence of the offender for more than five days," is ambiguous. Justice Zager nevertheless found that the legislature clearly intended registration within five days of the move to further the policy of the registration requirement. This interpretation is consistent with deadlines placed on other changes that are not ambiguous. Justice Appel responded that this analysis supports Mr. Coleman's theory more than it supports the state's, since it shows that the legislature knows how to draft an unambiguous five-day requirement.

Because the Court ruled against Coleman's interpretation of the statute, the district court did not err in denying a marshaling instruction including the five-day grace period.

b. During Direct Appeal

Maxwell v. Iowa Department of Public Safety, 903 N.W.2d 179 (Iowa 2017)
A person who has been convicted of a sex offense and who has posted an appeal bond is released from custody following conviction for the purpose of Iowa Code Chapter 692A and must comply with all the requirements of the Iowa Sex Offender Registry.

3. Sexually Violent Predator Commitment

a. Violation of Conditional Release – Due Process

In re the detention of Anderson, 895 N.W.2d 131 (Iowa 2017)
To revoke conditional release of an individual originally found to be a sexually violent predator, substantive due process requires the State to prove by a preponderance of the evidence that the person "violated the terms of release, that additional treatment is necessary, and the community is no longer safe with the person in release with supervision."

– While explicit findings were not made, Justice Zagar found that each of these elements had been established in returning Mr. Anderson from release to supervision to the transitional release program. Considering all the factors concerning procedural due process, (1) the private interest of the individual, (2) the risk of erroneous deprivation of that interest, and (3) the interest of the state, Mr. Anderson's return to the transitional release program did not violate procedural due process.

b. Overt Acts

In re Detention of Wygle, 910 N.W.2d 599 (Iowa 2018)
A defendant serving a special sentence and residing in a halfway house is not "presently confined" under Iowa Code § 229A.4(1) so, to be subject to Sexually Violent Predator civil commitment, it must be established under Iowa Code § 229A.4(2) that the defendant committed an overt act.

– Justice Appel's majority opinion notes the seriousness, as a matter of due process, of confining a person on the basis of future dangerousness. Generally, this only happens if a defendant commits a recent overt act. The present confinement alternative reflects an awareness that a defendant in prison generally has no opportunity to prove his or her dangerousness with an overt act. Under those circumstances, the act that resulted in conviction is the overt act.

L. Weapons – False Statement on Application to Acquire a Firearm

State v. Downey, 893 N.W.2d 603 (Iowa 2017)
Defendant does not violate Iowa Code § 724.17 (false statement on an application to acquire a weapon permit) in answering a question on the application that he does not have a prior felony conviction, when in fact he had been convicted previously of OWI, because the statute states that the "application shall require *only* the full name of the applicant, the driver's license or nonoperator's identification, card number of the applicant, the residence of the applicant, and the date and place of birth of the applicant," and the question concerning prior criminal history is not a statutorily-authorized question.

– Justice Wiggins relied in large part upon the rule of construction that the word "only" modifies the language following it most closely.

M. Taxation – Obstructing or Impeding Administration

Marinello v. United States, _____ U.S. _____, 138 S.Ct.1101, _____ L.Ed.2d _____ (2018)
To prosecute a defendant under the Omnibus provision of 26 U.S.C. §7212(a) (obstructing or impeding administration of the Federal Tax Code, there must be some nexus between the defendant's act and some proceeding of the Internal Revenue Service (i.e., an investigation or an audit), and it is not enough that the defendant commit an act for the purpose of obtaining some benefit.

N. Theft – Theft by Taking – Sufficiency

State v. Nall, 894 N.W.2d 514 (Iowa 2017)
Conviction under the Iowa theft by taking alternative of Iowa Code § 714.1(1) requires an actual taking without consent or authority so, while it may be punishable under other alternatives in the Code, a theft by deception is not criminalized under this statute.

– Other jurisdictions have provisions that theft by any means is a theft. Iowa is one of the few states that does not have such a provision.

III. Pre-trial Issues

A. Rules of Construction – "Only"

State v. Downey, 893 N.W.2d 603 (Iowa 2017)
The word "only" generally modifies the language following it most closely.

B. Unlawful Delegation of Government Authority

Behm v. City of Cedar Rapids, _____ N.W. 2d ____ (Iowa 2018)
As part of its Automated Traffic Enforcement program, a municipality does not engage in unlawful delegation of government functions by granting to the private ATE business access to the Nlets database of license plate information, a tool otherwise available to law enforcement agencies, in allowing the private business to establish a hot line for information about the ATE program, and in utilizing the ATE business to prepare violation packets to send to vehicle owners.

Behm v. City of Cedar Rapids, ____ N.W.2d _____ (Iowa 2018)
A municipality does not unlawfully delegate government functions in an Automated Traffic Enforcement program, where the private business merely performs the ministerial duty of collecting images of vehicles that commit violations and forwards them to a law enforcement officer who reviews them and makes the decision to proceed against the owner of the vehicle.

Behm v. City of Cedar Rapids ____ N.W.2d ____ (Iowa 2018)
A municipality does not unlawfully delegate government functions in utilizing volunteers as hearing officers in resolving claims arising from Automated Traffic Enforcement cameras, as the volunteers cease to be private citizens and act on behalf of the municipality when they commence the hearing.

C. Arrest – Authority – Department of Transportation Motor Vehicle Enforcement Officers

Rilea v. Iowa Department of Transportation, _____ N.W.2d _____ (Iowa 2018)
Prior to 2017, motor vehicle enforcement officers employed by the Iowa Department of Transportation had statutory authority under Iowa Code § 321.477 "to make arrests for violations of the motor vehicle laws relating to . . . operating authority, registration, size, weight, and load," but not for any other traffic offenses.

-- But, because MVE officers are not private persons, they are not authorized under Iowa Code § 804.9 to make citizens arrests. This decision essentially was moot by the time it was announced because, in the meantime, the Legislature had amended § 321.477 to vest DOT employees who as designated as peace officers with the same authority to make arrests that is possessed by other peace officers.

On the same day as *Rilea*, the Court decided *State v. Werner*, ____ N.W.2d ____ (Iowa 2018), in which the State advanced several arguments over and above those raised in *Rilea*. Iowa Code § 801.3(11)(h) recognizes that some DOT employees are designated as peace officers, and Iowa Code § 321.492 authorizes peace officers to stop vehicles, request identification, and issue a summons, etc. Limiting the authority to stop vehicles would interfere with the duty of all peace officers under Iowa Code § 321.380 to enforce school bus safety provisions. Officers' ability to make citizen's arrests is supported more in *Werner* than *Rilea*, because the defendant in Werner was actually taken into custody. The Court rejected each of these positions.

There may be circumstances in which law enforcement could stop a vehicle under the community caretaking theory, but the circumstances in Werner's case did not support such a seizure. And the Court declined to decide whether officers were authorized to stop Werner because his license was revoked, as there was no evidence they were aware of that fact.

D. Jurisdiction

1. Subject Matter Jurisdiction v. Authority to Hear the Case

Franklin v. State, 905 N.W.2d 170 (Iowa 2017)
The question of whether the Iowa Department of Corrections acted unlawfully in requiring a defendant to participate in the Sex Offender Treatment Program prior to parole, but denying the defendant's requests to enroll in the SOTP program is not a question of subject matter jurisdiction, but rather one of whether the district court possessed authority to hear the case and, because the actions of the Department of Corrections lengthened the defendant's sentence, the court possessed the authority under the postconviction relief provisions of Iowa Code § 822.2(1)(e) to hear the defendant's argument that he was being unlawfully held in custody.

– Justice Wiggins is adamant that parties know the distinction between the authority to hear the case and subject matter jurisdiction, which concerns the power granted to the court by statute or the constitution.

2. Magistrates – Restraining Orders

Vance v. Iowa District Court for Floyd County, 907 N.W.2d 473 (Iowa 2018)
As judicial magistrates have jurisdiction over simple misdemeanors, they also have subject matter jurisdiction to grant or deny continuances of no-contact orders in simple misdemeanor cases.

E. Juvenile Waiver to Adult Court – Youthful Offenders — Age Limit

State v. Crooks, 911 N.W.2d 153 (Iowa 2018)
The Iowa Code § 242.45(6) provision that the juvenile court may waive a defendant who is "fourteen years of age or older" to adult court is separate from the Iowa Code § 232.45(7)(a) procedure in which the court may treat a defendant who is fifteen years or younger as a youthful offender, who may be waved to adult court at the age of 18, and does not place a 14-year lower limit on when the defendant can be treated as a youthful offender, and the statute thus permits a 13-year-old defendant to prosecuted as a youthful offender on a charge of murder.

– The Court found that this provision was not vague.

F. Discovery and Disclosure of Evidence

1. Minutes of Testimony – Iowa R.Crim.P. 2.5(3)

a. Extent of Required Disclosure\

State v. Shorter, 893 N.W.2d 65 (Iowa 2017)
While the current Iowa R. Crim.P. 2.5(3) is intended to constitute a stringent requirement of disclosure of trial evidence in the minutes of testimony, it not a requirement "that the minutes of testimony provide a complete catalogue of witness testimony at trial, only that the defense be placed on fair notice and not subject to surprise testimony."

– Justice Appel devotes a lot of space in the Shorter opinion to the development of what he admits is a hotly contested area of the law. It appears that the Court intends to

announce a rule or apply some clear guidance, but in the end does not.

b. Identification Testimony

State v. Shorter, 893 N.W.2d 65 (Iowa 2017)
Because of the very pivotal nature of identification testimony, the State is required under Iowa R.Crim.P. 2.5(3) to disclose identification witnesses prior to trial in the minutes of testimony.

– Failure to do so in Mr. Shorter's case did not require reversal, however, because it was not clear that the State was aware prior to trial that the witness would identify him as a participant in the killing of the victim. It was also not clear whether the defendant or his co-defendant were aware that the witness would identify them at trial.

2. Subpoeanas duces tecum – ex parte

State v. Russell, 897 N.W.2d 717 (Iowa 2017)
Absent a showing of exceptional circumstances, Iowa Rules of Criminal Procedure 2.13(2) and 2.15(2) do not authorize *ex parte* issuance of subpoenas duces tecum to the defendant.

– In the unanimous decision in *Russell* Justice Zager did not announce circumstances under which an ex parte subpoena may be issued or the procedure to be followed in requesting one. Russell filed an interlocutory appeal following issuance of a discovery order precluding ex parte subpoenas, so there were no details before the Court.

The outcome of *Russell* was no surprise to me. Some of the dicta, however, is somewhat disturbing from the perspective of appointed criminal trial counsel. Finding that the prosecution has standing to move to quash a subpoena that violates the rule, Justice Zager asserts that the state "has an interest in managing the progression of the case, in preventing the lengthening of a trial when able, and in preventing undue witness pressure or harassment. The injury to the State is also concrete rather than hypothetical. The State has the burden of bringing Russell to trial, and as such, has an interest in the documents produced."

Until I read this, I had always assumed that there was at least the illusion of adversarial process, where both sides entered on equal footing. But in Justice Zager's view, challenged by no other sitting member of the Court, the state does more than merely presenting its case against the defendant. The prosecutor, rather than the neutral judge, manages the progression of trial. It is

the prosecutor who prevents the lengthening of trial, as it is the defendant who threatens to prolong trial if he or she too zealously advances his or her cause. In addition to all the other solemn burdens shouldered by the prosecutor, the prosecutor must protect witnesses from undue pressure brought on by the defense team -- who do *not* carry guns, wear badges and uniforms and draw from an arsenal of coercive devices available only to the government.

Give me a break.

And don't forget that, until charges are filed, prosecutors have the authority to conduct their discovery with ex parte subpoenas. Yes, the state has the burden of bringing Russell to trial. But Mr. Russell has a burden, too. He's the one who does all the time when the state prevails. Shouldn't we at least *pretend* this happens on a level playing field?

Justice Zager also rejected Russell's claims that the denial of ex parte subpoenas violates his Sixth Amendment right to effective assistance of counsel, to compulsory process and to due process.

3. *Brady* – Materiality

Turner v. United States, _____ U.S. _____, 137 S.Ct. 1885, _____ L.Ed.2d _____ (2017)
Where there is no reasonable probability that evidence found to have been withheld by the government would have changed the outcome of defendant's trial, the evidence is not material, and failure to disclose does not constitute grounds for reversal under *Brady v. Maryland*, 373 U.S. 83 (1963).

–*Turner* is very fact specific, and announces nothing particularly new. Joined by Justice Ginsburg, Justice Kagan argued in dissent that the outcome of trial in this case *would have* been different.

G. Limitations

1. Roles of Judge and Jury

State v. Tipton, 897 N.W.2d 653 (Iowa 2017)
In issues involving statutes of limitations, the district court determines the parameters of the statute, while the jury determines whether the case was filed within those parameters.

2. Continuing Offense

State v. Tipton, 897 N.W.2d 653 (Iowa 2017)
The offenses of fraudulently uttering, etc., a lottery ticket and of tampering with a lottery ticket under Iowa Code §§ 99B.36(1) and (2) do not involve ongoing harm and are not regarded by the legislature as continuing offense, so the continuing offense exception to the statute of limitations does not apply to these offenses.

– Generally, the limitation period begins to run when the last act constituting the offense has been committed. Iowa Code § 802.7. There is, however, an exception for continuing offenses. *State v. Francois*, 577 N.W.2d 417 (Iowa 1998). The test announced in *Toussie v. United States*, 397 U.S. 112 (1970) is whether (1) the language of the statute compels the conclusion that the offense in a continuing one, or (2) the nature of the offense is such that the legislature must have intended that it be considered a continuing offense.

Somewhat similar to the notion of a continuing offense is that of ongoing criminal conduct. The defendant's act of tampering with the lottery process ended on the day he committed it, so it was barred by the statute of limitations. The actions of one of his cohorts to redeem the ticket fell within the limitation period, so that count was not time barred.

3. Fraud Extension

State v. Tipton, 897 N.W.2d 653 (Iowa 2017)
The one-year fraud extension to the statute of limitations under Iowa Code § 802.5 commences when the government should have known a fraud had been committed, so where the defendant participated in a fraud on the Iowa lottery system in December, 2010, and where the State subsequently had probable cause to know that someone was attempting to defraud the system, and could not establish that law enforcement exercised due diligence to investigate the fraud, filing of charges in January, 2015 was not justified under § 802.5.

– The statutory period starts running when the government has probable cause. It is not necessary that the government know the identity of the perpetrator of the fraud.

49

H. Motions and Rulings

1. Speedy Trial

a. Arrest

State v. Williams, 895 N.W.2d 856 (Iowa 2017)
For the purpose of the application of the Iowa R.Crim.P. 2.33(2)(d) rule that an indictment must be found against a defendant within 45 days of arrest, an "arrest" must fulfill statutory requirements, including that a complaint is filed and the defendant taken before the magistrate, and an arrest that falls short of these requirements but might constitute an arrest for Fourth Amendment purposes does not trigger Rule 2.33(2)(d).

– The Court has swung back and forth on this issue over the years, but *Williams* expressly overrules *State v. Wing*, 791 N.W.2d 243 (Iowa 2010), which employed the constitutional definition of arrest. Stare decisis, Chief Justice Cady observes, must give way when current case law is incorrect. The only thing that has changed, Justice Wiggins responds, is the makeup of the Court, and stare decisis should not give way simply because there are different butts in the seats.[2]

b. Good Cause for Delay

State v. McNeal, 897 N.W. 697 (Iowa 2017)
The district court does not abuse its discretion in allowing evidence to commence two weeks after expiration of the Iowa Rule of Criminal Procedure 2.33(2)(b) speedy trial deadline where both parties assumed that the case would be resolved by plea up until two weeks before the deadline was to run and where the prosecutor announced at the time it became apparent there would be a trial that he was unable to procure three expert witnesses within the deadline period.

– What the district court actually did in *McNeal* was to commence jury selection two days before the deadline, and then to recess until witnesses were available. The Court declined to decide if this measure was sufficient to satisfy the rule. All justices appeared to be in agreement that *McNeal* does not constitute an across-the-board holding that the Rule 2.33(2)(b) deadline can be avoided by conducting voir dire within the 90-day period and then recessing until the prosecution is prepared to go to trial.

The sufficiency of the finding of good cause is reviewed for abuse of discretion.

[2]This is my characterization, not Justice Wiggins.

In his concurrence, Chief Justice Cady notes that, if he was the trial judge, he may not have proceeded in this manner. But the manner in which it was handled in *McNeal* was within the court's discretion.

Joined by Justices Hecht and Wiggins, Justice Appel disagreed.

2. Notice of Defenses – Mental Status

a.. Competency to Stand Trial

State v. Einfeldt, 914 N.W.2d 773 (Iowa 2018)
The district court errs in failing to halt trial already commenced to hold a hearing to determine competency under Iowa Code § 812.3, where the court has information that the defendant suffers from paranoid schizophrenia, among other impairments, untreated by medication, and during trial makes a series of irrational and disruptive statements, including several indicating a desire to kill her attorney.

– Justice Appel's ruling is based not only on § 812.3, but also upon due process.

b. Insanity – Right to Access to Expert

McWilliams v. Dunn, _____ U.S. _____, 137 S.Ct. 1790, _____ L.Ed.2d _____ (2017)
Under the Supreme Court decision in *Ake v. Oklahoma*, 470 U.S. 68 (1985), where there is a question concerning the defendant's sanity at the time of the offense the government must provide access to an indigent defendant to a mental health expert sufficiently available to effectively "assist in evaluation, preparation, and presentation of the defense.."

I. Injunction to Freeze Defendants Assets

Krogmann v. State, 914 N.W.2d 293 (Iowa 2018)
There is no authority under Iowa law for the district court to enter an injunction freezing the defendant's assets prior to trial, on the ground that they might be used to pay restitution to the victim if the defendant is convicted at trial or otherwise be required to pay in the future.

-- The Court reached a similar result in *State ex re. Pillers v. Maniccia*, 353 N.W.2d 934 (Iowa 1984). A conservator was appointed, and Mr. Krogman was permitted to expend some of his resources to hire an attorney. He was not, however, permitted to hire a jury selection consultant or to use his funds to post bond.

J. Guilty Plea Required Colloquy – Iowa R.Crim.P. 2.8(2)(b)(2)

1. Possible Sentences – Thirty-Five Percent Criminal Penalty Surcharge

State v. Weitzel, 905 N.W.2d 397 (Iowa 2017)
The 35 percent criminal penalty surcharge is punishment of which the defendant must be apprised in pleading guilty pursuant to Iowa R.Crim.P. 2.8(2)(b)(2), and where the court does not do so it has not substantially complied with Rule 2.8(2)(b)(2) and the defendant must be given the opportunity to withdraw his or her plea.

– Despite his failure to move in arrest of judgment, Mr. Weitzel was able to raise the issue on direct appeal without claiming ineffective assistance of counsel, because the court also failed to advise him that he must do so to preserve error.

2. Immigration Consequences – Duty of Counsel

Morales Diaz v. State, 896 N.W.2d 723 (Iowa 2017)
Counsel has a duty to a client who is an alien entering a plea of guilty to advise the client of all immigration consequences including, if applicable, immediate removal, the availability or nonavailability of cancellation of removal, detention pending removal, and denial of citizenship.

– Defense counsel told Mr. Morales that he would probably be deported whether or not he was convicted of the forgery charge for which he was arrested. Chief Justice Cady found counsel's duty to be more extensive, and that counsel's ineffective assistance was prejudicial.

The Court decided this case under the federal constitution, but appears to have given a more generous remedy than the federal courts have awarded following *Padilla v. Kentucky*, 559 U.S. 356 (2010). Following *Morales Diaz*, attorneys who represent aliens in state court are going to have to be more cognizant of federal immigration law to give more effective *Padilla* advice.

IV. Trial Issues

A. Jury

1. Jury Waiver – Record

State v. Gomez Garcia, 904 N.W.2d 172 (Iowa 2017)
Waivers of jury trial must follow the Iowa R. Crim.P 2.17(1) requirements that they be in writing and on the record, and demonstrate that waiver is knowing and voluntary

2. Jury Selection – Challenges for Cause – Prejudice

State v. Jonas, 904 N.W.2d 566 (Iowa 2017)
While, in the prosecution for murder of a defendant who is gay, the district court abused its discretion in failing to strike for cause a juror who repeatedly indicated that the defendant's sexual orientation would remain in the back of his mind, that he couldn't promise it wouldn't affect his judgment on the case, and where the defendant would do better with another juror, the defendant fails to establish prejudice where he does not show that he was denied a needed peremptory challenge by requesting an additional strike to remove another panelist who was objectionable to him.

– Mr. Jonas asked the Court to reconsider under Iowa law the existing authority, *State v Neuendorf*, 509 N.W.2d 743 (Iowa 1993), under which failure to remove an unqualified juror for cause does not require automatic reversal (as it had in the past) where the complaining party used a peremptory strike to remove him or her. Following *Ross v. Oklahoma*, 487 U.S. 81 (1988), prejudice exists only where it is demonstrated that the resulting panel was impartial.

Chief Justice Cady declined to back off on *Neuendorf*, but instead adopted the third approach taken in Texas in cases such as *Johnson v. State*, 43 S.W.3d 1 (Tex.Crim.App. 2001), under which the complaining party can demonstrate prejudice by identifying a juror he or she *would have* stricken had he or she not used a peremptory strike to eliminate the unqualified juror. The party must request an additional peremptory challenge, if it is denied, the party may argue prejudice from the denial of the challenge for cause.

B. Foreign Language Interpreters – Waiver – Appointment of Standby Interpreter

State v. Gomez Garcia, 904 N.W.2d 172 (Iowa 2017)
While a defendant has the right to waive the services of an interpreter at trial, waiver may only occur following an on-the-record colloquy in which the defendant is advised of the benefits of using an interpreter, and where (1) the defendant expressly (not tacitly) declines the interpreter's services, (2) the defendant is made aware of the availability of interpreter services, (3) the defendant is made aware of the costs of interpreter services, (4) the defendant is made aware of the interpreter's role and the duty to maintain confidentiality, and (5) the defendant is made aware that it is advisable to communicate in his or her native language.

– The latter five requirements are standards articulated by the American Bar Association. Mr. Gomez Garcia's waiver was deficient on several, but his challenge on appeal was not to the waiver, but rather to the forced appointment of a standby interpreter.

State v. Gomez Garcia, 904 N.W.2d 172 (Iowa 2017)
While the defendant has a right to waive the services of a foreign language interpreter, the district court does not abuse its discretion in appointing a standby interpreter to remain in the courtroom and to interpret the trial, with an earphone available for the defendant to use if he chooses to do so.

– Mr. Gomez argued that he was prejudiced by this because it was the reason he elected to waive jury trial in his case. Because the court had the discretion to appoint the standby interpreter, Justice Waterman concluded, this is not a basis for reversal.

C. Evidence

1. Iowa R.Evid. 5.106 – Completeness

State v. Huser, 894 N.W.2d 472 (Iowa 2017)
Admission of evidence under Iowa R.Evid. 5.106 which, following admission of evidence of a third-party conversation, allows admission of other conversations "when necessary in the interest of fairness, a clear understanding, or an adequate explanation," requires a showing that the substance of the other conversations is related to the substance of the original one, and does not permit wholesale admission of other conversations.

– Rule 5.106 is the rule of completeness. The additional conversations must complete the story by explaining or clarifying the original evidence.

2. Iowa R.Evid. 5.404(a)(2)(A)(ii) – Evidence of Victim's Prior Violent Behavior

State v. Einfeldt, 914 N.W.2d 773 (Iowa 2018)
The district court does not abuse its discretion in failing to admit evidence of two prior assaults committed by the victim, offered to support the defendant's claim of self defense, where the assaults occurred more than ten years earlier, when the victim was a minor.

3. Iowa R.Evid. 5.404(b) (Other Bad Acts) – Judicial Discretion

State v. Plain, 898 N.W.2d 801 (Iowa 2017)
Where the jury is permitted to hear a 911 recording indicating that the defendant is on GPS monitoring and had previously been in prison, the district court does not abuse its discretion in giving a cautionary instruction rather than granting a mistrial where (1) other evidence against the defendant was substantial, (2) the references were brief and not repetitious, and (3) the cautionary instruction was sufficient to ameliorate the harm generated by the improper evidence.

– Justice Hecht referred to the Court's decision in *State v. Belieu*, 288 N.W.2d 895, 901 (Iowa 1980) for a three-part test for whether a cautionary instruction mitigates the prejudice arising from Rule 5.404(b) evidence:

> The first *Belieu* consideration is whether the "defendant [can] combat the evidence without compounding the prejudice.". . . The second consideration is how extensive the evidence is and the promptness with which it is addressed. . .Finally, we assess prejudice–the stronger the State's evidence of Plain's guilt it, the less prejudicial the effect of the challenged testimony.

4. Impeachment of Own Witness – Prior Inconsistent Statement Concerning Identification of a Person

State v. Russell, 893 N.W.2d 307 (Iowa 2017)
While a party is not permitted, under *State v. Turacek* 456 N.W.2d 846 (Iowa 1977) to call a witness for the sole purpose of impeaching the witness with otherwise inadmissible evidence, and where prior inconsistent statements are admissible to impeach a witness under Iowa R. Evid. 5.801(d)(1)(A) only where the prior statement is made under oath and the declarant is subject to cross-examination, admission in a homicide prosecution of a prior statement identifying the defendant as an attacker, made by a witness who at trial denies any recollection of the incident, is admissible non-hearsay under Iowa R.Evid. 5.801(d)(1)(C) as "one of identification of a person made after perceiving the person."

– Mr. Russell was another defendant is the prosecution the included the defendant in *State v.* *Shorter*, 893 N.W.2d 65 (Iowa 2017). Mr. Russell advanced the other issues raised by Mr. Shorter, with the same results.

5. Hearsay

a. What Constitutes Hearsay

State v. Plain, 898 N.W.2d 801 (Iowa 2017)
Where a law enforcement officer at trial testifies not merely that he had a conversation with the victim and his wife and then recovered a set of bolt cutters, but also testifies based on that conversation that the bolt cutters were thrown by the defendant, causing a hole in the wall, the purpose of the testimony was to prove the truth of the matter asserted, and the testimony is inadmissible hearsay.

– Because there was substantial other evidence offered to establish that the defendant threw the bolt cutters at the wall, and because the court gave an instruction limiting the use of the hearsay testimony, Plain was not prejudiced and error was not reversible.

b. "Backdoor Hearsay"

State v. Huser, 894 N.W.2d 472 (Iowa 2017)
Where the district court has barred the state from introducing the hearsay testimony concerning statements made by third parties in the presence of a witness, the state is not allowed to circumvent the ruling by having the witnesses testify, properly, that she observed the third parties together, and prefacing the questions with a phrase such as "without telling us what was said," inviting the jury to infer what the content of the conversation was.

– Where more flagrant hearsay violations occurred in Mr. Huser's first trial, the prejudice from the violation in his second trial did not justify a new trial.

c. Iowa R.Evid. 5.804(b)(3) – Statements Against Penal Interest

State v. Huser, 894 N.W.2d 472 (Iowa 2017)
Statements by codefendant in a prosecution for murder that the victim had information that could send the declarant back to jail is an Iowa R.Evid. 5.804(b)(3) statement against penal interest that may be offered by defendant suspected of inciting the declarant to kill his wife's boyfriend.

– Huser attempted unsuccessfully to admit the statements under the "inextricably intertwined" theory, arguing that the codefendant's declarations were inextricably intertwined with the charged offense. According to Justice Appel, this doctrine "is a narrow exception reserved for situations in which evidence of another crime is admitted because of necessity in explaining the underlying crime charged." It did not apply in Mr. Huser's case.

Additionally, it was not established that the witness to which the codefendant made the statement was a co-conspirator, so the statement was not made in furtherance of a conspiracy under Iowa R.Evid. 5.801(d)(2)(E).

D. Motions

1, New Trial – Weight of the Evidence

State v. Wickes, 910 N.W.2d 554 (Iowa 2018)
While, in ruling upon defendant's motion for new trial alleging the verdict was against the weight of the evidence, the court uses language appropriate to a ruling on a motion for judgment of acquittal ("based on the whole record there is substantial evidence to support the decision and verdict"), the court applies the proper standard when it concludes "that the evidence, when weighed, weighs in favor of the verdict."

2. Motions in Arrest of Judgment -- Necessity

State v. Harrington, 893 N.W.2d 36 (Iowa 2017)
An objection to the district court's finding that the defendant was an habitual offender on the ground that the court did not utilize a sufficient colloquy in accepting the defendant's admissions on the issue may, and should, be raised by motion in arrest of judgment, to give the district court an opportunity to address the issue and to preserve the issue for appeal.

– But, because the Supreme Court had not previously set out the rule governing the extent of the required colloquy, the Court went ahead and considered the merits of Mr. Harrington's claim (and he prevailed). This is what I like about our Supreme Court in contrast with the Court when *I* practiced there (1985-1994). In those days, the Court simply would have found the issue to be

waived, and would never have come down in favor of the defendant on the merits.

E. Prosecutorial Misconduct

State v. Coleman, 907 N.W.2d 124 (Iowa 2018)
The prosecutor's isolated comments in closing arguments that "the defense, they want to – to blow a lot of smoke around the law, make it as fuzzy as possible" and "the defense will hide behind [a] cloud of assumption" do not constitute prosecutorial misconduct where they focus on the strength of theory of defense and not upon the credibility of the defendant.

– Additionally, Justice Zager found that comments did not prejudice Mr. Coleman to the extent that he was entitled to a new trial. The test for prejudice resulting from prosecutorial misconduct was outlined in *State v. Boggs*, 741 N.W.2d 492, 508-09 (Iowa 2007):

> (1) The severity and pervasiveness of misconduct; (2) the significance of the misconduct to the central issues in the case; (3) the strength of the State's evidence; (4) the use of cautionary instructions or other curative measures; (5) the extent to which the defense invited the misconduct.

The *Coleman* holding seems to run counter to *State v. Graves*, 668 N.W.2d 860 (Iowa 2003), in which it was misconduct to refer to a defense argument as a "smoke screen." *Graves* was different, Justice Zager found, because the impropriety was in the direct attack on the defendant's veracity. *State v. Coleman*, 907 N.W.2d at 139-40. In his partial dissent, Justice Appel notes that he does not see the distinction. But he agreed with the majority that the misconduct was isolated and non-prejudicial. *State v. Coleman*, 907 N.W.2d at 152-54 (Appel, J., concurring in part, dissenting in part).

State v. Plain, 898 N.W.2d 801 (Iowa 2017)
Although it is improper for the prosecutor to refer repetitively to the complaining witness as the "victim" during closing arguments, where the prosecutor did not intentionally violate her duty, where the prosecutor limited these references to closing arguments, the jury was instructed the closing arguments were not evidence, and the evidence was otherwise sufficient to support conviction, the defendant was not prejudiced, the defendant is not entitled to a new trial.

– Justice Hecht emphasizes the difference between intentional misconduct and that which is not intentional in determining whether the defendant is entitled to relief.

F. Jury Instructions

1. Confusing Instructions

State v. Benson, _____ N.W.2d _____ (Iowa 2018)
Where defendant is charged with two offenses, one a general intent offense and one having an element of specific intent, the district court errs in submitted definitional instructions for general and specific intent, but not informing the jury which instruction applies to which offense, as this has the effect of confusing the jury.

57

-- This is the first published opinion authored by Justice Susan Christensen. Justice Chrisensen is the daughter of Justice Jerry Larson, the longest-serving Justice in the history of the Court, who passed several months before Justice Christensen's appointment. In a touching gesture, Justice Christensen wore her father's judicial robe during her swearing in.

2. Implicit Bias

State v. Plain, 898 N.W.2d 801 (Iowa 2017)
While the district court has the discretion to give a jury instruction on implicit bias, the failure to do so, or the failure to utilize particular wording in giving the instruction, is not an abuse of that discretion.

– Justice Hecht stresses that courts do have a responsibility to address issues of implicit racial bias. Justice Appel's special concurrence contains a thoughtful summary of research on the issue of implici bias in the court system. Most helpful is his reference to a publication of the National Center for State Courts, Jerry Kang, *Implicit Bias: A Primer for Courts* 1-6 (August 2009) http://wp.jerrykang.net.s110363.gridserver.com/wp-content/uploads/2010/10/kang-Implicit-Bias-Primer-for-Courts-09.pdf.[3]

3. Malice Aforethought – Permissive Inferences

State v. Green, 896 N.W.2d 770 (Iowa 2017)
In a prosecution for murder, the district court does not err in instructing the jury that it may, but is not required to, find from the use of a dangerous weapon that the defendant acted with malice aforethought.

4. "Attempt"

State v. Tipton, 897 N.W.2d 653 (Iowa 2017)
The district court does not err in instructing the jury, based upon an Iowa Bar Association model instruction that attempt means "to try to do something," rather than giving the more detailed instruction offered by the defense.

5. Sex Offender Registration

State v. Coleman, 907 N.W.2d 124 (Iowa 2018)
Where a registered sex offender leaves the residence at which he is registered and moves into a temporary residence, Iowa Code § 692A.105 requires registration within five business days of the move, and does not allow for an additional five day grace period before the registration period begins to run, and the district court does not err in submitting a marshaling instruction to the jury

[3]I ran this link personally, and received a notice that "registration has been disabled."

that does not provide for the grace period.

– The parties agreed that the statute, that requires the sex offender to register "within five days of a change. . .when away from the principal residence of the offender for more than five days," is ambiguous. Justice Zager nevertheless found that the legislature clearly intended registration within five days of the move to further the policy of the registration requirement. This interpretation is consistent with deadlines placed on other changes that are not ambiguous. Justice Appel responded that this analysis supports Mr. Coleman's theory more than it supports the state's, since it shows that the legislature knows how to draft an unambiguous five-day requirement.

G. Habitual Offender Enhancements – Required Colloquy

State v. Brewster, 907 N.W.2d 489 (Iowa 2018)
The *State v. Harrington*, 893 N.W.2d 36 (Iowa 2017) requirement that a sufficient colloquy be conducted to assure that the defendant's admissions to prior convictions are knowing and voluntary applies to admissions to prior OWI convictions giving rise to a conviction for second-offense OWI.

– Under *Harrington*, the colloquy must be sufficient to (1) notify the defendant of the nature of the prior conviction allegation, and that prior convictions must have occurred where the defendant either was represented by counsel or waived counsel (and the court must make findings that the prior convictions are admissible); (2) notify the defendant of mandatory minimum and maximum punishment and, if applicable, the specific sentence the defendant will receive because of the prior convictions; (3) advise the defendant of his or her trial rights absent an admission; (4) advise the defendant that, by making the admissions, he or she is waiving trial; and (5) that defects in the colloquy must be raised in a motion in arrest of judgment to enable the defendant to appeal.

Mr. Brewster did not file a motion in arrest of judgment. The Court, however, gave him the same gift it gave Mr. Harrington. Since the hearing occurred before the Court had announced the colloquy requirement in *Harrington*, it allowed him to benefit from the holding.

State v. Coleman, 907 N.W.2d 124 (Iowa 2018)
The record of defendant's stipulation to prior convictions and to an habitual offender enhancement must include some advice to the defendant that prior convictions must have been obtained when he or she was either represented by counsel or waived representation by counsel.

– The colloquy requirements for stipulating to habitual offender status apply equally to other enhancement

based on prior convictions.

V. Sentencing

A. Procedure

1. Consideration of Sentencing Options

State v. Crooks, 911 N.W.2d 153 (Iowa 2018)
Although the sentencing court indicates on the record that its only options are to sentence the defendant to 50 years or to place the defendant on probation, where it is apparent from the record that the defendant was aware of all the available options, the court properly exercised its sentencing discretion.

– Mr. Crooks argued that the sentencing court abused its discretion in sentencing him, a youthful offender convicted of murdering his mother when he was 13, without considering the factors set out in *Miller v. Alabama*, 567 U.S. 460 (2012), as applied in Iowa in *State v. Lyle*, 854 N.W.2d 378 (Iowa 2014). While *Miller* and *Lyle* are concerned with the imposition of mandatory minimum sentences, and no minimum was imposed in Mr. Crooks' case., Justice Waterman stressed consideration of all mitigating factors, including the *Miller/Lyle* factors, in every case involving juveniles. He found that the *Miller/Lyle* factors were, in fact, considered by the sentencing judge. Justice Appel disagreed, and would have remanded Mr. Crooks' case for resentencing.

The Court also found that the sentencing court did not abuse its discretion in imposing the 50-year-sentence, in view of the fact that the defendant showed no remorse, and offered no explanation, for the attempted rape, then the murder of his mother. Expert witnesses concluded that there was no likelihood of his rehabilitation prior to reaching the age of 18. The indeterminate 50-year sentence affords him the opportunity to prove his rehabilitation to the parole board.

2. Reasons for Sentence -- Federal Resentencing after Beneficial Amendment to the United States Sentencing Guidelines

Chavez-Meza v. United States, _____ U.S. _____, 138 S.Ct. 1959, _____ L.Ed.2d _____ (2018)
Where the district court gave sufficient reasons for imposing the defendant's initial sentence at the low end of the range suggested by the advisory United States Sentencing Guidelines, it is sufficient that, upon resentencing following a beneficial amendment to the guideline range, the

district court sign a boilerplate order indicating that the new sentence conforms to the factors under 18 U.S.C. § 3553(a), without providing any more specificity, where the new sentence is also within the advisory guideline range.

-- The fact that the original sentence was to a term at the bottom of the range, while the reduced sentence was near the middle of the amended range does not call for more specific reasons.

B. Particular Sentences

1. 18 U.S.C. § 924(c) – Consecutive Sentences in Certain Gun Cases

Dean v. United States, _____ U.S. _____, 137 S.Ct. 1170, _____ L.Ed.2d _____ (2017)
While 18 U.S.C. § 924(c) provides that mandatory sentences for possessing a firearm in connection with a felony offense run consecutively to each other and to any other term of incarceration the defendant is serving, the rule does not prohibit the district court, in fixing the sentence that would be sufficient but not greater than necessary to satisfy the policy objectives of 18 U.S.C. § 3553(a), from taking into account the length of the § 924(c) sentence in determining the total sentence, and the individual sentences for the underlying offenses.

– Mr. Dean faced a thirty-year minimum sentence on the § 924(c) convictions alone. He asked the court to impose concurrent one-day sentences on the underlying convictions of robbery and some related offenses. The district court responded that the defendant's request was reasonable, but not authorized under § 924(c). Chief Justice Roberts responded that it was, in fact, authorized.

The Dean case arises out of Sioux City, in the Northern District of Iowa.

2. Enhancements for Prior Convictions – Habitual Offender – Admission by Defendant – Procedures Required

State v. Harrington, 893 N.W.2d 36 (Iowa 2017)
As the defendant has a right to a separate bifurcated trial on the question of whether he or she is an habitual offender, the defendant may admit to being an habitual offender only following a complete colloquy, similar to that necessary in taking a guilty plea, to assure that the admission is voluntary.

– The consequences of an habitual offender adjudication can be just as daunting as the actual conviction. In advising the defendant of the consequences of the adjudication, the one warning that probably isn't required is the potential of deportation. Generally, an habitual offender adjudication does not increase the risk of this.

One grammatical question that always arises in my mind is whether a defendant is *a* habitual offender or whether he or she is *an* habitual offender. I believe it's the latter. It appears

both ways in Chief Justice Cady's majority opinion.

3. Good Time Accumulation – Loss of Accrual for Failure to Participate in Treatment

State v. Iowa District Court for Jones County, 902 N.W.2d 811 (2017)
Notwithstanding a 2016 change in written Iowa Department of Corrections policy, *stare decisis* dictates that, following *Holm v. State*, 767 N.W.2d 409 (Iowa 2009), an inmate's ineligibility for reduction of sentence under Iowa Code § 903A.2(1)(a)(2) for failure to participate in a sex offender treatment program begins on the date the inmate declines treatment, and does not result in the loss of all prior accrued reduction for good behavior.

– Justice Waterman finds it interesting that eight years ago, in *Holm*, the State took the position that loss of good time begins at the time treatment is declined and it was Phil Mears, who represented Marshall Miller in this case, who took the contrary position for Mr. Holm. In 2016, the Department of Corrections reversed itself in its written policy, and now the sides are switched. In this case, Mears again argues that taking all of Mr. Miller's good time violates the *ex post facto* clauses of both the State and Federal Constitutions. It was not necessary to address the constitutional issues, Justice Waterman concluded, because the Court was rejecting the government's argument on the statutory ground.

4. Expungement

State v. Doe, 903 N.W.2d 347 (Iowa 2017)
In granting expungement under Iowa Code Chapter 901C, a "criminal case" subject to expungement when all criminal charges have resulted in acquittal or dismissal, Iowa Code § 901C.2(1)(a)(1), is determined by the case number, and not whether the charges involved the same course of behavior.

– Mr. "Doe" was charged in one trial information with a number of indictable misdemeanors and in a separate case number with simple misdemeanor domestic abuse arising from the same course of activity. He pleaded guilty to one of the indictable misdemeanors. The remainder, along with the simple misdemeanor, were dismissed. Under the new expungement provisions of § 901C, all criminal charges in the indictment were not dismissed, so they all remain on Mr. Doe's record. The entirety of the simple misdemeanor complaint was dismissed. If the Court viewed the case as consisting of all charges arising from the single course of conduct, as is done in some jurisdictions, the simple misdemeanor is not expunged. But the Court determined that the "case" is based on case number, so the simple misdemeanor was expunged.

5. Assessment of Attorney's Fees.

State v. Coleman, 907 N.W.2d 124 (Iowa 2018)
Prior to assessing court-appointed attorney fees for appointed counsel, the court must determine that defendant is reasonably able to repay fees without requiring the defendant to request a hearing on this issue.

6. Forfeiture

a. Civil Forfeiture

(1) Constitutional Objections – Timing of Hearing

In the matter of property seized from Herrera, 912 N.W.2d 454 (Iowa 2018)
A party contesting civil forfeiture of property is entitled to a hearing on his or her motion to suppress evidence seized in violation of the constitution prior to adjudication of the forfeiture claim.

(2) Assertion of Privilege

In the matter of property seized from Herrera, 912 N.W.2d 454 (Iowa 2018)
A party contesting civil forfeiture of property may decline, on Fifth Amendment grounds, to provide information required to be given under Iowa Code §§809A.13(c) and (d) without surrendering his or her claim to the property.

(3) Attorneys Fees

In the matter of property seized from Herrera, 912 N.W.2d 454 (Iowa 2018)
Where a party contesting civil forfeiture is required to litigate the claim for some period of time before the State agrees to allow the return of property without trial, that party is the prevailing party and is entitled to attorneys fees under Iowa Code §809A.12(7).

-- This case was complicated by the fact that it involved co-defendants. The attorney representing Mr. Rodriguez also represented co-defendant Herrera, and the case was remanded to determine how much of the attorney's time was devoted to Mr. Rodriguez' case. The issue of whether Mr. Rodriguez was the prevailing party under this section is one of first impression.

b. Federal – Joint and Several Liability

Honeycutt v. United States, _____ U.S. _____, 137 S.Ct. 1626, _____ L.Ed.2d _____ (2017)
The principle of joint and several liability does not apply to forfeiture of assets, or substitute assets, by coconspirators under 21 U.S.C. § 853, and only the defendants who receive an actual benefit from the offense is subject to forfeiture.

7. Federal Resentencing After Beneficial Guideline Amendments

a. Offenses with Mandatory Minimums

Koons v. United States, _____ U.S._____, 138 S.Ct. 1783, _____ L.Ed.2d _____ (2018)
For defendants who were sentenced at a statutory mandatory minimum, or below a minimum based upon substantial assistance, the statutory minimum is the guideline sentence, so the defendant does not benefit under 18 U.S.C. §3582(c)(2) from a retroactive reduction in what would otherwise have been the applicable guideline in the absence of the minimum sentence.

-- The most notable aspect of this case, the companion case to *Hughes v. United States*, below, is that Mr. Koons was represented before the Supreme Court by a team that included Assistant Federal Public Defender Joe Herrold from Des Moines.

b. Fed.R.Crim.P 11(c)(1)(C) Plea Agreements

Hughes v. United States, _____ U.S. _____, 138 S.Ct. 1765, _____ L.Ed.2d _____ (2018)
Because the calculation of a range under the advisory United States Sentencing Guidelines generally is the first step in negotiating a binding Fed.R.Crim.P. 11(c)(1)(C) plea agreement, where the United States Sentencing Commission retroactively adopts amendments that significantly reduce the defendant's guideline range, the defendant serving a sentenced based upon a Rule 11(c)(1)(C) agreement is eligible for consideration for a reduction under the amendment.

-- The extent of the reduction is still for the sentencing court to decide. A reduction may not be in order where the original sentencing court indicated clearly that acceptance of the plea was based in no part on the application of the guidelines. In 2011, a four-justice plurality of the Court reached essentially that holding in *Freeman v. United States*, 564 U.S. 522 (2011). There, Justice Sotomayor concurred in the result, but took the position that defendants who had pled under Rule 11(c)(1)(C) could benefit from a retroactive amendment only where the sentencing court indicated in accepting the agreement that the agreement was based on the guidelines. In *Hughes*, Justice Sotomayor joined the other justices in abandoning this reasoning.

8. Extension of a No-Contact Order

Vance v. Iowa District Court for Floyd County, 907 N.W.2d 473 (Iowa 2018)
There was insufficient evidence for a magistrate to fail to find under Iowa Code § 664A.8 that the subject of a no contact order no longer poses a threat to the safety of the victims and granting a five-year continuance of the no-contact order where there had been no violations of the order during its one year in existence, and where the subject testified and put on evidence that he has

been fully compliant, is not violent, and has no interest in having contact with the victim in the future.

– Section 664.8 requires the court to modify and extend the order "unless the court finds the defendant no longer poses a threat." It appears that Mr. Vance may have gotten a gift from the Supreme Court here. There is nothing in that section that *requires* the order not be continued under any particular set of circumstances.

9. Revocation – Credit for Time Served

State v. Hensley, 911 N.W.2d 678 (Iowa 2018)
The Bridges of Iowa substance abuse treatment program, located in an unused wing at the Polk County Jail, in which participants are not locked down, requires residential placement, intensive supervision and 24-hour-monitoring, which requires participation in extensive treatment programs, and which imposes a curfew and all of the rules applicable to a halfway house, possesses all the characteristics of a community correctional residential treatment facility, and where participation is required as a condition of probation, the resident must be given credit under Iowa Code § 907.3(3) for time her or she resided there when probation is revoked.

VI. Appeal and Collateral Review

A. Direct Appeal

1. Procedural – Notice of Appeal – Deferred Restitution

Manrique v. United States, _____ U.S. _____, 137 S.Ct. 1266, _____ L.Ed.2d _____ (2017)
Where defendant is sentenced for his offense, but the court defers ruling on the amount of restitution, and the restitution order is issued after notice of appeal has been filed, the restitution order is a new appealable ruling, and the defendant must file a separate notice of appeal after its entry.

– Justice Thomas explains that the time limitation on filing notice of appeal is not a jurisdictional rule. It is a claim-processing rule. But it is a mandatory claim-processing rule, and it is the one claim-processing rule a violation of which cannot be remedied after the limitation has passed.

Justice Ginsberg would have reversed, because Mr. Manrique was not advised of his right to appeal after the restitution order was entered. And once restitution was entered, the district court transmitted to file to the Court of Appeals. So the court and the parties essentially were on notice of the contested issue.

2. Appealable Issues

a. Stare Decisis

State v. Iowa District Court for Jones County, 902 N.W.2d 811 (2017)
Notwithstanding a 2016 change in written Iowa Department of Corrections policy, *stare decisis* dictates that, following *Holm v. State*, 767 N.W.2d 409 (Iowa 2009), an inmate's ineligibility for reduction of sentence under Iowa Code § 903A.2(1)(a)(2) for failure to participate in a sex offender treatment program begins on the date the inmate declines treatment, and does not result in the loss of all prior accrued reduction for good behavior.

b. Appeal v. Other Remedies

Vance v. Iowa District Court for Floyd County, 907 N.W.2d 473 (Iowa 2018)
As there is no right to direct appeal of simple misdemeanor judgments, there is no right to direct appeal of the continuation of a no-contact order stemming from a simple misdemeanor case.

– If a party has an arguable claim, the Court will treat a case in which the wrong remedy is requested as having been filed correctly. In this case, the Court directed Vance to apply for discretionary review, which he did. Once he did, the Court determined that discretionary review was also not the proper remedy, so it treated Mr. Vance's request as a petition for writ of certiorari, because he was arguing that the magistrate exceeded its authority or otherwise acted illegally in extending a no-contact order in a simple misdemeanor case.

3. Preservation of Error

a. Timing of Objection

State v. Huser, 894 N.W.2d 472 (Iowa 2017)
Where the district court grants defendant's pretrial motion to exclude particular evidence in such a way that it is clearly a final ruling on the objection, the fact that the defendant does not object immediately when the State introduces evidence precluded by the ruling, but waits to do so outside the presence of the jury after the witness' testimony is completed, does not render the objection untimely.

b. Guilty Plea – Constitutional Error

Class v. United States _____ U.S. _____, 138 S.Ct.798, _____ L.Ed.2d _____ (2018)
A plea of guilty in and of itself does not bar a defendant from appealing the constitutionality of the statute under which he or she was convicted, on grounds that are not inconsistent with admissions made during the plea, where the defendant does not expressly waive the right to appeal the conviction on constitutional grounds.

c. Federal Plain Error

Rosales Mireles v. United States, _____ U.S. _____, 138 S.Ct. 1897, _____ L.Ed.2d _____ (2018)
To satisfy what has been characterized as the fourth prong in determining whether unobjected to error is plain error, in which the Court has the discretion to correct errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings," a misapplication of the United States Sentencing Guidelines that results in a higher presumptive guideline range may, in the absence of contravailing facts, meet that standard.

-- The three prongs for plain error recognized in *United States v. Olano*, 507 U.S. 725 (1993) are (1) that the error must not have been intentionally waived, (2) that the error must truly be plain, and (3) that the defendant's substantial rights have been affective. After this showing is made, as noted above, the reviewing court may consider the issue if the error seriously affects the fairness, integrity or public reputation of the proceedings. The Fifth Circuit interpreted the latter language is requiring that plain errors must "shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or the integrity of the district judge." *United States v. Rosales Mireles*, 850 F.3d 246, 250 (2017).

Justice Sotomayor found that the Fifth Circuit's interpretation was too restrictive.

d. Prejudicial Error – Structural Error

McCoy v. Louisiana, _____ U.S. _____, 138 S.Ct. 1500, _____ L.Ed.2d _____ (2018)
Where the defendant insists that he is factually innocent of the charged offense, or an element of the offense, and insists that trial counsel not admit at trial that the defendant committed the offense or the element, and counsel takes an inconsistent position and admits the defendant's guilt, error is structural, and the defendant is not required to demonstrate prejudice.

4. Standard of Review

a. Limitations

State v. Tipton, 897 N.W.2d 653 (Iowa 2017)
Allegations that a charge should be dismissed for having been filed beyond the limitation are reviewed for correction of errors at law.

b. Sentencing – *Miller* Sentencings of Juveniles

State v. Roby, 897 N.W.2d 127 (Iowa 2017)
Where the sentencing court applies the test of *Miller v. Alabama*, 567 U.S. 460 (2012) in sentencing a defendant who committed his or her offense as a juvenile, the issue is no longer a constitutional issue requiring *de novo* review, but an abuse of discretion may occur where the "sentencing court fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case," *quoting United States v. Haack*, 403 F.3d 997, 1004 (8th Cir. 2005).

5. Harmless Error

State v. Ness, 907 N.W.2d 484 (Iowa 2018)
Despite other formidable evidence that the defendant was driving while intoxicated, the erroneous admission of the results of a preliminary breath test are prejudicial where video evidence is equivocal and because of the important role breath tests play in OWI prosecutions.

– Justice Mansfield cited language in *State v. Moorehead*, 699 N.W.2d 667, 673 (Iowa 2005) that the Court "presume[s] prejudice unless the record affirmatively establishes otherwise" when preliminary breath tests are admitted erroneously.

B. State Postconviction Relief

1. Postconviction v. Administrative Procedure Review

Belk v. State, 905 N.W.2d 185 (Iowa 2017)
A defendant who is not considered for parole prior to completion of a Sex Offender Treatment Program may challenge the constitutionality of a denial of SOTP by the Department of Corrections as rendering him "unlawfully held in custody or other restraint" in postconviction under Iowa Code § 822.2(1)(e) rather than under the Administrative Procedure Act.

– Justice Wiggins did not rule on the merits of Mr. Belk's claim, only upon the dismissal of his postconviction relief action for failing to state a claim. Justice Waterman dissected the substance of the claim in his dissent.

Justice Wiggins also extended to Mr. Belk the opportunity to recast his petition, in which he claimed a violation of Iowa Code § 822.2(1)(a), going to the lawfulness of his conviction.

Belk solidifies the direction of the Court as being that postconviction relief is the remedy for any action that results in a restraint of liberty for inmates.

2. Availability

a. Guilty Pleas – Actual Innocence

Schmidt v. State, 909 N.W.2d 778 (Iowa 2018)
Because under Article I, section 17 of the Iowa Constitution the conviction of an innocent defendant is disproportionately cruel and unusual punishment and under Article I, section 9 a violation of substantive Due Process, a freestanding claim of actual innocence is available under Iowa Code §§ 822.2(1)(a) and 822.2(1)(d) to a defendant who pleaded guilty where evidence that could not have been discoverable at the time of the plea and sentencing amounts to clear and convincing evidence in view of which no jury could have found him or her guilty beyond reasonable doubt.

– In the federal courts, actual innocence is a gateway permitting consideration of unpreserved constitutional error, but not a freestanding ground for relief. Several other states recognize actual innocence as a ground for postconviction review.

Because Mr. Schmidt's conviction was based upon a plea of guilty it is not clear, to me at least, whether the clear and convincing evidence standard applies to actual innocence challenges to convictions by jury.

This case arose as a challenge to summary judgment granted in the district court. The holding in this case is that summary judgment was not appropriate based upon a finding that actual innocence (the claim in this case being that a sexual abuse victim recanted his earlier statements) is not a ground for postconviction relief. Summary judgment might still be proper if the district court determined, based upon the undisputed allegations, that the applicant did not meet the test articulated in this case.

The general rule in place at the time *Schmidt* was announced is that a guilty plea waives all challenges that may be made to the defendant's conviction other than those intrinsic in the plea (i.e. voluntariness). There is some discussion in the various opinions about the role of stare decisis in the Court's decisionmaking. In a different context, Justice Wiggins complained vociferously a year earlier in a dissent in *State v. Williams*, 895 N.W.2d 856 (Iowa 2017), in which the Court abandoned and replaced the previous definition of arrest for the purpose of triggering speedy indictment, stressing the need for "the restoration of the principle of stare decisis in Iowa jurisprudence." In *Schmidt*,

however, Justice Wiggins authors the opinion veering from established precedent, and Justice Waterman cries foul, citing the *Williams* dissent.

b. Grounds for Relief

(1) *Brady* violation

Moon v. State, 911 N.W.2d 137 (Iowa 2018)
The failure of the state to apprise the defendant that a co-defendant had prepared a third party witness to testify against the defendant does not generate a reasonable probability that the result of the proceeding would have been different and thus is not material to the issue of guilt in the defendant's case, where other evidence thoroughly corroborates the co-defendant's testimony against the defendant and the co-defendant's credibility is impeached by numerous inconsistencies in the statements the co-defendant made.

– In this appeal from summary judgment dismissing Mr. Moon's postconviction petition, Justice Wiggins assumed that a genuine issue of material fact existed with respect to the other two requisites set out in *Harrington v. States*, 659 N.W. 2d 509 (Iowa 2003), to be granted a hearing on a *Brady* claim. Justice Wiggins assumed, without deciding that the evidence discussed by Mr. Moon in his petition was, in fact, suppressed. And the Court concluded that the evidence was favorable. It was not, however, material.

(2) Newly Discovered evidence

Moon v. State, 911 N.W.2d 137 (Iowa 2018)
Newly-discovered evidence that co-defendant had prepared a third-party witness to testify against the defendant was merely impeaching and therefore not material where the third party did not actually testify, where other evidence thoroughly supported the defendant's conviction, and where the co-defendant was impeached with a series of false statements about the offense, and probably would not have changed the result of the trial.

– The first two requisites to prevail on a newly-discovered evidence claim under *Jones v. State*, 479 N.W. 265, 274 (Iowa 1991) were established by Moon to the extent that summary judgment against him was not warranted. He was not aware at the time of his verdict that the third party had made statements to law enforcement, so the evidence was discovered after the statute of limitations had run. And he could not have known about the potential witness' testimony

through the exercise of due diligence. Moon was unable, however, to prove the final two *Jones* requirements.

3. Procedure

a. Discovery

Powers v. State, 911 N.W.2d 774 (Iowa 2018)
In a postconviction relief action challenging petitioner's conviction of sexual abuse, the district court abuses its discretion in denying discovery of investigative reports of a subsequent allegation of sexual abuse of the same victim by different assailants, that could have produced evidence that the victim made false allegations.
– The issue in determining the eligibility for discovery in postconviction is not whether the evidence would be admissible, but rather whether it "appears reasonably calculated to lead to the discovery of admissible evidence." Iowa R. Civ.P. 1.503. This is a low threshold.

b. Dismissal for Lack of Prosecution – Reinstatement

Villa Magana v. State, 908 N.W.2d 255 (Iowa 2018)
Where a postconviction relief application is dismissed under Iowa Rule of Civil Procedure 1.944 for failure to prosecute, the district court errs in failing to reinstate the application where the failure to prosecute was the product of ineffective assistance of counsel.

– Justice Per Curiam followed *Lado v. State*, 804 N.W.2d 248 (Iowa 2011) in reaching this result. Ineffective assistance that enables a postconviction relief action to lapse and be dismissed under Rule 1.944 is structural error, and the applicant need not demonstrate that he or she would have been successful on the merits. Partially for that reason, Justice Per Curiam reached the result under *Lado* despite the fact that the *Lado* issue was not raised by the applicant until his reply brief. It was also significant that, although Villa did not raise *Lado*, the state attempted in its brief to refute the *Lado* analysis. So the issue was considered by the court. An additional complication was the fact that Villa's appellate counsel in postconviction was also his postconviction trial counsel. Justice Per Curiam noted that counsel should probably have withdrawn, but forged ahead and granted reinstatement.

c. Limitations

Moon v. State, 911 N.W.2d 137 (Iowa 2018)
Under the Iowa Code §822.3 exception to the three-year limitation on the filing of a postconviction relief petition for "a ground of fact or law that could not have been raised within the applicable time period," a "relevant" ground of fact is one that has the potential to qualify as material evidence, and petitioner is not required to establish that the outcome of the underlying case would likely or probably have been changed.

– This standard was set by the Court in *Harrington v. States*, 659 N.W. 2d 509 (Iowa 2003).

d. Successive Applications

(1) Cause for Raising Issue Not Raised Initially

Allison v. State, 914 N.W.2d 866 (Iowa 2018)
For issues such as ineffective assistance of counsel for which the initial review occurs in a postconviction procedure, ineffective assistance of postconviction counsel may constitute "sufficient reason" under Iowa Code § 822.8 for not raising or inadequately raising the issue in the initial postconviction relief proceeding, justifying a subsequent application.

(2) Filing Outside the Limitation Period

Allison v. State, 914 N.W.2d 866 (Iowa 2018)
Where an applicant files an initial postconviction relief application within the three-year Iowa Code § 822.3 limitation period, but then desires to file a subsequent application outside of the limitation period arguing that postconviction counsel was ineffective in advancing the claim of ineffective assistance of trial counsel (in cases in which postconviction constitutes the court of initial review of such claims), the filing of the subsequent application relates back to the timely original application, and is not barred by the limitation.

-- This decision at least partially overrules the holding in *Dibble v. State*, 557 N.W.2d 881 (Iowa 1996) that a second or subsequent postconviction application must be filed within the § 822.3 limitation period. In his dissent, Justice Waterman warned that this decision will spark a deluge of cases. For the majority, Justice Appel responds that lawyers must file pleadings in good faith, and the system will dispose of claims lacking any basis of law and fact.

C. Federal Habeas Corpus

1. Exhaustion in State Court – Exception Where No State Vehicle for Review Exists – Ineffective Appellate Counsel

Davila v. Davis, _____ U.S. _____, 137 S.Ct. 2058, _____ L.Ed.2d _____ (2017)
The *Martinez v. Ryan*, 566 U.S. 1 (2012) exception to the rule that the federal habeas court will not hear claims not fully exhausted in state court, available in jurisdictions where claims of ineffective assistance of trial counsel are not raised on direct appeal but rather preserved for collateral review, where there may be no right to counsel, does not extend to permit the federal habeas court to consider for the first time claims of ineffective direct appellate counsel.

2. State Application of Federal Law

a. General

Kernan v. Cuero, _____ U.S. _____, 138 S.Ct. 4, _____ L.Ed.2d _____ (2017)
Because there is no firmly established Supreme Court decision holding that, after the defendant accepts a guilty plea to a particular range of imprisonment, and enters a plea of guilty, then the government amends the charge to allege an additional prior conviction subjecting the defendant to a substantially higher mandatory minimum sentence, the remedy is to allow the defendant to plead anew rather than to order specific performance of the original agreement, the state court did not render a decision contrary to firmly established Supreme Court precedent and habeas relief is not appropriate.

– It appears that even Justice Per Curiam agrees that Mr. Cuero got screwed, but the AEDPA standard is the AEDPA. Hey, here's an idea. Why not just deny cert and leave things the way they are?

I think I know the answer to that one. *Cuero* comes out of the Ninth Circuit and is announced on the first day of the 2017 term. It appears to be a time-honored Supreme Court tradition, kicking off each term reversing a Ninth Circuit decision in a *per curiam* opinion.

Dunn v. Madison, _____ U.S. _____, 138 S.Ct. 9, _____ L.Ed.2d _____ (2017)
The state court does not render a decision of law and fact "so lacking in justification" as to be erroneous "beyond any possibility for fairminded disagreement" in finding that a capital defendant, though suffering from a mental defect that impairs his memory of this offense, was able to understand that he was being punished for a murder and that his execution thus is not cruel and unusual punishment under *Panetti v. Quarterman*, 551 U.S. 930 (2007).

McWilliams v. Dunn, _____ U.S. _____, 137 S.Ct. 1790, _____ L.Ed.2d _____ (2017)
Under the Supreme Court decision in *Ake v. Oklahoma*, 470 U.S. 68 (1985), where there is a question concerning the defendant's sanity at the time of the offense the government must provide to an indigent defendant access to a mental health expert sufficiently available to effectively "assist in evaluation, preparation, and presentation of the defense.," and in denying such access to a defendant where those circumstances exist the state has rendered a decision contrary to or that involved an unreasonable application of the clearly established federal law set out in *Ake*.

– In an opinion written by Justice Breyer, the majority expressly declined to decide the broader question upon which the Court had granted review, which was whether the defense is entitled to have a *defense* expert, as opposed to a neutral one. Must jurisdictions now allow a defense expert. The majority also left it to the lower courts to determine whether the error was prejudicial.

Virginia v. LeBlanc, ____ U.S. _____, 137 S.Ct. 1726, _____ L.Ed.2d _____ (2017)
The state court of Virginia's determination that a state "geriatric release" program, that allowed prisoners who were 65 years old and had served at least five years of their state sentence, or 60 years old and had served at least ten years, to apply for parole, satisfied the holding in *Graham v. Florida*, 560 U.S. 48 (2010) that inmates convicted as minors must have a meaningful opportunity to obtain release by demonstrating increased maturity and rehabilitation was not an unreasonable application of federal law, and may not be overturned in a federal habeas corpus proceeding.

b. Summary Opinions

Wilson v. Sellers, _____ U.S. _____, 138 S.Ct. 1188, _____ L.Ed.2d _____ (2018)
To determine whether the state court correctly interpreted federal law where the highest court affirmed a lower court summarily with no reasons given, the federal habeas court may "look through" the summary decision to the reasoning of the lower court and it is presumed that the higher court relied upon that reasoning.

– It is, however, a rebuttable presumption. Justice Breyer essentially followed the reasoning of Justice Scalia in *Ylst v. Nunnemaker*, 501 U.S. 797 (1991).

3. Harmless Error – Structural Error – Unobjected

Weaver v. Massachusetts, _____ U.S. _____, 137 S.Ct. 1899, _____ L.Ed.2d _____ (2017)
While closure of jury selection because of lack of space may amount to denial of a public trial, a Sixth Amendment violation determined to be structural error not susceptible to harmless error analysis, where closure is not objected to by trial counsel and thus the issue is raised as ineffective assistance of trial counsel, defendant is required to demonstrate prejudice to obtain a new trial.

4. Mootness

United States v. Sanchez-Gomez, _____ U.S. _____, 138 S.Ct. 1532, _____ L.Ed.2d _____ (2018)
There is no informal class action procedure in federal habeas court that allows petitioners to continue litigate claims that are likely to reoccur in other cases in the future but have become moot in the petitioners' cases.

5. Certificates of Appealability

Tharpe v. Sellers, _____ U.S. _____, 138 S.Ct. 545, 199 L.Ed.2d 424 (2018)
The circuit court of appeals erred in finding that a capital habeas corpus applicant had failed to show prejudice, and therefore denying a certificate of appealability, when a juror who participated in the decision to impose the death penalty on the African-American defendant subsequently gave an affidavit admitting to strong racist views, which amounted to clear and convincing evidence that the state court's factual determination was wrong when it found that the juror's decision to impose the death penalty was not based on race.

– This decision by Justice Per Curiam has no likely precedential effect, and very little impact. The Court admits that the prejudice issue is only part of the inquiry into whether a certrificate of appealability is warranted, and so this decision merely delays the inevitable. It does manage to draw out a vitrolic dissent from Justice Thomas, joined by Justices Alito and Gorsuch. Apparently desiring to seize the harsh rhetoric mantel formerly worn by the late Justice Scalia, Thomas complains that the "Court must be disturbed by the racist rhetoric in that affidavit, and must want to do something about it. But the Court's decision is no profile in moral courage. By remanding this case to the Court of Appeals for a useless do-over, the Court is not doing Tharpe any favors. And its unusual disposition of his case callously delays justice for Jaquelin Freeman, the black woman who was brutally murdered by Tharpe 27 years ago. Because this Court Should not be in the business of ceremonial handwringing, I respectfully dissent."

I think it is interesting that the Court discloses the identity of the racist juror, Barney Gattie. In the affidavit given to investigators for Mr. Tharp, Gattie articulated his opinion that "there are two types of black people: 1. Black folks and 2. Niggers." The defendant was someone "who wasn't in the 'good' black folks category in may book, should get the electric chair for what he did." He indicated that "[s]ome of the jurors voted for death because they felt Tharpe should be an example to other blacks who kill blacks, but that wasn't my reason." Finally, he mused, "After studying the Bible, I have wondered if black people even have souls."

Several days after giving this affidavit, Gattie gave a second affidavit to prosecutors stating, in so many words, that (1) he was too drunk to know what he was saying, (2) he wasn't under oath, (3) his statements were taken out of context and (4) he was essentially led to make them by the defense attorneys.

VII. Miscellaneous Issues

A. 42 U.S.C. § 1983 – Qualified Immunity for Law Enforcement.

District of Columbia v. Wesby, _____ U.S. _____, 138 S.Ct. 577, _____ L.Ed.2d _____ (2018)
Law enforcement officers enjoy qualified immunity from suit under 42 U.S.C. § 1983 unless it is clearly established at the time that their actions were in violation of the law so, although individuals arrested for being unlawfully present on a premises claimed to have been given permission to be there, officers may, in good faith, disbelieve the validity of the claims, and their actions are protected by qualified immunity.

Kisela v. Hughes, _____ U.S. _____, 138 S.Ct. 1148, _____ L.Ed.2d _____ (2018)
Assuming that a law enforcement officer violated 42 U.S.C § 1983 petitioner's rights under the Fourth Amendment in shooting her as she emerged from her house and walked towards her roommate carrying a kitchen knife (not pointed at the roomate) after it was reported the woman was acting erratically in stabbing at a tree with the knife, the officer is entitled to summary judgment on the ground that he possesses qualified immunity where the constitutional violation is not clearly established under existing law.

– To pierce the veil of qualified immunity, the petitioner must demonstrate (1) that the behavior of law enforcement violates a statutory or constitutional protection, and (2) that the violation is clearly established to the extent that a reasonable person would be aware.