2018-19 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 any other person or entity.

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I. Constitutional Law

A, Art. I, section 1 (legislative power) — Delegation of Powers to the Executive

Gundy v. United States, _____ U.S. _____, 139 S.Ct. 2116, _____L.Ed.2d_____(2019)
The provision of the sex offender registration notification act in 34 USC 20913(d) authorizing the Attorney General to specify the applicability of SORNA to individuals previously convicted of sex offenses prior to its enactment does not violate the article 1 section 1 separation of powers doctrine, because the Attorney General's discretion appears to be limited.

– The Act appears to require that the Attorney General must register all sex offenders. This is an extension on *Reynolds v. United States*, 565 U.S. 432 (2012).

This is an interesting decision by a four-Justice plurality. Justice Kavanaugh did not participate. Justice Alito concurred in the result only, indicating that he disagrees with the broad delegation principles articulated by the Court in the past, but following them as a matter of stare decisis. He suggested that he might join a decision overruling them.

Justice Gorsuch wrote a very persuasive dissent challenging the trend toward delegation. It seems apparent that once Justice Kavanaugh joins the Court on a case of this nature the outcome might be different.

Gundy is also interesting in that it's one of those cases in which, because of the nature of the offense involved, the Justices who normally champion the rights of the accused line up against the accused, and the conservatives side with him.

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

Behm v. City of Cedar Rapids, 922 N.W.2d 524 (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.

C. Art. I, §10, cl. 1 (Ex Post Facto)

State v. Aschbrenner, 926 N.W.2d 240 (Iowa 2019)
A state law that requires individuals on the sexual offender registry to report internet identifiers such as social media identities within five business days of obtaining them is not punitive, and thus does not involve the Ex Post Facto Clause.

-- Aschbrenner based his argument upon the 2018 decision in *In re T.H.*, 913 N.W.2d 578 (Iowa 2018), which found that sex offender registration requirements were punitive as applied to juvenile registrants. Justice Waterman limited *T.H.* to juveniles.

State v. Petty, 925 N.W.2d 190 (Iowa 2019)
Imposition of a surcharge under Iowa Code § 911.2B violates the Ex Post Facto Clause of the both the federal and state constitutions where § 911.2B became effective on July 1, 2015, and the defendant's offense occurred on June 1, 2015.

-- Where a portion of a sentence violates the Ex Post Facto clause, the remedy is removal of that portion of the sentence only, and remand for corrected sentence.

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

Behm v. City of Cedar Rapids, 922 N.W.2d 524 (Iowa 2018)
A municipal Automated Traffic Enforcement ordinance that 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, 922 N.W.2d 524 (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.

.E First Amendment – Free Speech

1. Internet Access

State v. Aschbrenner, 926 N.W.2d 240 (Iowa 2019)
A state law that requires individuals on the sex offender registry to report internet identifiers within five business days does not violate the First Amendment, because the reporting requirement generally will not come into play until after the communication rather than before.

2. Retaliatory Arrests – 42 U.S.C. §1983 Civil Suit

Nieves v. Bartlett, ____ U.S. _____, 139 S.Ct.1715, ____ L.Ed.2d _____ (2019)To prevail in a civil action under 42 U.S.C. § 1983 on a claim that plaintiff's arrest was motivated by an intent by law enforcement to retaliate for plaintiff's statements, the plaintiff must demonstrate either that no probable cause existed for the arrest or that similarly situated defendants would not have been taken into custody absent the plaintiff's statements.

F. Fourth Amendment

1. 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. The government 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).

2. Warranted Searches

a. Misrepresentation of Facts

State v. Baker, 925 N.W.2d 602 (Iowa 2019)
The fact that the defendant had been arrested coming to Iowa from California with a large quantity of marijuana is probable cause supporting a search warrant, and the fact that in applying for a warrant law enforcement omitted the fact that the defendant was not arrested is not a material misstatement.

State v. Baker, 925 N.W.2d 602 (Iowa 2019)
Law enforcement does not materially misstate facts in a warrant application with the assertion that the defendant was evading law enforcement, while leaving out the fact that the law enforcement he was evading was under cover, where the totality of circumstances support probable cause.

-- Law enforcement is not required to include in a warrant application facts that cast doubt on probable cause.

b. Confidential Informant

State v. Baker, 925 N.W.2d 602 (Iowa 2019)
The magistrate does not err in issuing a search warrant based in part upon information from a confidential informant, despite the absence of a showing of the informant's credibility, when law enforcement conducted an independent investigation that corroborated the information.

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.

3. Warrantless Searches

a. "*Terry* Stops

(1) Automobile Stops -- Pretextual Stops

State v. Brown, 930 N.W.2d 840 (Iowa 2019)
Notwithstanding law enforcement's subjective reasons for effecting an automobile stop, the stop is valid under article 1, section 8 of the Iowa Constitution when a reasonable officer would have probable cause to believe the subject committed a traffic offense.

-- More clearly than ever, the final decision of what essentially was the 2018 Iowa Supreme Court term illustrates how important it is to take gubernatorial elections seriously. With the swearing in of Justice Christopher McDonald this year, the golden era of Iowa criminal jurisprudence that had lasted approximately a quarter century ground to a complete stop. The effects are unmistakable.

For some time, our progressive Court has been sending out signals that Iowa would soon break with the United States Supreme Court interpretation of the Fourth Amendment in *Whren v. United States*, 517 U.S. 806 (1996). The Iowa Court would announce that pretextual stops, where law enforcement pulls your teenaged son over on a hunch or, even worse, because of his dark skin, and justifies it with a rationalization on the level of a burnt out license plate light, are not permitted under the Iowa Constitution.

But then *this* happened.

Then the Democratic Party couldn't find anybody better than Jack Hatch or Fred Hubbell to run for governor, and all that progress made an about

turn.

Chief Justice Cady, who will soon lose his leadership position on the Court due to some back alley politics in Des Moines, dissented.

Justice Brent Appel went to town. In a dissent that spanned 107 pages of the 162-page slip opinion, Justice Appel carefully traced the course of events that led to *Whren* and the reasons why it was appropriate for Iowa to abandon a practice which has led, among other things, to a racist application of the law.

Justice McDonald didn't just swing the vote to the conservatives. He also authored a bone-chilling concurring opinion asking why, when the Iowa Court diverts from the federal interpretation of a parallel right under the Federal Constitution, the federal interpretation has to be the floor? Why can't the state court interpret its constitution to provide *less* protection than the federal constitution?

Does anyone want to field that one?

State v. Haas, 930 N.W.2d 699(Iowa 2019)
Notwithstanding law enforcement's subjective reasons for stopping a vehicle, law enforcement has reasonable grounds under article I, section 8 of the Iowa Constitution to seize it when they receive information that the driver's license of the registered owner of the vehicle, who they presume is driving the vehicle, is suspended, and where the license plate illumination system appears to be malfunctioning.

(2) Reasonable Suspicion for Vehicular Stop

State v. Baker, 925 N.W.2d 602 (Iowa 2019)
Law enforcement have reasonable suspicion to stop defendant's vehicle after they observe what appears to be a hand-to-hand drug transaction, where the defendant had been observed acting suspiciously in the area two weeks earlier, and where an anonymous caller told police that the defendant had recently returned to town with a large quantity of marijuana.

-- Each of these factors, on their own, might not support a stop. But the totality of circumstances supported it.

(3) Automobile Stops – Prolonged Detention

State v. Salcedo, _____ N.W.2d _____ (Iowa 2019)
Law enforcement unreasonably extended the detention of a vehicle stopped for driving in the passing lane where the defendant was questioned for several minutes about unrelated criminal activity for which they lacked reasonable suspicion, and none of the questioning related to the offense for which the vehicle was stopped.

– Fourteen minutes elapsed before law enforcement requested and obtained Salcedo's consent to search the vehicle. Law enforcement admitted at the detention hearing that their intention was to investigate drug-related offenses.

(4) 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 districts under § 461A.46. Therefore, the 10:30 closing time was in effect, and law enforcement had probable cause to make the stop.

(5) Unconscious Subjects

Mitchell v. Wisconsin, _____ U.S. _____, 139 S.Ct. 2525, _____ L.Ed.2d _____ (2019)
There is a compelling need for a non-consensual blood alcohol test where law enforcement has probable cause to believe the defendant has been operating while intoxicated and is unconscious, and thus unable to consent to a test.

-- *Mitchell* is a plurality opinion of four Justices of the Court, written by Justice Alito. It is likely to have force, because Justice Thomas joined the result, making the broader argument that, because alcohol and other substances dissipate rapidly in the blood, there is an exigency in every case in which they are involved. Such a holding would expressly overrule *Missouri v. McNeely*,

569 U.S. 141 (2013), which Justice Thomas argues was wrongly decided.

b. 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.

c. 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 case law. 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. Assu333ming 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.

d. 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, 919 N.W.2d 1 (Iowa 2018)
When police receive a report of a vehicle going into a ditch at 4:30 a.m., find the vehicle in the ditch, but do not find the driver and see no signs of injury, then subsequently 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 of the decision in *Coffman*. The second and third prongs of the *Coffman* test 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 rather would have requested assistance.

4. Exclusionary Rule – Administrative Revocation Proceedings

Westra v. Iowa Department of Transportation, 929 N.W.2d 754 (Iowa 2019)
Where law enforcement has reasonable suspicion to stop and search a vehicle, the exclusionary rule does not apply to preclude use in an administrative revocation proceeding of evidence obtained during the stop on the ground that law enforcement lacked statutory authorization to conduct the stop, except where the evidence was excluded in a corresponding criminal proceeding.

-- The court held in *Westendorf v. Iowa Department of Transportation*, 400 N.W.2d 553 (Iowa 1987) that the exclusionary rule does not apply in revocation proceedings. Subsequently, the Legislature adopted an exception in Iowa Code § 321J.13(6) for cases in which evidence was found to be inadmissible in a criminal OWI proceeding. Westra asked that the exception should apply equally to cases in which, for whatever reason, criminal charges were not pursued. The language of the statute does not support this interpretation, Justice Mansfield responded.

G. 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*.

d. Dual Sovereignty

Gamble v. United States, _____ U.S. _____, 139 S.Ct. 1960, _____ L.Ed.2d _____ (2019)
Successive prosecutions in state then federal court based on identical conduct and for charges with identical elements are not prosecutions for the "same offense," because they are committed against different sovereigns, and thus the prosecution in federal court of a defendant who has previously been convicted or acquitted in state court of what appear to be the same charges does not violate the Fifth Amendment.

-- The principle of dual sovereignty has been in affect for years. There was hope that, because Justice Ginsburg and Justice Thomas have expressed disagreement with it, that the Court was taking *Gamble* to overrule prior case law. Justice Ginsburg wrote a passionate dissent. Justice Gorsuch, who is becoming one the justices often favorable to criminal defendants, also dissented. Justice Thomas wrote a long opinion discussing when it is appropriate to disregard *stare decisis*. But he concurred with the majority.

2. Self-Incrimination

a. Self-Incrimination – Assertion of Right at Trial

State v. Heard, _____ N.W.2d _____ (Iowa 2019)
A non-party witness who makes a blanket assertion of his or her privilege against self-incrimination during a criminal trial may not be required to assert the privilege in the presence of the jury, even if the witness had, in fact, testified at an earlier trial of the same defendant whose conviction had been reversed on appeal.

b. 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.

H. Sixth Amendment

1. Right to Jury Trial

a. Jury Selection

(1) Fair Cross Section

State v. Lilly, 930 N.W.2d 293 (Iowa 2019)
To assure that criminal juries represent a fair cross section of the community, under article I, section 10 of the Iowa Constitution the courts are to employ a statistical analysis under which a disparity exceeding one standard deviation establishes a prima facie case of underrepresentation of the distinctive group in the venire.

-- In *State v. Plain*, 898 N.W.2d 801 (Iowa 2017) the Court abandoned the absolute disparity test articulated by the Court a quarter century earlier in *State v. Jones*, 490 N.W.2d 787 (Iowa 1992) that essentially made it impossible to establish underrepresentation of distinctive groups in Iowa, in favor of a hybrid of tests including (1) absolute disparity, (2) comparative disparity and (3) statistical analysis. In *Lilly,* the Court moves away from the former two tests, and endorses the third.

The Court remanded Lilly's case for a determination as to whether underrepresentation is due to systematic exclusion.

As in *State v. Veal*, 930 N.W.2d 319 (Iowa 2019), it is Justice Mansfield who joins what is now considered the liberal minority to form the four-justice majority in this case. Justice Appel is eloquent as always, stressing that the

changes in jury selection procedures is only a start. Efforts to root out implicit bias must affect all areas of trial, not just jury selection.

The downside to this case, although not totally unexpected, is Justice McDonald's partial dissent. Justice McDonald takes issue, not only with Iowa Supreme Court precedent, but with what essentially is the settled federal interpretation that the Sixth Amendment (and the Iowa Constitution) guarantees a cross section of the community in the jury venire. If this opinion is a harbinger of things to come, we be in for even a much more rocky road than we had anticipated, as the Court takes an abrupt right turn.

State v. Veal, 930 N.W.2d 319 (Iowa 2019)
Under the federal standard for underrepresentation in jury panels articulated in *Casteneda v. Partida*, 430 U.S. 482 (1977) evidence of a downward variance of two standard deviations from the representation of a particular group in the community population is necessary to establish underrepresentation of that group in the jury pool.

-- In *State v. Lilly*, 930 N.W.2d 293 (Iowa 2019), decided the same day as *Veal*, the Court held that, under article I, section 10 of the Iowa Constitution, defendant must prove only that underrepresentation exceeded one standard deviation. Veal raised his claim solely under the Sixth Amendment, so Justice Mansfield based the ruling on federal analysis.

State v. Lilly, 930 N.W.2d 293 (Iowa 2019)
Under article I, section 10 of the Iowa Constitution, "run-of-the-mill management practices," including creation of address lists, policies regarding jury excuses and handling of jury summonses, can support a claim of systematic exclusion, if they have the effect of producing underrepresentation of a distinctive group in the jury venire.

State v. Veal, 930 N.W.2d 319 (Iowa 2019)
While, under article I, section 10 of the Iowa Constitution, "run-of-the-mill jury management practices" can amount, under some circumstances, to systematic exclusion, *State v. Lilly*, 930 N.W.2d 293 (Iowa 2019), this may not be the case under the Sixth Amendment, as articulated in *Berghuis v. Smith*, 559 U.S. 314 (2010).

-- Even under the federal standard, Justice Mansfield determined that Veal had established underrepresentation. He had not established systematic exclusion. He was unable to do so, because the standards announced in his case and *Lilly*

obviously had not been announced. The case was remanded to permit him to attempt to make that showing.

This is a curious case in that the remaining members of what is now the conservative majority of the Court, Justices Waterman, Christensen and McDonald) dissented as to this issue. On a separate issue, in which Justice Mansfield affirmed the denial of a *Batson* claim, Justices Wiggins and Appel dissented. Chief Justice Cady joined on all issues, but also expressed agreement with a separate opinion by Justice Wiggins calling for the end of peremptory challenges.

In *State v. Williams*, 929 N.W.2d 621 (Iowa 2019), decided the same day as *Lilly* and *Veal*, defense counsel also cited only the Sixth Amendment, so his challenge is governed by *Berguis*, and remanded like the others. The *Williams* majority contains the following summary of *Veal* and, in many respects, *Lilly*:

> In two other cases decided today, we have discussed what a defendant must prove to establish a fair-cross-section constitutional violation. . . . As we have explained, under the second *Duren/Plain* prong, the percentage of the distinctive group in the population should be determined using the most recent available census data. . . These data may be adjusted to account for those who are actually eligible to serve as jurors, for example, by eliminating the population that is under eighteen and the population (if any) that is incarcerated in a state prison located in the county. . .
> For Sixth Amendment purposes, the defendant must then show that the percentage of the group in the jury pool is less than this expected percentage by at least two standard deviations. . . Pools may be aggregated, so long as pools closer in time to the trial date are not omitted when earlier pools are included. . . The aggregation of pools can help solve the "small numbers" problem observed by the district court in its thoughtful ruling.
>
> Once underrepresentation has been shown, the defendant must then show that some practice or practices caused the underrepresentation – i.e. the third *Duren/Plain* prong.. . . As we have explained in *Veal*, for Sixth Amendment purposes, the practice must be something more than an item on the *Berguis v. Smith* "laundry list."

State v. Williams, 929 N.W.2d at 629-30.

(2) *Batson* Claims

State v. Veal, 930 N.W.2d 319 (Iowa 2019)
Under the unique circumstances of a case in which the prosecution strikes the one remaining minority jury panelist on the ground that the lead prosecutor had, in the past, prosecuted the panelist's father on a case involving multiple class "A" felonies in a trial at least partially attended by the panelist, the district court is correct in finding that the state has presented a valid, race-neutral reason for rejecting the challenge.

. b. Right to Jury Trial – Federal Supervised Release Violations with Minimum Sentences

United States v. Haymond, _____ U.S. _____, 139 S.Ct. 2369, _____ L.Ed.2d _____ (2019)
The provision of 18 U.S.C. § 3583(k) that in the case of a defendant on supervised release for certain sex offenses, who violates supervised release by committing certain sexual offenses, supervised release must be revoked and the defendant be sentenced, on the violation alone, to a period of incarceration no less than five years, violates the defendant's Sixth Amendment right to trial by jury unless the defendant is afforded the right to a jury trial at which the violation must be proven beyond reasonable doubt.

-- In the four-justice plurality decision, to which Justice Breyer filed an opinion concurring in the judgment, Justice Gorsuch found § 3583(k) violated not only the Sixth Amendment right to trial by jury, but the Fifth Amendment right to Due Process as well.

2. Right to Counsel

a. Attachment of Right

(1) Initial appearance

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.

(2) Stages of Trial – Motion to Correct Illegal Sentence

Jefferson v. Iowa District Court, 926 N.W.2d 519 (Iowa 2019)
A proceeding on a motion to correct an illegal sentence is a stage of trial so, provided that the defendant is truly challenging the legality of his or her sentence and not the actual conviction or the procedures utilized at sentencing, the defendant has a right to counsel where the motion is filed even after the case is concluded.

-- This case was decided under Iowa R.Crim.P. 2.28(1) and not under the Constitution.

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

State v. Lorenzo Baltazar, _____ N.W.2d _____ (Iowa 2019)
The "stand your ground" justification under Iowa Code § 704.1(3) applies only where the defendant is not engaging in illegal activity, so counsel is not ineffective in failing to object to a justification instruction that predates enactment of § 704.1(3) where the defendant was committing the offense of carrying weapons when the murder for which was charged was committed.

– Justice Christenson also found that Lorenzo was not prejudiced by the failure, in view of evidence that he did not act in any form of self-defense.

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.

State v. Macke, 933 N.W.2d 226 (Iowa 2019)
Counsel is ineffective in failing to object when the prosecutor, who had silently acquiesced during the defendant's plea hearing when the defense announced that the parties had agreed to a joint recommendation of a deferred judgment, argued at sentencing for supervised probation and the district court accepted the government's recommendation.

– This is the woman who left her four children, aged six through twelve, home alone in their Johnston apartment while she went off to Germany. Maybe it's the effect of twenty year of federal sentencing practices, but it strikes me that even a period of supervised probation, without a deferred judgment, is a pretty damn lenient sentence.

(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. Walker, _____ N.W.2d _____ (Iowa 2019)
Defendant in a prosecution for sexual abuse and lascivious acts is not prejudiced by the failure of defense counsel to object to the admission of the hearsay testimony of a nurse who repeats statements made by the victim and her mother, where there is overwhelming evidence of the defendant's guilt, including the defendant's own admissions, and where the objectionable testimony is merely cumulative to evidence that was properly admitted.

(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.

Garza v. Idaho, ____ U.S. ____, 139 S.Ct. 738, ____ L.Ed.2d ____ (2019)
The principle that defense counsel is ineffective for failing to file an appeal of a guilty plea at the defendant's request, and that the defendant need not show prejudice to prevail on this ground, applies whether or not the defendant executed an appeal waiver in pleading guilty.

-- The Court in *Garza* extends the holding in *Roe v. Flores Ortega*, 528 U.S. 470 (2000), in which counsel was ineffective in failing to accede to the client's request to appeal, but in which no appellate waiver was executed. Justice Sotomayor explains that the filing of an appeal is a ministerial function. While many grounds for appeal are extinguished by a guilty plea, and especially where there is an appellate waiver, claims like prosecutorial misconduct may not. The defendant has the authority to make the decision as to whether or not to file an

appeal. Once the appeal is filed, it is for counsel to select the appropriate non-waived issues, are there are any.

I. 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 in Wickes to reach the second and third prongs 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 waved 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. Life With Parole

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. 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.

d. Parole – Procedures

Bonilla v. Iowa Board of Parole, 930 N.W.2d 751 (Iowa 2019)
As long as the rules and procedures of the Iowa Board of Parole can be applied in such a way in cases involving offenses committed as a juvenile that the Board considers the inmates "demonstrated maturity and rehabilitation" and recognizes that "children are different," the procedures do not facially violate the Eighth Amendment.

-- Justice Appel explores a plethora of issues in *Bonilla*. He makes it clear that Bonilla has only challenged the system facially and not as applied. In response to a facial challenge, the statute, etc., survives if it can applied in any case in a way that survives constitutional scrutiny. Justice Appel utilizes the theory of constitutional avoidance, under which courts endeavor to resolve cases on non-constitutional grounds before holding a statute invalid.

4. Death Penalty

a. Intellectual Disability

Moore v. Texas, _____ U.S. _____, 139 S.Ct. 666, _____ L.Ed.2d _____ (2019)
Where scientific testing reveals that the defendant is on the line with respect to a deficit in intellectual function, where there are indications that the defendant possesses adaptive deficits, and there is evidence that the deficits set in when the defendant was a minor, the defendant suffers from intellectual disability and may not be executed.

-- The parties were in agreement that the three-part test for intellectual disability is whether (1) using criterion from testing, the defendant possesses a deficit in intellectual functions, (2) the defendant possesses adaptive deficits, determined using clinical analysis

and also intellectual measures, and (3) the onset of the deficits occurred when the defendant was a minor.

This was Mr. Moore's second trip up to the Court. The Texas Court of Appeals initially relied on a test in its prior decision in *Ex parte Briseno*, 135 S.W.3d 1 (Tex.Crim.App. 2004) which relies heavily on manifestations of adaptive deficits that can be interpreted by lay persons. The Supreme Court remanded the case on the ground that intellectual disability should be measured by mental health professionals, and not by lay perception.

On remand, the Texas Court of Appeals gave lip service to the Supreme Court opinion, but rejected *Moore's* position using many of the same reasons it used during the first appeal.

It just looks like the Republic of Texas really wants to kill this guy, and the Supreme Court doesn't.

Madison v. Alabama, _____ U.S. _____, 139 S.Ct. 718, _____ L.Ed.2d _____ (2019)
While the mere fact that the defendant is unable to remember his or her offense does not prevent the defendant from being executed, where the defendant suffers from dementia or some other condition to the extent that he or she is unable to comprehend the reason why the State wishes to execute him, the Eighth Amendment precludes execution.

-- It is not necessary that the defendant suffer from psychosis or delusions. The key inquiry is whether the defendant is able to understand the reason he has been singled out for capital punishment. The case was remanded to the State court to determine if this standard has been met.

b. Method of Execution

Bucklew v. Precythe, _____ U.S. _____, 139 S.Ct. 1112, _____ L.Ed.2d _____ (2019)
Despite the fact that the petitioner suffered from a rare medical condition that may make the state's lethal injection painful the petitioner, like other death row inmates challenging the method of execution as violative of the Eighth Amendment, must propose an alternative method of execution that is feasible and readily implemented, and must demonstrate that the proposed alternative would be less painful.

-- The "feasible, readily implemented" alternative requirement was announced in a plurality decision of the Court in *Baze v. Rees*, 553 U.S. 35 (2008), and then adopted by the majority in *Glossip v. Gross*, 135 S.Ct. 2726 (2015). Bucklew argued that, under the

facts of his case, the requirement should not apply. Additionally, Bucklew did propose an alternative to lethal injection -- hypoxia by nitrogen gas.

In the Eighth Circuit, two judges with Iowa roots articulated lone support for Mr. Bucklew's challenge to summary judgment. In her dissent to the denial of *en banc* reconsideration, Judge Jane Kelly agreed that the feasible, readily implemented alternative should not apply to an as-applied challenge such as Bucklew's. And Judge Steve Colloton found at least a triable issue in the assertion that nitrogen hypoxia would subject Bucklew to less pain than lethal injection.

5. Excessive Fines – Incorporation to States

Timbs v. Indiana, _____ U.S. _____, 139 S.Ct. 682, _____ L.Ed.2d _____ (2019)
The Eighth Amendment proscription of excessive fines is incorporated in the 14th Amendment Due Process Clause to apply to the States.

J. Fourteenth Amendment

1. Substantive Due Process

a. Juveniles

(1) Liberty Interests

Bonilla v. Iowa Board of Parole, 930 N.W.2d 751 (Iowa 2019)
Under both the Fourteenth Amendment and Iowa Const. art I, sec. 9, an inmate convicted for offenses committed as a juvenile who is appearing before the Iowa Board of Parole has a liberty interest in the proper application of the Eighth Amendment holdings in *Graham v. Florida*, 560 U.S. 48 (2010) and *Miller v. Alabama*, 567 U.S. 460 (2012) and their prodigy.

-- Justice Appel concluded that the procedures followed by the Iowa Board of Parole survived a facial due process challenge. Bonilla did not lodge an as applied challenge. In some cases, it is necessary to allow the inmate to appear in person. But it is not necessarily mandated in each routine annual hearing. Inmates are allowed to see pertinent information in their files, although they do not have access to "generic notes" and some professional opinion records. Justice Appel upheld this, and also the fact that the Board of Parole allows some "unverified"

information in inmates' files. Inmates are not required categorically, in every case, to detailed grounds for denial of parole. Nor are *Graham* and *Miller* categorically violated by the fact that some inmates are not provided access to treatment that might facilitate their release.

There is no right to counsel in annual parole review hearings. Nor is there a categorical right to appointment of expert testimony at every annual review hearing.

It is important to note that the Court is not saying that an inmate may not challenge the Board's procedures as applied to his or her case. There were no as applied challenges in *Bonilla*.

(2) Felony Murder

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.

b. Mobile Speed and Red Light Cameras

Behm v. City of Cedar Rapids, 922 N.W.2d 524 (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. Constitutional Vagueness of a Statute

United States v. Davis, _____ U.S. _____, 139 S.Ct. 2319, _____L.Ed.2d_____(2019)
The provision of 18 USC 924(c), under which a defendant is subject to a consecutive minimum five-year sentence for possessing a firearm in furtherance of a drug trafficking offense or felony crime of violence, alternatively defining a felony crime of violence as being one that by its nature extension risk of physical force against the person or property of another, is constitutionally vague.

— In *Davis*, Justice Gorsuch builds upon the opinions of the Court in *Johnson v. United States*, 135 S.Ct. 2551 (2015), holding a similar residual clause of the Armed Career Criminal Act vague for the same reason, and in *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018), which reached a similar result with respect to the residual clause of 18 USC paragraph 16, defining what is a crime of violence for the various purposes in the Code. The key point of contention in *Davis* was Justice Gorsuch's reliance upon the categorical approach followed in *Johnson et al*, which examines the elements of the offenses with which the defendant may have been charged, rather than the defendant's actual conduct, to determine if the offense in which he or she engaged was a violent one.

Writing for the four-Justice dissent, Justice Kavanaugh focused on the primary distinction that *Johnson* and *Dimaya* involve defendants being punished more severely for prior violent behavior, while defendants are charged under 924(c) for possessing firearms in connection with a contemporaneous violent offense.

State v. Newton, 929 N.W.2d 250 (Iowa 2019)
As applied to a defendant for whom law enforcement has found reasonable grounds to invoke implied consent, the defendant has sufficient notice of the Iowa Code § 321J.2(1)(c) prohibition of operating a motor vehicle "[w]hile any amount of a controlled substance is present in the person," and § 321J.2(1)(c) is not, under the circumstances, constitutionally vague.

-- If you are driving, and if any detectible amount of a controlled substance is found in your blood or urine, you are operating while intoxicated. This is true whether or not you are impaired to any degree. As we know, marijuana can be found in the blood for up to a month after its use.

Mr. Newton challenged this provision as violating both procedural and substantive Due Process, under both the Iowa and United States Constitutions. Chief Justice Cady's response was that it is not the presence of the controlled substance alone that subjects this defendant to prosecution under §321J.2(1)(c). They wouldn't even be testing the blood or urine if law enforcement had not had reasonable grounds to invoke implied consent. It's not an element, exactly, but it's part of it. In other words, a person with a residual amount of a controlled substance in his or her system is subject to an irrebuttable presumption of operating while intoxicated if law enforcement is able to articulate grounds to invoke implied consent. Otherwise, the statute may be constitutionally vague.

Only Justice Appel dissented.

b. Excessive Fines – Incorporation to States

Timbs v. Indiana, _____ U.S. _____, 139 S.Ct. 682, _____ L.Ed.2d _____ (2019)
The Eighth Amendment proscription of excessive fines is incorporated in the 14th Amendment Due Process Clause to apply to the States.

-- Justice Ginsburg drops a footnote in her majority opinion that the sole exception to the principle that all the protections of the Bill of Rights are incorporated through the 14th Amendment is the requirement of jury unanimity in criminal proceedings. I don't know that the Court has previously made such a sweeping statement.

In separate concurrences, Justices Gorsuch and Thomas both articulate their belief that incorporation of the protections of the Bill of Rights should come through the Privileges and Immunities Clause, and not through the 14th Amendment.

c. Mobile Speed and Red Light Cameras

Behm v. City of Cedar Rapids, 922 N.W.2d 524 (Iowa 2018)
The provision of a municipal Automated Traffic Enforcement ordinance that permits vehicle owners to petition 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.

3. Equal Protection

a. Peremptory Strikes of Minority Jurors on Discriminatory Grounds.

Flowers v. Mississippi, _____ U.S. _____, 139 S.Ct. 2228, _____L.Ed.2d_____(2019)
An African-American defendant's 14th amendment right to Equal Protection in violated in a capital murder prosecution where the prosecutor struck all but one black jury panelist, where in the six trials in this case combined the same prosecutor had struck a total of 41 of the 42 prospective black jurors that it was in a position to strike including five of the six on the current panel, where the government engaged in disparately more questioning of prospective jurors who were African-American than those who were white, and where minority panelists were treated differently from similarly situated white panelists.

—Perhaps surprisingly, what appears to be Justice Kavanaugh's first major opinion in a criminal case should function as a potent weapon for criminal defendants with *Batson* issues. He stresses that he is making no new law, but rather applying Batson to an unusual set of facts. The bottom line is that, while each of the actions of the court and the prosecution might withstand scrutiny on their own, the totality of the circumstances of this case and the previous five attempts to convict Mr. Flowers demonstrate a pattern of discrimination.

Joined by Justice Gorsuch, Justice Thomas is equally aggressive in his dissent.

b. Automated Traffic Cameras

Behm v. City of Cedar Rapids, 922 N.W.2d 524 (Iowa 2018)
Use of an Automated Traffic Enforcement system, in which speed and red light violations are tracked using privately owned cameras, does not violate equal protection where they do not apply to commercial and government-owned vehicles and where out-of-state vehicle owners are permitted to participate in administrative hearings in writing, as the cost-saving justification for these exclusions is realistically conceivable and has basis in fact.

-- The "realistically conceivable" and "basis in fact" language flows from the holding in the second decision in *Racing Association of Central Iowa v. Fitzgerald*, 675 N.W.2d 1, 74 (2004) that parties challenging legislation on substantive due process grounds failed to make sufficient record demonstrating

that the governmental interest in the legislation is "insubstantial or empirically unsustainable."

II. Substantive Offenses

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

State v. Kelso-Christy, 911 N.W.2d 663 (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.

B. Child Endangerment – Sufficiency

State v. Benson, 919 N.W.2d 237 (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.

C. Driving Offenses

1. Operating with Controlled Substances

a. Right to Independent Chemical Test

State v. Smith, 926 N.W.2d 760 (Iowa 2019)
Where a driver suspected of being intoxicated does not make any mention of the possibility of taking an independent chemical test, law enforcement has no obligation under Iowa Code § 321J.11 to inform the driver that he or she has that right and to make the test available to that driver.

-- The arrestee invokes the right by making "any statement that can be reasonably construed as a request for an independent chemical test." *State v. Lukins*, 846 N.W.2d 902 (Iowa 2014).

b. Sufficiency

State v. Myers, 924 N.W.2d 823 (Iowa 2019)
The initial laboratory test used to determine if controlled substances are possibly present is, on its own, insufficient evidence to support a conviction of operating a motor vehicle while having any amount of a controlled substance in a person under Iowa Code § 321J.2(1)(c).

-- In my opinion § 321J.2(1)(c) has to be the most chickenshit provision in the Iowa Code. Section 321J.2(1)(a) criminalizes driving while *impaired* by a controlled substance. You don't have to be impaired to be convicted under (1)(c). You just have to have a measureable amount in your system. The prosecutor in *Myers* argued that the initial test, together with Myers' erratic driving and less than stellar performance on roadside testing, suffice to convict him. Those things might support a conviction under (1)(a), Justice Cady responds, but not one under (1)(c). Justice Mansfield argues in a special concurrence joined by Justices Christensen and Waterman that Double Jeopardy does not preclude the State prosecuting Mr. Myers now under (1)(a). He wasn't acquitted under that alternative. He simply wasn't convicted.

2. 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.

3. Sentencing – Habitual Offender

Noll v. Iowa District Court, 919 N.W.2d 232 {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.

4. Automated Traffic Enforcement (ATE) Systems

a. Sufficiency of Evidence

City of Cedar Rapids v. Leaf, 923 N.W.2d 184 (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, 922 N.W.2d 524 (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

to 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.

5. Administrative Revocation – Exclusionary Rule

Westra v. Iowa Department of Transportation, 929 N.W.2d 754 (Iowa 2019)
Where law enforcement has reasonable suspicion to stop and search a vehicle, the exclusionary rule does not apply to preclude use of evidence obtained in an administrative revocation proceeding on the ground that law enforcement lacked statutory authorization to conduct the stop, except where the evidence was excluded in a corresponding criminal proceeding.

-- The court held in *Westendorf v. Iowa Department of Transportation*, 400 N.W.2d 553 (Iowa 1987) that the exclusionary rule does not apply in revocation proceedings. Subsequently, the Legislature adopted an exception in Iowa Code § 321J.13(6) for cases in which evidence was found to be inadmissible in a criminal OWI proceeding. Westra asked that the exception should apply equally to cases in which, for whatever reason, criminal charges were not pursued. The language of the statute does not support this interpretation, Justice Mansfield responded.

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

1. 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.

2. 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.

3. Defenses – Stand Your Ground

State v. Lorenzo Baltazar, _____ N.W.2d _____ (Iowa 2019)
The "stand your ground" justification under Iowa Code § 704.1(3) applies only where the defendant is not engaging in illegal activity, so counsel is not ineffective in failing to object to a justification instruction that predates enactment of § 704.1(3) where the defendant was committing the offense of carrying weapons when the murder for which was charged was committed.

E. Firearms Offenses

1. 18 U.S.C. 924(c)(Possession of a Firearm in Furtherance of a Felony Crime of Violence or a Drug Trafficking Offense)

United States v. Davis, _____ U.S. _____, 139 S.Ct. 2319, _____L.Ed.2d_____(2019)
The provision of 18 USC 924(c), under which a defendant is subject to a consecutive minimum five-year sentence for possessing a firearm in furtherance of a drug trafficking offense or felony crime of violence, alternatively defining a felony crime of violence as being one that by its nature extension risk of physical force against the person or property of another, is constitutionally vague.

— In *Davis*, Justice Gorsuch builds upon the opinions of the Court in *Johnson v. United States*, 135 S.Ct. 2551 (2015), holding a similar residual clause of the Armed Career Criminal Act vague for the same reason, and in *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018), which reached a similar result with respect to the residual clause of 18 USC paragraph 16, defining what is a crime of violence for the various purposes in the Code. The key point of contention in *Davis* was Justice Gorsuch's reliance upon the categorical approach followed in *Johnson et al*, which examines the elements of the offenses with which the defendant may have been charged, rather than the defendant's actual conduct, to determine if the offense in which he or she engaged was a violent one.

Writing for the four-Justice dissent, Justice Kavanaugh focused on the primary distinction that *Johnson* and *Dimaya* involve defendants being punished more severely for prior violent behavior, while defendants are charged under 924(c) for possessing firearms in connection with a contemporaneous violent offense.

2. Federal Prohibited Persons in Possession – Scienter

Rehaif v. United States, ____ U.S. ____, 139 S.Ct. 2131, ____ L.Ed.2d ____ (2019)
To establish, under 18 U.S.C. §§ 922(g), that a defendant was a prohibited person in possession of a firearm, it must be proven both that the defendant knew he or she was in possession of the firearm and that he or she knew she possessed the status that brings the statute into play (i.e., being a felon, being a drug abuser, etc.)

-- This 8-2 decision by Justice Breyer involved a defendant accused of being an illegal alien in possession of a firearm. Originally, he came into the United States on a student visa, but his legal status was lost when he failed in school. The government was required to prove merely that Rehaif was an illegal alien, but not that he was aware that he was. This decision runs counter to the holdings of nearly every state and federal jurisdiction to have considered the question and have held, almost uniformly, that the government is required only to prove the defendant knowingly engaged in possession. Arguably, it applies to every status that subjects a defendant to prosecution under § 922(g). It may have a major impact on pending, and perhaps closed, cases in federal court, where § 922(g) prosecutions are the loss leaders among cases selected for prosecution.

F. Kidnaping – Confinement – Sufficiency

Sauser v.State, 928 N.W.2d 816 (Iowa 2019)
Merely pointing a gun at the victim for a period of time prior to shooting and killing the victim does no constitute confinement sufficient to support a conviction of kidnaping.

-- This is one of the cases in which the defendant won the battle, but may have lost the war. After a protacted argument and a period of time during which the defendant held a gun on her husband, she shot him and, a short time later, he died. Ms Sauser was charged originally with first degree murder, but was permitted to plead guilty to kidnaping in the second degree, voluntary manslaughter and going armed with intent. She received a total of 40 years imprisonment. Having successfully argued for reversal of the kidnaping conviction, I assume she may now return for trial on the first degree murder charge.

G. Robbery -- 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.

H. Sexual Offenses

1. 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 are unambiguous, and thus the sentencing court does not abuse its discretion in denying probation to a teacher who is a mandatory reporter.

2. Sexually Violent Predator Commitment -- 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.

I. 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.

III. Pre-trial Issues

A. Unlawful Delegation of Government Authority

Behm v. City of Cedar Rapids, 922 N.W.2d 524 (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, 922 N.W.2d 524 (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, 922 N.W.2d 524 (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 the hearing commences.

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

Rilea v. Iowa Department of Transportation, 919 N.W.2d 380 (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 are 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*, 919 N.W.2d 375 (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.

C. Jurisdiction – Indian Country

State v. Stanton, 933 N.W.2d 244 (Iowa 2019)
Under 2018 federal legislation repealing a 1948 provision that confers jurisdiction to the state for all violations of state law, committed in Indian country, the state continues to retain jurisdiction over state criminal law violations that involve non-Indian defendants and victims.

– Jessica Stanton was arrested for three state misdemeanors allegedly committed at the Meskwaki casino near Tama. State magistrate Richard Vander Mey interpreted the new federal law as removing all crimes committed on tribal land from state jurisdiction "regardless of the race or ethnic background of any potential Defendant" Vander Mey ordered the Tama County Sheriff to "consult with the County Attorney to determine whether prisoners such as the defendant should even be received and retained in custody by the Tama County Sheriff." And, he continued, "Tribal police officers should be instructed by tribal judicial officers to cease an desist from charging persons with violations of the Code of Iowa for the reasons that it will only serve to clog state courts and result in the imposition of court costs upon the Meskwaki Tribe for cases which must be dismissed." And, Vander Mey did, in fact, impose court costs on the Meskwaki Tribe for Ms. Stanton's case.

But Vander Mey was simply wrong.

So never mind.

D. Right to Contact Family Member – "Place of Detention"

State v. Davis, 922 N.W.2d 326 (Iowa 2019)

The Iowa Code § 804.20 right to contact a family member or attorney after arrest applies where the defendant is being held at a place of detention, and where, because of adverse weather conditions, the defendant was taken to the sally port of the county jail for purposes of field sobriety testing, that facility is for testing and it is not a place of detention, so law enforcement does not violate § 804.20 by completing field sobriety testing before granting the defendant's wish to contact his wife.

E. Appointment of Counsel – Stages of Trial – Motion to Correct Illegal Sentence

Jefferson v. Iowa District Court, 926 N.W.2d 519 (Iowa 2019)
A proceeding on a motion to correct an illegal sentence is a stage of trial so, provided that the defendant is truly challenging the legality of his or her sentence and not the actual conviction or the procedures utilized at sentencing, the defendant has a right to counsel where the motion is filed even after the case is concluded.

-- This case was decided under Iowa R.Crim.P. 2.28(1) and not under the constitution. In his motion, Mr. Jefferson argued that his sentence was disproportional and excessive. Thus, it was truly a motion to correct an illegal sentence, and under rule 2.28(1) he was entitled to appointed counsel.

F. 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.

G. Statutory Construction

1. Effective Date of Statutes

State v. Williams, 929 N.W.2d 621 (Iowa 2019)
A defendant who killed his victim during the evening of June 30, 2017 cannot benefit from the "stand your ground" defense, which came into effect on July 1, 2017.

-- This is the kind of thing that usually only happens to me. Just hours, perhaps minutes, before stand your ground became a defense in this state. And Mr. Williams was locked out of even making the argument. Justice Mansfield cited language in *State v. Harrison*, 914 N.W.2d 178, 205 (Iowa 2018) that it is "well-settled law that substantive amendments to criminal statutes do not apply retroactively."

2. Issue Preclusion

Barker v. Iowa Department of Public Safety, 922 N.W.2d 581 (Iowa 2019)While the Iowa Department of Public Safety has the authority to determine the length of length of time a defendant is required to register on the Iowa sex offender registry, the concept of issue preclusion bars the state from challenging an incorrect 2015 ruling of the Court of Appeals in a postconviction relief appeal that the district court had properly imposed a 10-year registration period, when the defendant subsequently challenges on judicial review a Department of Public Safety administration determination that he is subject to a lifetime period of registration.

-- In deciding *Barker*, Justice Christensen utilizes a test for issue preclusion articulated by the Court in *Soults Farms, Inc. v. Schafer*, 797 N.W.2d 92, 104 (Iowa 2011) and *Employers Mutual Casualty Co v. Van Haaften*, 815 N.W.2d 17, 22 (Iowa 2012):

> (1) the issue in the present case must be identical, (2) the issue must have been raised and litigated in the prior action, (3) the issue must have been material and relevant to the disposition of the prior case, and (4) the determination of the issue in the prior action must have been essential to the resulting judgment.

The application of issue preclusion is not without limit. The Court distinguished, rather than overruled, two cases in which an administrative agency had "special competency to resolve" a particular issue. *See Heidemann v. Sweitzer*, 375 N.W.2d 665 (Iowa 1995) and *Grant v. Iowa Department of Human Services*, 722 N.W.2d 169 (Iowa 2006). There is no special administrative competency in determining what, as a matter of law, is an aggravated sex offense giving rise to lifetime registration. *Barker v. Iowa Department of Public Safety*, 922 N.W.2d at 588-89.

H. Motions and Rulings

1. Notice of Defenses – Mental Status

a. Competency to Stand Trial

State v. Einfeldt, 914 N.W.2d 773 (Iowa 2018)
The district court abuses its discretion 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. Restoration of Competency

State v. Veal, 930 N.W.2d 319 (Iowa 2019)
Where defendant initially is determined to be incompetent to stand, but subsequently two thorough, detailed evaluations conclude that the defendant has been restored to competency, the state has met its burden of establishing restoration despite evidence suggesting that the defendant may still be impaired.

2. Speedy Trial (Iowa R. Crim. P. 2.33(2)(b)

State v. Veal, 930 N.W.2d 319 (Iowa 2019)
Where, on the morning of the 90th day of the speedy trial deadline period, defense counsel raises a claim of systematic exclusion of jury panelists, and the court grants an extension of one-day to permit counsel to conduct research and discovery, the district court does not abuse its discretion in finding good cause for the delay.

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.

IV. Trial Issues

A. Jury Selection – Individualized Voir Dire on Racial Bias

State v. Williams, 929 N.W.2d 621 (Iowa 2019)
The district court did not abuse its discretion in denying the defendant's request to conduct individualized voir dire on jurors to determine whether they had racial bias, where both the defendant and the victim were of the same race, where race did not appear to be a factor in the offense, where defense counsel conducted effective questioning of the panel, and where, if the motion was granted, jury selection in the defendant's first degree murder prosecution may have lasted more than a day.

-- That final rationale did not set well with Justices Wiggins and Appel in their dissents. Notwithstanding the ultimate holding, Justice Mansfield at least paid lip service to the notion that "[d]efense counsel should be given considerable leeway in utilizing voir dire to eliminate potential racial bias from the jury."

B. Defenses – Stand Your Ground

State v. Williams, 929 N.W.2d 621 (Iowa 2019)
A defendant who killed his victim during the evening of June 30, 2017 cannot benefit from the "stand your ground" defense, which came into effect on July 1, 2017.

C. Evidence

1. Iowa R.Evid. 5.403 – Evidence that is Prejudicial or Cumulative

State v. Walker, _____ N.W.2d _____ (Iowa 2019)
Where defendant is charged with sexual abuse and lascivious acts on a four-year-old girl based upon her allegations of physical contact between them, the district court does not abuse its discretion in excluding evidence, under Iowa R.Evid. 5.403 as being unfairly prejudicial, that the girl's brother had previously been sexually abused, that the boy had been taking an apparent interest in his sister's body, and where the mother of the children required that both of them remain dressed in each other's presence, where no offer of proof was made, and there was no actual evidence that the brother had abused the sister.

– Walker's argument was that the evidence was arguably probative to establish that the victim obtained knowledge about inappropriate sexual activity from her brother, rather than from being assaulted by the defendant. Even if marginally relevant, Justice McDonald added, the evidence would be excludable under Iowa R.Evid. 5.412 as other sexual activity by the victim. In his concurring opinion, Justice Appel disagreed with both conclusions. Rule 5.412 is inapplicable, he argued, because the alleged sexual assault by her brother would not be "other" sexual activity, but rather evidence that the charged assault was committed by the brother and not the defendant. *State*

v. Walker, _____ N.W.2d at _____ (Appel, J., concurring).

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.

State v. Veal, 930 N.W.2d 319 (Iowa 2019)
Especially where the defendant is able to bring up some prior convictions of a victim/witness, the district court does not abuse its discretion in refusing to permit the defendant to bring out pending drug charges in another state and a prior misdemeanor drug charge, where there is no indication that the witness received some benefit in those cases by agreeing to testify against the defendant.

-- The Court also rejected Veal's argument that the district court abused its discretion in not permitting him to bring out that the witness had been selling drugs to one of the murder victims and the resultant financial hardship generated bad blood between them, where the jury was informed that there was a "rift" between the two.

3. Iowa R.Evid. 5.405 – Methods of Proving Character – Character of the Victim – Specific Prior Offenses

State v. Lorenzo Baltazar, _____ N.W.2d _____ (Iowa 2019)
The district court in a murder prosecution does not abuse its discretion in refusing to admit video of the victim engaging in fights with other individuals in support of a defense of self defense or similar justification, unless there is evidence that the defendant was aware of the victim's prior violence at the time the offense was committed.

State v. Williams, 929 N.W.2d 621 (Iowa 2019)
The victim's prior violent behavior is not an essential element of the defense of self-defense so, unless the defendant is aware of them, prior specific instances of violent behavior by the victim are not relevant in a prosecution for murder.

-- This one hurts. This holding is consistent with those of nearly every jurisdiction that has considered the issue. But in 1988, the Iowa Supreme Court reached the opposite conclusion in *State v. Dunson*, 433 N.W.2d 676 (Iowa 1988). It came at a time that criminal defendants ***never*** won appeals in the Iowa Supreme Court. *Dunson* was **my** case. It very well may have been my only substantial victory in the first five years I was in the Appellate Defender's office. *Dunson* is overruled by *Williams*.

It is likely that many of the magnificent first steps taken over the past two decades or so by the Iowa Supreme Court will now be abrogated, quickly, by the new conservative majority. But do they have to do it with **my** case?

4. Iowa R.Evid. 5.412 (Rape Shield) – False Claims of Abuse by Victim – Request for Hearing After Deadline.

State v. Trane, _____ N.W.2d _____ (Iowa 2019)
Where defendant in a sex abuse prosecution becomes aware of prior false claims of sexual abuse by the victim against a different person in newly discovered evidence first brought to defendant's attention on the eve of trial, the defendant is entitled to a Rule 5.412 hearing despite the fact that he or she did not file the request at least 14 days prior to trial, as required under Iowa R.Evid. 5.412(c)(1).

– The fact that the defendant has refused to waive speedy trial does not disqualify him or her from receiving a Rule 5.412 hearing. The court, however, may find that the motion and its resolution constitutes good cause for commencing trial beyond the speedy trial deadline. The defendant must be apprised of this when he or she insists on a speedy trial and also upon pursuing the 5.412 motion.

The failure of the defendant to establish, in the motion, that the claim of a prior false claim is supported by a preponderance of the evidence is not a basis to deny the motion, provided the prior false claims are relevant and important to the defendant's case. The 5.412 hearing exists to permit the defendant to make the showing.

D. Improper Demonstration

State v. Veal, 930 N.W.2d 319 (Iowa 2019)
The district court does not abuse its discretion in permitting the prosecution's firearms witness to perform a demonstration for the jury using a weapon that differs in some respects from the murder weapon, where the jury is informed that it is not the original weapon, where the demonstration weapon is not admitted as evidence, and where the defendant is unable to establish prejudice.

E. Jury Instructions

1. Implicit Bias

State v. Williams, 929 N.W.2d 621 (Iowa 2019)
The district court does not abuse its discretion in denying the defendant's request for a jury instruction on implicit bias, where the Iowa State Bar Association's Iowa Criminal Jury Instruction 100.8, that was given, sufficiently addresses the issue of jury bias.

-- The Bar Association instruction is not enough, Justice Wiggins argues in his dissent, because, while it addresses bias, it does not mention implicit bias. Justice Appel agreed, pointing out that this issue has already been addressed in *State v. Plain*, 898 N.W.2d 801 (Iowa 2017). Justice Mansfied responded in the majority opinion that the error in *Plain* was the district court's statement that it lacked the authority to give the implied bias instruction. In *Williams*, the court did not claim

it lacked authority, but instead found the Bar Association instruction sufficient. Justices Appel and Wiggins disagreed.

2. Confusing Instructions

State v. Benson, 919 N.W.2d 237 (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 submitting 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.

-- This is the first published opinion authored by Justice Susan Christensen. Justice Christensen 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.

F. Trial of Habitual Offender – Colloquy

State v. Smith, 926 N.W.2d 760 (Iowa 2019)
To comply with the requirements of *State v. Harrington*, 893 N.W.2d 36 (Iowa 2017) a stipulation to prior convictions for the purpose of establishing that the defendant is an habitual offender must be taken in a colloquy similar to that utilized in taking a plea of guilty, and the court fails to comply substantially with these requirements where it does not adequately inform the defendant as to the nature of the habitual offender charge, the maximum punishment the defendant will face, the trial rights the defendant surrenders by stipulating to prior offenses and that failure to move in arrest of judgment is necessary to assert his or her arguments on appeal.

G. Trial and Post-Trial Motions

1. Prosecutorial Misconduct
State v. Veal, 930 N.W.2d 319 (Iowa 2019)
The prosecutor does not commit misconduct during jury selection in suggesting to the jury that the burden of proof is no different in a case involving selling liquor to a minor than in a case involving a murder, where there is no mention of potential penalties the defendant may face.

State v. Veal, 930 N.W.2d 319 (Iowa 2019)
While, in closing arguments, prosecutors must not make personal comments that are denigrating or inflammatory towards defense counsel, where arguments veer in that direction they do not entitle defendant to a new trial unless the defendant can prove prejudice.

State v. Christensen, 929 N.W.2d 646 (Iowa 2019)
The district court does not err in denying new trial based upon testimony elicited by the prosecution from the State's expert witness that physical evidence was available for testing, essentially placing the burden of proof on the defendant, where the district court overruled the defendant's objection and gave the jury a curative instruction, and the testimony was an isolated act rather than a pattern of misconduct.

-- The Court in *Christensen* also failed to find reversible misconduct where an expert witness testified, inaccurately, that a metal detector was used during the investigation. There was not

apparent plan by the prosecution to mislead the jury, and the misstatement was corrected in testimony to the jury.

2. Ineffective Assistance

State v. Trane, _____ N.W.2d _____ (Iowa 2019)
2004 legislation that authorizes claims of ineffective assistance of counsel to be raised on direct appeal and in postconviction relief does not authorize such claims to be raised in the trial court in a motion for new trial.

3. Implicit Juror Bias

State v. Christensen, 929 N.W.2d 646 (Iowa 2019)
The jury's knowledge of heightened community awareness of the defendant's case does not, alone, justify new trial where there is no evidence that jurors were connected with the community response, where potential jurors who had expressed opinions about the merits of the case had been stricken in voir dire, and where the jurors' awareness appeared to be about threats of violence in the community, rather than specific threats to themselves.

4. 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."

5. Motion in Arrest of Judgment – Sufficiency

State v. Petty, 925 N.W.2d 190 (Iowa 2019)
A motion in arrest of judgment does not sufficiently preserve error for review where it raises a different claim than the one subsequently argued on appeal.

E. Merger of Counts After Conviction

State v. West, 924 N.W.2d 502 (Iowa 2019)
Because the greater offense of involuntary manslaughter by committing a public offense other than forcible felony or escape carries, as a class "D" felony, a lesser punishment than the underlying offense of delivery of a controlled substance, a class "C" felony, the obvious intent of the legislature was that the defendant may be punished cumulatively for the two offenses.

-- The strict elements test of *Blockburger v. United States*, 284 U.S. 299 (1932) is a tool the courts utilize to determine if merger is appropriate, but legislative intent controls.

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 in prison 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 has 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 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

a. Unproven Charges

State v. Gordon, 921 N.W.2d 19 (Iowa 2018)

Where the defendant admitted to the presentence reporter that, while awaiting sentencing on a charge of sexual abuse in the third degree involving a minor, he was arrested in the presence of a minor female and was in possession of methamphetamine, the district court's reference to the subsequent arrest in sentencing the defendant does not amount to improper reliance upon unproven charges.

-- The Court a similar result in its previous decision in *State v. Gonzalez*, 582 N.W.2d 515 (Iowa 1998).

State v. Guise, 921 N.W.2d 26 (Iowa 2018)

While the record indicates that the sentencing judge was aware of unproven charges against the defendant, the court did not abuse its discretion in mentioning the unproven charges at sentencing in the absence of evidence that the court relied upon them in selecting the appropriate sentence.

b. Sentencing Recommendation in the Presentence Investigation

State v. Headley, 926 N.W.2d 545 (Iowa 2019)
Because the Department of Corrections possesses knowledge relevant to the defendant's likelihood of success upon release into the community, and because sentencing recommendations in the presentence investigation are not binding on the court, the court does not abuse its discretion in considering such recommendations.

c. Consideration of Risk Assessment Tools

State v. Headley, 926 N.W.2d 545 (Iowa 2019)
Because risk assessment tools predict the likelihood of recidivism and the risk of the defendant's danger to the community and provide other pertinent information relevant to the sentencing decision, as a general matter the district court does not abuse its discretion in considering them on their face.

-- Justice Wiggins found that Headley did not sufficiently preserve an argument that use of the particular risk assessment tools mentioned in his case violated due process. This issue was preserved for postconviction review.

d. 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.

e. Defendant's Immigration Status

State v. Avalos Valdez, _____ N.W.2d _____ (Iowa 2019)
It is improper for the sentencing court to rely on the defendant's immigration status as the sole reason for imposing a particular sentence, but may consider it where it is relevant to an acceptable sentencing factor, so it is proper to deny probation where the defendant is likely to be deported and will not be available for supervision.

– This holding, one of first impression in Iowa, is consistent with those of nearly every jurisdiction that has decided the issue.

B. Particular Sentences

1. Life Without Parole – Proof of Defendant's Adulthood

State v. Heard, _____ N.W.2d _____ (Iowa 2019)
Assuming that proof that the defendant committed a class a felony when he or she was under the age of 18 is necessary to impose a sentence of life without parole, imposition of life without parole without a finding of adulthood is a procedural error, and is not reversible where no objection was raised at the time of sentencing.

– Mr. Heard was, in fact, well past the age of 18 when he committed the murder of which he was convicted.

2. Habitual Offenders – Federal Armed Career Criminal Act – Precursors –Violent Felonies

United States v. Stitt, _____ U.S. _____, 139 S.Ct. 399, _____ L.Ed.2d _____ (2018)

While under a burglary statute such as Iowa's, which defines burglary as including the entry into premises not designed for occupation, burglary is broader than the generic burglary that constitutes a prior violent felony for the application of the Armed Career Criminal Act, a burglary under a statute that includes entry into automobiles and boats that are adapted for overnight occupation is a valid Armed Career Criminal predicate.

Stokeling v. United States, ____ U.S. ____, 139 S.Ct. 544, ____ L.Ed.2d____ (2019)

For a state robbery to qualify as a prior felony crime of violence for application of the Armed Career Criminal Act, the level of force that must be required to commit the robbery must be sufficient to overcome the resistance of the victim.

Quarles v. United States, _____ U.S. _____, 139 S.Ct. 1872, _____ L.Ed.2d _____ (2019)

The generic concept of burglary includes remaining on a premises without authorization and forming the intent to commit a crime at any time the defendant is remaining on, so a state burglary statute that includes this alternative is a felony crime of violence for the purpose of qualifying as a predicate for Armed Career Criminal status.

3. Parole – Federal Supervised Release – Tolling

Mont v. United States, _____ U.S. _____, 139 S.Ct. 1826, _____ L.Ed.2d _____ (2019)

Thirty days or more of time spent as "imprison[ment] in connection with a conviction," for which the period of supervised release of a federal defendant is tolled under 18 U.S.C. § 3624(e), includes pretrial detention for a separate offense that is ultimately credited towards the separate sentence.

4. Expungement

a. Proper Suspects – Pursuing Police Officers

State v. Shears, 920 N.W.2d 527 (Iowa 2018)

Damages to law enforcement vehicles pursuing the defendant are caused by the defendant's offense of eluding, and thus the city may receive criminal restitution under Iowa Code Section 910 for the resulting pecuniary damages.

-- Law enforcement officers may be victims in Iowa for the purpose of awarding restitution. Iowa utilizes civil tort principles regarding causation in determining restitution. Principles of intervening cause are recognized but do not, at least in Shears' case, restrict his liability.

b. Invalid Restitution

State v. Roache, 920 N.W.2d 93 (Iowa 2018)

Where defendant steals from the victim's automobile a paperback study guide for a commercial truck driver training course, and the victim ultimately agrees to pay a $1900 "fine" to the business offering the course for losing the book, the fine is invalid as being punitive and, in the particular case of the defendant, unsupported by evidence.

-- Probably the most significant aspect of Justice Waterman's opinion in *Roache* is the adoption by the Court of the civil "scope of liability" standard from the Restatement(Third) of Torts. As the Court laid out in civil tort cases in *Thompson v. Kaczinski*, 774 N.W.2d 829, 837-39 (Iowa 2009), proximate cause first involves a finding of factual cause. To determine whether "the plaintiff's harm is beyond the scope of liability as a matter of law, courts must initially consider all of the range of harms risked by the defendant's conduct that the jury *could* find as the basis for determining [the] defendant's conduct tortious. Then, the court can compare the plaintiff's harm with the range of harms risked by the defendant to determine whether a reasonable jury might find the former among the latter." Justice Waterman adds that the "scope of liability is broader for intentional torts." *State v Roache*, 920 N.W.2d at 101.

3. Restitution

a. Ability to Pay

State v. Albright, 925 N.W.2d 144 (Iowa 2019)
In determining the amount of restitution owed by the defendant for items other than victim restitution, court fines, penalties and surcharges, the sentencing court must determine the defendant's reasonable ability to pay, and enter restitution in an amount commensurate with it.

-- The options available to the court when the defendant does not have the ability to pay are (1) to order no restitution at all, (2) to order the defendant to pay restitution in an amount less than the full amount, or (3) to order community service in place of all or part of the restitution amount.

While, if possible, all amounts of restitution should be determined at the time of sentencing, if it is not possible the defendant's ability of pay should be determined after the final determination of restitution amounts is made, and the final restitution order issued then.

In *State v. Covel*, 925 N.W.2d 183 (Iowa 2019) the restitution order was remanded because the court found Mr. Covel had the ability to pay before determining the final restitution amount. The sentencing order was vacated in *State v. Headley*, 926 N.W.2d 545 (Iowa 2019), where the sentence court did not consider the defendant's reasonable ability to pay in taxing costs to that defendant.

b. Costs of Incarceration Restitution – Payment for Jail Time

State v. Gross, ____N.W.2d. ____ (Iowa 2019)
If the State elects to collect payment of room and board, medical expenses, etc., from jail inmates as civil judgments under Iowa Code Chapter 626 rather than as restitution under Iowa Code Chapter 910, the court is not required to make a determination of the defendant's ability to pay, a finding required under Iowa Code Section 910.2(1)(a).

— The state is permitted under Iowa Code Section 356.7 to elect whether to collect room and board, etc., as restitution or as a civil judgment. There are benefits to each. If collected as restitution payment of the costs may be made a condition of probation or work release, and are not dischargeable in bankruptcy.

Justice Mansfield also discussed, apparently without fully deciding, whether this is a sentencing issue that may be raised for the first time on appeal. If costs are collected as

a civil judgment, it appears that the defendant may be required to request reconsideration under the civil rules to preserve the error. Justice Mansfield did decide the case on the merits.

c. Fines and Costs – Apportionment in a Multi-Count Indictment

State v. McMurry, 925 N.W.2d 592 (Iowa 2019)
Unless it can be demonstrated that certain fines and costs related to dismissed or acquitted charges only, and not to the prosecution as whole, fines and costs are not apportioned between counts resulting in conviction and those which are not.

-- The restitution order in *State v. Ruth*, 925 N.W.2d 589 (Iowa 2019) was remanded to determine if the costs of the Sheriff's service of subpoenas should be apportioned between counts of conviction and those that were dismissed. The other costs were either attributable to the count of conviction or not associated with a single count. The parties can avoid having this situation arise by agreeing to apportionment of costs when they reach a plea agreement.

Because the costs incurred in *State v. Headley*, 926 N.W.2d 545 (Iowa 2019) were the same as they might have been with or without the dismissed charges, a sentence that did not apportion costs was not an illegal sentence.

4. Forfeiture -- Civil Forfeiture

a. 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.

b. 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

c. 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.

4. 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.

5. Revocation

a. 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.

b. Juvenile

State v. Covel, 925 N.W.2d 183 (Iowa 2019)
The district court properly exercised its discretion in revoking a juvenile's probation where it conducted two hearings, ordered preparation of a second presentence investigation, carefully considered all of the evidence and explained in great detail the reasons for revocation.

VI. Appeal and Collateral Review

A. Direct Appeal

1, Right to Appeal – Waiver—Counsel's Failure to Appeal

Garza v. Idaho, ____ U.S. ____, 139 S.Ct. 738, ____ L.Ed.2d ____ (2019)
The principle that defense counsel is ineffective for failing to file an appeal of a guilty plea at the defendant's request, and that the defendant need not show prejudice to prevail on this ground, applies whether or not the defendant executed an appeal waiver in pleading guilty.

-- The Court in *Garza* extends the holding in *Roe v. Flores Ortega*, 528 U.S. 470 (2000), in which counsel was ineffective in failing to accede to the client's request to appeal, but in which no appellate waiver was executed. Justice Sotomayor explains that the filing of an appeal is a ministerial function. While many grounds for appeal are extinguished by a guilty plea, and especially where there is an appellate waiver, claims like prosecutorial misconduct may not. The defendant has the authority to make the decision as to whether or not to file an appeal. Once the appeal is filed, it is for counsel to select the appropriate non-waived issues, are there are any.

2. Preservation of Error

a. Motion in Arrest of Judgment

State v. Smith, 926 N.W.2d 760 (Iowa 2019)
Defendant's failure to move in arrest of judgment following his stipulation to prior offenses making him an habitual offenses does not preclude his appeal where, although the district court apprised him of the necessity of moving in arrest of judgment within the required period of time, the district court did not inform him that failure to do so would preclude him from being able to appeal his case.

b. Sentencing Error

State v. Gordon, 921 N.W.2d 19 (Iowa 2018)

While, generally, error in sentencing may be raised at any time and defendant is not required to preserve error, defendant's claim that the district court's consideration of a risk assessment tool violated due process must be brought to the district court's attention prior to sentencing where the risk assessment tool is discussed in the presentence investigation, and preservation is necessary to alert the court as to the basis for the objection.

-- The Supreme Court was unable to ascertain from the available record whether counsel was ineffective in failing to provide the evidentiary basis for Gordon's objection. Thus, the case was preserved for a subsequent postconviction relief action. Similar issues arose, with a similar result, in *State v. Guise*, 921 N.W.2d 26 (Iowa 2018).

c. 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.

d. 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.

e. Acquiescence by the State and the Court

State v. Newton, 929 N.W.2d 250 (Iowa 2019)
Where the defendant does not preserve a constitutional challenge to the statute under which he is prosecuted by a timely motion to dismiss, the issue is not waived where the State resists the challenge on the merits and the district court fully considers the issue and rules on the merits.

f 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.

3. Mootness – Exceptions

State v. Avalos Valdez, _____ N.W.2d _____ (Iowa 2019)
The issue of whether the district court may rely, in sentencing the defendant, upon the defendant's immigration status is one of public importance that is likely to arise in the future, so it may be resolved by the Court even after the defendant has completed his sentence and has been turned over to Immigration and to the federal court.

4. Appealable Issues – Jurisdiction-Stripping Legislation

State v. Macke, 933 N.W.2d 226 (Iowa 2019)
Amendments effective on July 1, 2019 to Iowa Code §§ 814.6 and 814.7 that strip Iowa appellate courts of the jurisdiction to consider on direct appeal challenges to guilty pleas (in most cases) and challenges based upon claims of ineffective assistance of counsel do not apply retroactively to appeals by defendants who were sentenced prior to that effective date.

– Justice Waterman based his ruling on the Court's 1991 decision in *James v. State*, 479 N.W.2d 287 (Iowa 1991). The State asked the Court overrule *James* in *Macke* citing *Hannan v. State*, 732 N.W.2d 45 (Iowa 2007), in which a prison was allowed to avail himself of a remedy that accrued after his case had been resolved. There is a distinction, Justice Waterman explained, between legislation that provides a remedy and legislation that strips the courts of jurisdiction.

In his lone dissent, Justice McDonald concedes that Ms. Macke had attained the right to

appeal her sentence before § 814.6 was amended. Section 814.7, however, does not limit her right to appeal, but instead limits the jurisdiction of the Court to consider ineffective assistance as a ground for relief. It is, he argues, a remedial statute, to which the Court should apply the three-pronged test of *Iowa Comprehensive Petrol. Underground Storage Tank Fund Bd. v. Shell Oil Co.*, 606 N.W.2d 370, 375 (Iowa 2000):

> First, we look to the language of the new legislation; second, we consider the evil to be resolved; and then, we consider whether there was any previously existing statute governing or limiting the mischief which the new legislation was intended to remedy.

5. Standards of Review

a. Juror Disqualification

State v. Christensen, 929 N.W.2d 646 (Iowa 2019)
It remains undecided in Iowa law whether the standard of review on issues of juror disqualification is for abuse of discretion or, because jury impartiality may rise to the level of a constitutional issue, de novo.

-- The defense drew on language in previous decisions such as *State v. Beckwith*, 46 N.W.2d 20 (1951) that suggest review of rulings on challenges for cause should be less than deferential. It was not necessary to decide in *Christensen*, because the challenge to the juror in his case lacked evidentiary support.

b. Jury Misconduct

State v. Christensen, 929 N.W.2d 646 (Iowa 2019)
Where the Supreme Court agrees with the lower court's findings of fact to the extent that its decision would be the same whether the standard of review would be abuse of discretion or de novo, it is unnecessary to reach a decision on which standard applies to claims of jury misconduct and prejudice.

-- The *Christensen* opinion is rife with issues in which Justice Appel devotes many pages to exploring the historical evolution of the law and how various jurisdictions have reached different results, only to find it unnecessary to resolve them because the evidence so strongly favored the lower court's ruling.

Down that same road, the Court considered whether the United States Supreme Court decision in *Remmer v. United States*, 347 U.S. 227 (1954) that efforts to tamper with the jury are presumed prejudicial. Where a reasonable probability was not shown that the

verdict in Christensen's case would have been different without the jury possibly being exposed to statements in the social media about the case and about possible riots in the community that might follow a not-guilty verdict, it was not necessary to determine whether *Remmer* will good law in Iowa.

c. Challenges to the Constitutionality of Statutes.

State v. Newton, 929 N.W.2d 250 (Iowa 2019)
Constitutional challenges to statutes are subject to *de novo* review, in which the challenger must prove the challenge unconstitutional beyond a reasonable doubt, and must "negate every reasonable basis upon which the court could hold the statute constitutional." *Citing State v. Biddle*, 652 N.W.2d 191 (Iowa 2002).

B. State Postconviction Relief

1. 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.

2. 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

Goode v. Iowa, 920 N.W.2d 520 (Iowa 2018)

A claim on appeal of denial of postconviction relief that postconviction counsel rendered ineffective assistance in litigating the claim raised in the application relates back to the application, and is not barred by the three-year limitation period in Iowa Code § 822.3.

-- While the right to counsel in a postconviction proceeding is statutory and not constitutional, the Court does not place form over substance in consider applications for relief. Thus it vacated the Court of Appeals denial of relief on the sole ground that Mr. Goode raised his claim as a constitutional one. The Court did not rule on the merits of Mr. Goode's claim, but remanded it for another postconviction relief proceeding.

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.

e. Entitlement to an Appointed Expert

Linn v. State, 929 N.W.2d 717 (Iowa 2019)
Iowa Code § 822.5, providing that costs and expenses of legal representation in postconviction relief petitions be paid by the state, authorizes the appointment at state expense of an expert necessary to provide adequate representation, and where a petitioner claims that the murder of which she has been convicted was the product of Battered Woman Syndrome and that, despite her requests to counsel to do so, counsel declined to call an expert on the issue, the petitioner has demonstrated a reasonable need to provide an expert to evaluate her potential defense and counsel's effectiveness in representing her.

-- Justice Appel's unanimous opinion is a primer on the defense of Battered Woman Syndrome.

f. Summary Judgment

Linn v. State, 929 N.W.2d 717 (Iowa 2019)
The district court errs in granting summary judgment of a petition for postconviction relief in which petitioner claims trial counsel was ineffective in not calling an expert witness to establish that she suffers from Battered Woman Syndrome, where the court concludes merely, without hearing testimony from counsel, that counsel had strategic reasons for not doing to.

C. Federal Habeas Corpus

1. State Application of Federal Law -- 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).

2. 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.

D. Certiorari in the Supreme Court – Standard of Review

Madison v. Alabama, _____ U.S. _____, 139 S.Ct. 718, _____ L.Ed.2d _____ (2019)
The highly deferential standard of review in the Antiterrorism and Effective Death Penalty Act applies where state findings are challenged in federal Habeas Corpus proceedings, but not where state convictions or reviewed directly by the Supreme Court through certiorari

VII. Miscellaneous Issues

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

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.

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.

B. Wrongful Prosecution Lawsuits

1. Absolute Immunity for Prosecutors

Venckus v. Iowa City, 930 N.W.2d 792 (Iowa 2019)
Government officials, including prosecutors, enjoy absolute immunity from being sued for all actions relating to the judicial phase of a criminal case.

-- This immunity applies to lawsuits raising common law torts as well as constitutional torts. It applies to all actions of a prosecutor relating to the filing and prosecution of a case. Actions during the investigative stage of proceedings, however, are protected by qualified immunity. Of all the claims raised by Joshua Venckus in his suit against Johnson County, the only one in which prosecutors were not protected by judicial process immunity was the ethical complaint filed by prosecutors against his attorney in an unrelated matter that he claimed was filed to distract his attorney from the case.

Law enforcement officers, on the other hand, enjoy a lower degree of protection. They have absolute immunity while testifying in court, which is a judicial function. Justice McDonald was less specific about which functions are and are not protected because, in his view, the legal

basis for Venckus' claims were not clearly stated.

2. Iowa Municipal Tort Claims Act (Iowa Code Chapter 670)

Venckus v. Iowa City, 930 N.W.2d 792 (Iowa 2019)
The Iowa Municipal Tort Claims Act exists to provide a remedy for claims previously barred by sovereign immunity, and is not itself a bar to filing a civil action advancing claims under the Iowa Constitution.

Venckus v. Iowa City, 930 N.W.2d 792 (Iowa 2019)
Unlike tort claims against the State of Iowa, Iowa Code § 670.5 requires that tort claims against a municipality be filed within two years of the injury to the claimant, rather than accrual of the claim.

-- Claims against municipalities are governed more strictly because municipalities "operate under greater fiscal constraints than the state does." *Farnm ex rel. Farnm v. G.D. Searle & Co.,* 339 N.W.2d 392, 397 (Iowa 1983).