# 2019-21 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.

# 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 otification 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 has no discretion but to 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 follows them as a matter of stare decisis. He suggested that he might join a decision overruling them.

Justice Gorsuch wrote a very persuasive dissent criticizing 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. Art. I, §10, cl. 1 (Ex Post Facto)

*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 imposition of the corrected sentence.

*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. Here, Justice Waterman limited the application of *T.H.* to juvenile offenders.

C. 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.

-- I'm not sure I buy into Justice Waterman's logic here, if I understand it correctly.

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.

D. Fourth Amendment

1. Seizure

*State v. Fogg*, 936 N.W.2d 664 (Iowa 2019)
A vehicle parked in an alley is not seized, bringing into play principles of search and seizure under the Fourth Amendment or Iowa law, where a law enforcement officer approaches the vehicle at night with only low headlight beams activated and without sirens or flashers, parks his vehicle twenty feet in front of the vehicle and approaches it on foot, despite the fact that the vehicle is unable to drive away without backing up 125 feet or driving over the lawns of private residences.

– Joined by Justice Wiggins, Justice Appel argued in his dissent that the operative fact is whether the driver of the vehicle would feel that she was free to leave, and under the circumstances, Ms. Fogg was not.

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 failed to note 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 undercover, 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.

3. Warrantless Searches

a. 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 in 2019, 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 was destined to lose his leadership position on the Court due to some back alley politics in Des Moines, but then unexpectedly passed away, dissented.

Justice Brent Appel went to town on this. 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.

b. Reasonable Suspicion for Vehicular Stop

*Kansas v. Glover*, ____ U.S._____, 140 S.Ct.1183, _____ L.Ed.2d _____ (2020)
Absent any indication to the contrary, it is reasonable for a law enforcement officer to assume that a vehicle is being operated by its registered owner, and the officer has reasonable suspicion to stop the vehicle solely on information that the registered owner of the vehicle has a suspended drivers license.

*State v. Baker*, 925 N.W.2d 602 (Iowa 2019)
Law enforcement officers 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.

c. Automobile Stops – Prolonged Detention

*State v. Salcedo,* 935 N.W.2d 572 (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 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.

d. Jurisdiction to Stop Boats – Navigable Waters Defined

*State v. Meyers*, 938 N.W.2d 205 (Iowa 2020)
Despite the fact that the Lake Panorama owners association has constructed barricades on the river feeding the lake, under various definitions in Iowa Code § 462A the lake constitutes navigable waters and a navigable lake subject to the jurisdiction of the Iowa Department of Natural Resources, and not a private lake, and law enforcement has jurisdiction to stop a boat on the lake.

– The land surrounding the lake and the lake bed may belong to private parties, but because the lake is fed by navigable waters, the water belongs to the public.

e. 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.

4. Exclusionary Rule – Administrative Revocation Proceedings

*Westra v. Iowa Department of Transportation*, 929 N.W.2d 754 (Iowa 2019)
Where law enforcement had 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 license 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 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.

E. Fifth Amendment

1. Double Jeopardy

a. Appellate Reversal for Insufficient Evidence – Sex Offender Reporting

*State v. Chapman*, 944 N.W.2d 864 (Iowa 2020)
Where the appellate court determines that there was insufficient evidence in defendant's plea colloquy to a charge of child endangerment to establish that he acted with sexual intent and vacates the sex offender registration requirement, double jeopardy does not preclude a remand for an evidentiary hearing to determine whether there is evidence "in the record" to establish the intent element, because registration serves a public safety objective and is not punitive.

– It is unclear how much new evidence will be permitted on remand.

In a concurring opinion, Justice Appel took the position that registration is punitive. His opinion contains some very pointed language about "those pesky independent-minded state courts," unlike the Iowa courts, that "mesmerized by federal precedent, come high water or not, uncritically cited the 'frightening and high' risk of recidivism as revealed truth no fewer than eleven times in Iowa caselaw. These courts engaged in no independent analysis, simply concluding that because the United States Supreme Court said it, it must be true."

b. 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 effect for years. There was hope that, because Justice Ginsburg and Justice Thomas have expressed disagreement with it, the Court was taking *Gamble* to overrule prior case law. Justice Ginsburg wrote a passionate dissent. Justice Gorsuch, who is becoming one justices often friendly 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 During Trial

*State v. Heard*, 934 N.W.2d 433 (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. Jury Instruction

*State v. Gibbs*, 941 N.W.2d 888 (Iowa 2020)
In a prosecution for murder in which the defendant relies upon a defense of justification, the Fifth Amendment is violated by a jury instruction that incorporates the Iowa Code § 704.2B requirement that a person who uses deadly force must report the use of force to law enforcement within a reasonable time.

– In his majority opinion, Justice Mansfield did not hold that § 704.2B was invalid on its face, just that its use in the instructions placed a burden on the defendant to make a decision as to whether to waive the protection of the Fifth Amendment at the time of the offense.

Mr. Gibbs' second-degree murder conviction was not reversed, however, as the evidence against him was harmless beyond reasonable doubt. The killing was caught on video, and there were several eye witnesses.

The argument was based solely on the Fifth Amendment, as Iowa does not have a self-incrimination clause in its constitution. Whatever protection the Iowa Constitution provides is in its Due Process clause. Appellate counsel made a passing reference to the Iowa Constitution, without any further citation or argument as to why the state constitution would be different in its scope. Justice Mansfield made it clear that the decision was based on Fifth Amendment grounds, as the Fifth Amendment protection against self-incrimination is incorporated to the states via the Fourteenth Amendment.

Nevertheless, Justice McDonald wrote a lengthy concurring opinion advocating, among other things, for a holding that the Court should not consider arguments that parallel provisions of the state constitutional should be construed to provide more protection, unless the proponent provides analysis and authority supporting them. Fair enough. He rails against the suggestion that the state courts have any duty to interpret parallel provisions similarly to the federal interpretation. Again, fair enough. But then he repeats, in more detail than ever, his previously-articulated objection to the notion that the federal interpretation of the parallel provision is the constitutional "floor." Why can't the state courts provide *less* protection than the federal courts?

Well, isn't it because nearly all of the rights in the Bill of Rights incorporated to the states under the 14th?

This isn't the first case in which Justice McDonald has taken these positions. What is notable, and frightening to anyone who has enjoyed the progress in the Iowa courts over the past quarter century, is that newly-installed Justice Oxley joined Justice McDonald in this portion of his opinion.

F. 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 under-representation 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 under-representation 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 its abrupt right turn.

*State v. Veal*, 930 N.W.2d 319 (Iowa 2019)
Under the federal standard for under-representation 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 under-representation 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 under-representation 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 under-representation. 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 an interesting decision 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 (citations omitted)

*State v. Wilson*, 941 N.W.2d 579 (Iowa 2020)
The holdings of *State v. Plain*, 898 N.W.2d 801 (Iowa 2017) and other cases concerning the under-representation of minorities on juries apply to claims of under-representation in jury *pools*, and the *Plain* issue does not arise where there is an allegation of under-representation of minorities on the particular panel selected for the defendant's case, unless there is a showing of under-representation in the pool.

(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 Unanimous Verdict

*Ramos v. Louisiana*, _____ U.S. _____, 140 S.Ct. 1390, _____ L.Ed.2d _____ (2020)
The Sixth Amendment right to a unanimous verdict in a criminal case is incorporated to the states via the 14th Amendment.

– At the time this case arose only two states, Oregon and Louisiana, permitted less than unanimous verdicts in criminal cases. Since then, Louisiana has modified its law to require a unanimous verdict. The interested aspect of this case involves the Court's plurality opinion in *Apodaca v. Oregon*, 406 U.S. 404 (1972). Four justices in that case could not say that unanimity serves an important societal function and took the position

that the cost benefit analysis militates against the requirement. Concurring in the result only, Justice Powell agreed with the four other justices who found that unanimity is required under the Sixth Amendment, but argued that it is not incorporated through the Fourteenth.

The Supreme Court generally follows the rule that, where the Court reaches a particular result using different analyses, the most narrow reasoning is the controlling precedent. This being the case, Justice Powell's concurrence would become the *Apodaca* rule. The various opinions in *Ramos* explore the questions of whether Powell's concurrence is precedent and, if so, whether *stare decisis* permits overruling that precedent.

c. Compulsory Process

*State v. Leedom*, 938 N.W.2d 177 (Iowa 2020)
A criminal defendant litigating a motion for new trial based on allegations of prosecutorial misconduct generally does not have the right to call the prosecutor as a witness to testify about his or her motives in taking a particular course of action during trial.

d. Sentencing Factors in Capital Cases

*McKinney v. Arizona*, _____ U.S. _____, 140 S.Ct. 702, _____ L.Ed.2d _____ (2020)
While the Sixth Amendment requires a jury finding on aggravating factors supporting imposition of the death penalty, where it is found on collateral review that the sentencing judge improperly refused to consider a mitigating factor, the weighing of aggravating and mitigating factors on remand may be conducted by the reviewing Court, without a jury.

– The 5-4 majority in this case based the decision on the holding in *Clemons v Mississippi*, 494 U.S. 738 (1990) that the appellate court may conduct reweighing on remand after it is found that the original sentencing judge employed an improper sentencing factor. Essentially, *Clemons* follows a harmless error analysis. *Clemens* is different, McKinney argued, because his case involved the failure to consider a proper mitigating factor. The analysis, Justice Kavanaugh responded, is the same.

McKinney also argued, as did Justice Ginsburg in her dissent, that *Clemens* was overruled by *Ring v. Arizona*, 536 U.S. 584 (2002) and *Hurst v. Florida*, 136 S.Ct. 616 (2016) under which the appellate courts are no longer permitted to reweigh the sentencing factors on remand. The holdings of *Ring* and *Hurst,* the majority found, were not

retroactive to defendants whose convictions were final when they were announced. Justice Kavanaugh found that McKinney's conviction was final in 1996, and the current remand was a product of collateral review. Justice Ginsburg disagreed.

e. Federal Supervised Release Violations with Minimum Sentences 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 – 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. Ineffective Assistance

(1) Breach of Duty

(A) General

*State v. Lorenzo Baltazar*, 935 N.W.2d 862 (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 violating the Iowa Code prohibition against carrying weapons when the murder for which was he charged was committed.

– Justice Christensen also found that Lorenzo was not prejudiced by the failure, in view of evidence that did not support any notion of self-defense.

*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 aftertaste from twenty years of federal sentencing practices, but it strikes me that even a period of supervised probation, without a deferred judgment, is a pretty damned lenient sentence.

(B) Objection to In-Court Identification of the Defendant.

*State v. Doolin*, 942 N.W.2d 500 (Iowa 2020)
Even where, prior to trial, a witness failed to identify the perpetrator of an offense, trial counsel was not ineffective in failing to object to a first-time, in-court identification of the defendant by an eyewitness.

(C) Trial Instructions

(i) Identification Testimony

*State v. Booth-Harris*, 942 N.W.2d 562 (Iowa 2020)
While the defense may ask for a more detailed instruction discussing estimator and system variables that affect the reliability of identification testimony, counsel is not ineffective in not objecting to ISBA Model Jury Instruction 200.45, concerning such testimony.

(ii) Failure to Instruct on Essential Element

*State v Kuhse*, 937 N.W.2nd 622 (Iowa 2020)
Trial counsel is not ineffective in failing to object to a marshaling instruction on a charge of domestic abuse causing injury that does not include as an element that the defendant acted without justification, where the jury was apprised in the instructions as a whole that they must find lack of justification to convict the defendant, and where the evidence supporting the defendant's justification defense is weak to the extent that it is reasonably likely that the outcome of trial would be different.

— Because judgment and sentence were entered in this case before July 1, 2019, the Court was not barred under Iowa

Code 814.7 from considering Mr. Kuhse's ineffective assistance claim on direct appeal.

Failure to instruct is presumed on appeal to be prejudicial, if proper objection is lodged in the district court. If the issue must be raised as ineffective assistance, the defendant bears the burden of establishing that, but for counsel's failure to object, the result of trial would have been different.

(D) Failure to Obtain Defense Expert at Sentencing

*State v. Majors*, 940 N.W.2d 372 (Iowa 2020)
Counsel is not ineffective in failing to obtain an expert witness at the resentencing of a defendant who committed his offense as a juvenile and whose case had previously been remanded due to the district court's failure to consider factors set out in *State v. Lyle*, 854 N.W.2d 358 (Iowa 2014), when counsel relied instead upon cross examination of the state's expert, where counsel explained that it was a decision with which the defendant agreed.

– The majority found that this was a valid strategic decision on the part of counsel, especially where counsel may be concerned that a defense expert may do more harm than good. Justice Appel authored a strong dissent. Sentencing is an important stage of trial, and defense counsel has a significant duty here. Even if an expert would not be helpful as a witness at sentencing, one would be invaluable in preparing to litigate issues involved in sentencing a youthful defendant. And the decision to retain an expert is counsel's, not the defendant's.

(E) Death Penalty Cases – Failure to Investigate

*Andrus v. Texas*, _____ U.S. _____, 140 S.Ct. 1875, _____ L.Ed.2d _____ (2020)
In a prosecution for capital murder, counsel is ineffective in failing to investigate issues relating to the defendant's disadvantaged childhood that resulted in damaging mental trauma.

– The case was remanded to determine whether Andrus suffered *Strickland* prejudice.

(2) Prejudice

(A) General

*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.

*State v. Walker*, 935 N.W.2d 874 (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) Beneficial Illegal Plea Agreement

*State v. Gordon*, 943 N.W.2d 1 (Iowa 2020)
Defendant was not prejudiced where counsel obtains, at the defendant's request, a plea agreement that contains an illegal term, that being that, despite his conviction for a forcible felony, the defendant could remain out of custody for two days after sentencing, where the defendant received all of the benefits of the agreement but absconded at the end of the two-day period.

– The holding in *Gordon* may, to some degree, be limited by its facts, with Justice Appel noting, "we do not fly on the wings of Pegasus surveying the broad field of the many potential consequences of a wide variety of illegal plea bargains. Instead, we have boots on the ground and firmly anchor our decision on the unusual facts and claims presented in this appeal before us."

Mr. Gordon was able to challenge his plea on ineffective assistance grounds, because judgment in his case took place before July 1, 2019, when Senate File 589, requiring that all claims of ineffective assistance be made in petitions for postconviction relief, took effect.

At the time his appeal was filed, Mr. Gordon was still at large. Generally, an appeal is dismissed where the defendant flees while it is pending. By the time the Court was in position to decide the case, however, he was back in custody. The Court found no reason "in policy or equity" to dismiss the appeal under those circumstances.

G. Eighth Amendment

1. Juvenile Offenders

a. Mandatory Minimum Sentences

*State v. Majors*, 940 N.W.2d 372 (Iowa 2020)
The district court does not abuse its discretion in imposing a minimum sentence before parole eligibility upon a defendant who committed his offense as a juvenile, when it properly considers all of the factors set out in *State v. Lyle*, 854 N.W.2d 358 (Iowa 2014) before doing so.

– This was treated by the Court as an argument that the district court abused its sentencing discretion, not as a constitutional issue. While, under *Lyle*, mandatory minimum sentences for juveniles are expected to be rare, the district court and the majority of the Supreme Court found that all the *Lyle* factors were established. Majors was just under 18 years old when he committed his offense. The offense was well

planned. He did not show a level remorse that would point to a prospect of rehabilitation. He apparently consulted with other inmates at the Iowa Medical and Classification Center as to how to put himself in the best position to obtain resentencing.

Justice Appel authored an extensive dissent, responding to each of the points raised by Justice Waterman. He was joined by Justice Wiggins, who has since departed from the Court. There is a very ominous footnote in the majority opinion noting that the Court did not consider overruling *Lyle* and *State v. Roby*, 897 N.W.2d 124 (Iowa 2017) in *Majors* because it was not raised by the State. *State v.. Majors*, 940 N.W.2d at 386 (fn. 2). Justice McDonald has advocated doing so, and Chief Justice Christensen appears to agree.

Justice Waterman also rejected Majors' argument that his attorney was ineffective in failing to obtain an expert witness at his resentencing (the case had previously been remanded due to the district court's failure to articulate *Lyle* factors), and instead relying upon cross examination of the state's expert. Defense counsel explained that it was a decision with which the defendant agreed. The majority found that this was a valid strategic decision on the part of counsel, especially where counsel may be concerned that a defense expert may do more harm than good. While, in the future, Justice Appel may be a lone voice in the wilderness, defense counsel should pay heed to his response to this holding. Sentencing is an important stage of trial, and defense counsel has a significant duty here. Even if an expert would not be helpful as a witness at sentencing, one would be invaluable in preparing to litigate issues involved in sentencing a youthful defendant.

b. 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.

2. 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. Aggravating and Mitigating Factors

*McKinney v. Arizona*, _____ U.S. _____, 140 S.Ct. 702, _____ L.Ed.2d _____ (2020)
While the Sixth Amendment requires that a jury find aggravating factors supporting imposition of the death penalty, where it is found on collateral review that the sentencing judge improperly refused to consider a mitigating factor, the weighing of aggravating and mitigating factors on remand may be conducted by the Court, without a jury.

– The 5-4 majority in this case based the decision on the holding in *Clemons v Mississippi*, 494 U.S. 738 (1990) that the appellate court may conduct reweighing on remand after it is found that the original sentencing judge employed an improper sentencing factor. Essentially, *Clemons* follows a harmless error analysis. *Clemens* is different, McKinney argued, because his case involved the failure to consider a proper mitigating factor. Justice Kavanaugh responded that the analysis is the same.

McKinney also argued, as did Justice Ginsburg in her dissent, that *Clemens* was overruled by *Ring v. Arizona*, 536 U.S. 584 (2002) and *Hurst v. Florida*, 136 S.Ct. 616 (2016) under which the appellate courts are no longer permitted to reweigh the sentencing factors on remand. The holdings of *Ring* and *Hurst,* the majority found, were not retroactive to defendants whose convictions were final when they were announced. Justice Kavanaugh found that McKinney's conviction was final in 1996, and the current remand was a product of collateral review. Justice Ginsburg disagreed.

c. 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.

*Barr v. Lee*, _____ U.S. _____, _____ S.Ct. _____, _____L.Ed.2d _____ (2020)
It is unlikely that death row inmates will prevail in establishing that the administration of a single-dose of pentobarbital as a method of execution is cruel and unusual punishment when it has been used in 100 execution without incident in five states, where it is has been requested by inmates given the option, and where it has been approved by courts in jurisdictions that have carried out executions.

– *Lee* is a *per curiam* order, issued on July 14, 2020, after the conclusion of the 2019 term, vacating a preliminary injunction by the district court on the execution of a number of federal defendants, the first in 17 years in federal cases. Though not named in the written opinion, one of them was Dustin Honken, who subsequently was executed on July 17, 2020, becoming the first defendant since 1963 to be executed for a crime committed in Iowa.

The focus of the two dissenting opinions, representing the views of four Justices, was that position that the case should have been fully briefed and argued.

Most of the previous decisions of the Court in recent years have examined the Eighth Amendment ramifications of multi-drug protocols, with one drug being administered, for example, to relax the muscles, one to render the inmate unconscious and one to stop the heart. Here, the Court gives at least some approval to administration of a single dose of the drug most commonly used to euthanize our pets.

3. 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.

H. Fourteenth Amendment

1. Substantive Due Process – Juveniles – 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. 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 creates a substantial 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 (18 U.S.C. § 924(e)) 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. Incorporation of Due Process Rights to the States

*Ramos v. Louisiana*, _____ U.S. _____, 140 S.Ct. 1390, _____ L.Ed.2d _____ (2020)
The Sixth Amendment right to a unanimous verdict in a criminal case is incorporated to the states via the 14th Amendment.

– At the time this case arose only two states, Oregon and Louisiana, permitted less than unanimous verdicts in criminal cases. Since then, Louisiana has modified its law to require a unanimous verdict. Concurring in the result only, Justice Powell agreed with the four other justices who found that unanimity is required under the Sixth Amendment, but found that it is not incorporated through the Fourteenth.

The Supreme Court generally follows the rule that, where the Court reaches a particular result using different analyses, the most narrow reasoning is the controlling precedent. So Justice Powell's concurrence arguably becomes the *Apodaca* rule. The various opinions in *Ramos* explore the questions of whether Powell's concurrence is precedent and, if so, whether *stare decisis* permits overruling that precedent.

c. Insanity – Definition

*Kahler v. Kansas*, _____ U.S. _____, 140 S.Ct. 1021, _____ L.Ed.2d _____ (2020)
The Due Process Clause does not mandate that the defendant's inability to distinguish right from wrong provides a defense to a criminal charge.

– For the five-Justice majority, Justice Kagan wrote that it is the prerogative of the states to determine what constitutes insanity as a defense. In his dissent, Justice Breyer noted that moral incapacity, the second prong of the rule articulated in *M'Naghton's Case*, has been a defense throughout history. *Kahler v. Kansas*, 140 S.Ct. at 1038-46. (Breyer, J., dissenting).

d. Speedy Trial – Delay Between Bench Trial and Verdict

*State v. Fordyce*, 940 N.W.2d 419 (Iowa 2020)
An 11-month delay between the defendant's bench trial and the entry of verdict did not violate the defendant's right to due process where the defendant waived speedy trial, the issues were complicated, and the court released a detailed 17-page verdict.

– Chief Justice Christensen urged judges to issue rulings as much as possible within the 60-day period set out in Iowa Court R. 22.10.

e. First-time, In Court Identifications of the Defendant

*State v. Doolin*, 942 N.W.2d 500 (Iowa 2020)
Even where, prior to trial, a witness failed to identify the perpetrator of an offense, due process is not violated by a first-time, in-court identification of the defendant by an eyewitness.

–Consequently, trial counsel was not ineffective in failing to object to the procedure on due process grounds, especially since the *Doolin* holding was consistent with those of nearly all of the other jurisdictions that have considered the issue.

The first of the two-step due process test[1] for admissibility of identification procedures is whether the procedure utilized is unduly suggestive. Here, Justice Waterman followed the holding in *Perry v. New Hampshire*, 565 U.S. 228 (2012) that, while a pretrial show up of a single suspect by law enforcement may be unduly suggestive, it is different where the identification is made in court. The witness is subject to cross examination, touted as the greatest mechanism for truth-finding, and counsel is present. The decision as to the validity of the identification should be made by the jury, and not the Court.

In *Doolin*, Justice Waterman adopted the *Perry* analysis as the appropriate test under the Iowa Constitution.

As we will now see with increasing frequency, Justice Appel was the lone dissent. Recent scientific research has revealed the inherent weaknesses in identification testimony that are not being taken into account in the constitutional analysis. The evaluation should include *estimator* variables, which involve factors that affect the accuracy of the witness' perception, and the *system* variables, involving the processes used to collect identification information from the witness.

Because Justice Appel has quickly become the last man standing from the Golden Era of the Iowa Court, it is not likely that, unless the United States Supreme Court changes its view in this and other areas, holdings in this and other areas will swing back the other way in our professional lifetimes. Justice Appel's opinions, now mostly dissents, are always voluminous. Even if they are not useful in persuading an Iowa state court to alter the current constitutional analysis, much of what he writes can helpful in taking our identification technique challenges to the *jury*.

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[1]The second being the suggestive procedure produced a substantial likelihood of irreparable misidentification. *Manson v. Brathwaite*, 432 U.S. 98 (1977).

*State v. Booth-Harris*, 942 N.W.2d 562 (Iowa 2020)
Identification procedures are not unduly suggestive or unreliable where, following a shooting death, an eyewitness is first shown a single photo of the individual who subsequently became the defendant (although at the time the defendant was not a known suspect), then shown two multi-subject lineups by an officer who had no knowledge of the case, to which the witness made a tentative identification of the defendant in the first, then a more positive identification in the second, and where, prior to both arrays, the witness was advised that the actual suspect may or may not be in the lineup.

– *Booth-Harris* was decided the same day as *Doolin* and involved much of the same subject matter. As in *Doolin*, Justice Waterman wrote for the majority and Justice Appel was the sole dissent. Both opinions are lengthy and, as I noted with respect to *Doolin*, remain useful in challenging identifications in factual arguments to the jury.

On both prongs of the *Manson* test, Justice Waterman relies on factors articulated in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972):

> (1) the opportunity of the witness to view the perpetrator at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation.

As he did in *Doolin*, Justice Appel argued that the *Biggers* test is incomplete, and advocated for consideration of a more extensive list of estimator and system variables. Justice Appel also agreed with Booth-Harris that trial counsel was ineffective in failing to object to ISBA Model Jury Instruction 200.45, the stock instruction concerning eyewitness identification, because it fails to take into account the estimator and system variables. The defense may ask for a more detailed instruction, Justice Waterman responded, but counsel is not ineffective in not objecting to the model instruction.

3. Equal Protection– 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 detailed 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.

# II. Substantive Offenses

A. Child Endangerment – Sufficiency

*State v. Folkers*, 941 N.W.2d 337 (Iowa 2020)
The consumption of butaneous hash oil, in which hash is lighted with a butane torch, creates a substantial risk to the safety of children in the residence in which it is used, so there is sufficient evidence to support a conviction of child endangerment where its use by the victim's parents resulted in a fire in the residence in which their child was present.

B. Controlled Substance Offenses – Sentences – Minimum Sentences – Iowa Code §901.12 Reductions for Pleading Guilty

*Campuzano v. Iowa District Court for Polk County*, 940 N.W.2d 431 (Iowa 2020)
The provision of Iowa Code §901.12 that retroactively reduces by one-half mandatory minimum sentences for certain drug offenses where the defendant pleads guilty expressly does not apply to defendants who receive enhanced sentences under Iowa Code §124.401(1)(e) for committing drug offenses while in the immediate possession of a firearm.

– Justice Appel argued in his dissent that Campuzano qualifies for the reduction because he was *convicted* under Iowa Code §124.401(1)(b), which is an offense to which §901.12 applies. He was merely sentenced under §124.401(1)(e).

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), in its application, has to be the number one 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 measurable 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), Chief 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. Drunk Boating – Law Enforcement Jurisdiction to Stop Boats on Private Lakes

*State v. Meyers*, 938 N.W.2d 205 (Iowa 2020)
Despite the fact that the Lake Panorama owners association has constructed barricades on the river feeding the lake, under various definitions in Iowa Code § 462A the lake constitutes navigable waters and a navigable lake subject to the jurisdiction of the Iowa Department of Natural Resources, and not a private lake, for which an exception applies, and law enforcement has jurisdiction to stop a boat on the lake.

– The land surrounding the lake and the lake bed may belong to private parties, but because the lake is fed by navigable waters, the water belongs to the public.

3. 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. 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 involves a substantial 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 knew he or 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.

3. Iowa Code § 724.4B (carrying a firearm on a school ground) – School Ground Defined

*State v. Mathias*, 936 N.W.2d 222 (Iowa 2019)
For the purpose of the Iowa Code § 724.4B prohibition against carrying a firearm on a school ground, the parking lot of a freestanding athletic stadium owned by the school district and used by several schools in the community, though not contiguous to any of them, constitutes the grounds of a school.

– Writing for the majority (I guess), Justice Wiggins acknowledges that the statute does not define school grounds to that extent that, by its text, one can determine if the facility here qualifies. He acknowledges that the statute is ambiguous, and employs the rules of construction to find the result.

Justice McDonald concurs, but takes the position that the stadium is a "school," so Justice Wiggins' analysis is unnecessary.

Either one of these interpretations might be correct. But Justices Waterman and Christensen join *both*, which is a little confusing to me.

It is Justice Mansfield who raises the question that I had reading, especially, the majority opinion. Even the law enforcement officer who made the arrest had to consult the Scott County Attorney to determine if the stadium was covered under § 724.4B. If Justice Wiggins needed to engage in that level of analytical gymnastics to decide the question, how can the statute provide sufficient notice to the guy on the street that he can't carry a gun in the stadium parking lot? How is the statute not constitutionally vague? And, as Justice Mansfield points out, why does the rule of lenity not apply here?

4. Iowa Code § 724.4C (Carrying Weapons while Intoxicated)

*State v. Shorter*, 945 N.W.2d 1 (Iowa 2020)
Conviction under Iowa Code § 724.4C (carrying weapons while intoxicated) requires proof that the defendant carried a weapon, and it is not sufficient that the defendant merely *possessed* the weapon, and the district court errs in submitting marshaling instructions allowing the jury to find the defendant guilty if he "possesses or carries" the weapon.

– This decision could have a positive impact in federal criminal cases. In federal firearms offenses, there is a five-level guideline enhancement for possessing firearms "in connection with another felony offense." Based on the Eight Circuit disposition of a Southern District of Iowa

case, *United States v. Walker,* 771 F.3d 449 (8th Cir. 2014), the enhancement is being given uniformly in our circuit to defendants who are possessing their firearms in automobiles, on the basis of the Iowa carrying weapons statute. If the Iowa Supreme Court is interpreting a statute to mean that having the gun in the car is not enough, many of these federal defendants may be facing substantially less severe sentences.

E. Fraud – Federal Wire Fraud 18 U.S.C. §1343 and Fraud on a Federally Funded Program or Entity, 18 U.S.C. §666(a)(1)(A) – sufficiency

*Kelly v. United States*, _____ U.S. _____, 140 S.Ct. 1565, _____ L.Ed.2d _____ (2020)
It is an essential element of both 18 U.S.C. §1343 (wire fraud) and 18 U.S.C. §666(a)(1)(A) (fraud on a federally funded program or entity) that the defendant commit the fraud for to purpose of obtaining property so, where individuals in the administration of New Jersey Governor Chris Christie employed a dishonest scheme to realign traffic lanes on the George Washington Bridge, causing massive traffic gridlock, for the purpose of exacting political revenge on officials who did not support him, evidence was not sufficient to support conviction under either statute, since no property was obtained.

– Writing for a unanimous Court, Justice Kagan rejected the government's arguments that (1) the use of the bridge constituted "property," and (2) that the costs incurred in employing workers to address the crisis were property of which the government was deprived.

F. Homicide

1. Stand Your Ground

a. Applicability

*State v. Lorenzo Baltazar*, 935 N.W.2d 862 (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 perpetrated.

b. Right to a Pretrial Hearing

*State v. Wilson*, 941 N.W.2d 579 (Iowa 2020)
Iowa Code § 704.13, that provides civil and criminal immunity to homicide defendants who stand their ground, allows for immunity from liability, not immunity from prosecution, so the issue is taken up at trial before the trial jury, and not in a pretrial hearing to the court.

– Some jurisdictions provide for immunity from prosecution to defendants who demonstrably stood their ground. In most, but not all, of them, the issue is resolved in a

pretrial hearing. The Iowa Legislature made the decision not to provide immunity from prosecution. It was not fundamentally unfair to require Mr. Wilson to essentially meet a burden of proving the stand your ground defense at trial, and to make the decision of having to call or not call witnesses relevant to the issue, because his entire defense, even at trial, was based on the stand your ground theory.

The evidence in Wilson's case did not establish the defense or mandate that the district court grant a post-trial motion to dismiss. Mr. Wilson had delivered the first salvo in a verbal dispute in an Iowa City pedestrian mall between rival groups of individuals, and also fired the first shot.

2. Self-Defense

*State v. Fordyce*, 940 N.W.2d 419 (Iowa 2020)
Where the victim in an alleged homicide clearly initiated the confrontation, but where the defendant left the scene and subsequently returned and followed his family members back to the victim's residence where the killing took place, the defendant "continued" the action that caused the victim's death and the district court's verdict that the defendant did not act in self-defense was supported by substantial evidence.

– Chief Justice Christensen did not consider that application of the "Stand Your Ground" provision of Iowa Code § 704.1(3), which took effect after the killing, and is not applied retroactively.

G. 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 protracted argument and a period of time during which the defendant held a gun on her husband, she shot him and, a short while 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.

H. Making False Reports Iowa Code § 718 – Jury Instructions

*State v. Bynum*, 937 N.W.2d 319 (Iowa 2020)
Defendant charged with making a false report that the victim committed the offense of carrying weapons is not entitled, to establish that the defendant was merely guilty of making a false report to law enforcement, to an instruction informing the jury that the victim would have an affirmative defense to the carrying weapons charge of having a valid permit to possess the weapons, where there is no evidence that the victim had a permit.

– Having a valid permit is an affirmative defense to the weapons charge that must be established by the charged individual. It is not an element.

I. Sexual Offenses – Sex Offender Registration – Sufficiency of Evidence – *Alford* Pleas

*State v. Chapman*, 944 N.W.2d 864 (Iowa 2020)
Where defendant entered a plea under *North Carolina v. Alford*, 400 U.S. 25 (1970) to a charge of child endangerment the sentencing court, in determining whether the defendant should be placed on the sex offender registry, is permitted to consider only the portions of the minutes of testimony that establish the elements of child endangerment, and may not consider other statements in the minutes that may show that the defendant acted with sexual intent.

– Hearsay statements made by the victim's mother that did not specify the sexual nature of the offense did not constitute evidence establishing sexual intent beyond reasonable doubt. Chapman argued that, because the court found insufficient evidence supporting the registration requirement, the effort to impose the requirement must be dismissed, as a matter of double jeopardy. Double jeopardy does not apply, Justice Oxley responded, because registration exists for public safety purposes, and not for punishment. The case was remanded to allow for an evidentiary hearing to determine if some evidence "in the record" supports a finding that Chapman's offense was sexually motivated. It is unclear how much new evidence will be permitted on remand.

Justice Appel concurred, but took the position that registration is punitive. His opinion contains some very pointed language about "those pesky independent-minded state courts," unlike the Iowa courts in recent times that "mesmerized by federal precedent, come high water or not, uncritically cited the 'frightening and high' risk of recidivism as revealed truth no fewer than eleven times in Iowa caselaw. These courts engaged in no independent analysis, simply concluding that because the United States Supreme Court said it, it must be true."

J. Theft

1. Possession of a Tool to Remove Theft Detection Device – Sufficiency

*State v. Ross*, 941 N.W.2d 341 (Iowa 2020)
A steel cable used to secure a lawn mower in a hardware store is not a theft detection device, so the use of bolt cutters to sever such a cable is not sufficient to support a conviction under Iowa Code §§ 714.1 and 2(2) for possessing a tool for removing a theft detection device.

– Mr. Ross pled guilty to this offense as part of a plea agreement. The case was remanded for resentencing, with the state having the prerogative, if it wishes, to reinstate the original charges.

2. Theft by Check – Sufficiency

*State v. Schiebout*, 944 N.W.2d 666 (Iowa 2020)
An essential element of the offense of theft by check under Iowa Code §714.1(6) is that the defendant must know that the check will not be paid when submitted to the bank so, where the defendant writes a check on an account that she is not authorized to use the evidence nevertheless is insufficient to support a conviction under §714.1(6) where there is no evidence the defendant knew it would not be paid when presented.

– There is an interesting alignment of Justices on *Schiebout*. The pro-defense 5-2 majority opinion was, I believe, the first criminal opinion authored by Justice McDermott who had been on the Court for several weeks. The dissent, on the other hand is written by Justice Oxley, who joined the Court just several weeks earlier. I believe this is her first written criminal opinion. She is joined by Justice McDonald, the other Governor Kim Reynolds appointee.

The state's position, rejected by Justice McDermott, is that it may be assumed that the defendant knew the check would not be paid when presented when she wrote the check on an account she wasn't authorized to use. This assumption is written into the Model Penal Code, Justice McDermott responded, but not adopted by the Iowa Legislature. It was also written into the jury instructions in Ms. Schiebout's case, Justice Oxley fires back, and thus constitutes the law of the case.

# III. Pre-trial Issues

A. Jurisdiction – Indian Country

1. Disestablishment of the Reservation

*McGirt v. Oklahoma*, _____ U.S. _____, 140 S.Ct.2452, _____ L.Ed.2d _____ (2020)
For the purposes of the Major Crimes Act, 18 U.S.C. 1153(a), that places in United States federal court exclusive jurisdiction over all Native Americans who commit offenses in "Indian Country," a reservation is not disestablished, and therefore remains Indian Country, until Congress passes legislation explicitly doing so and, in the absence of legislation, the State court has no jurisdiction over such a defendant.

– Announced on the final day of the 2019 term, *McGirt* is a fascinating decision on several planes, including the fact that the 5-4 majority opinion was written by Justice Gorsuch. Like Justice Scalia, whose seat on the Court he inherited, Justice Gorsuch has taken several interesting positions on various issues that reveal he may not be the dyed-in-the-wool, knee-jerk conservative he was intended to be (the same may also be true, to a lesser degree, of Justice Kavanaugh). My guess is that Justices Gorsuch and Kavanaugh will ultimately be called upon to prove their worth to their Presidential sponsor when we see how they handle the challenge to *Roe v. Wade*.

The first two paragraphs contain a refreshing admission of the historic mistreatment of at least the Creek Indians by the United States government, and a resolution that the pattern of treaty violations will not continue, at least in this case:

> On the far end of the Trail of Tears was a promise. Forced to leave their ancestral lands in Georgia and Alabama, the Creek Nation received assurances that their new lands in the West would be secure forever. In exchange for ceding "all their land, East of the Mississippi river," the U. S. government agreed by treaty that "[t]he Creek country west of the Mississippi shall be solemnly guarantied to the Creek Indians." Treaty With the Creeks, Arts. I, XIV, Mar. 24, 1832, 7 Stat. 366, 368 (1832 Treaty). Both parties settled on boundary lines for a new and "permanent home to the whole Creek nation," located in what is now Oklahoma." Treaty With the Creeks, preamble, Feb. 14, 1833, 7 Stat. 418 (1833 Treaty). The government further promised that"[no] State or Territory [shall] ever have a right to pass lawsfor the government of such Indians, but they shall be allowed to govern themselves." 1832 Treaty, Art. XIV, 7 Stat.368.
>
> Today we are asked whether the land these treaties promised remains an Indian reservaion for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word.

*McGirt v. Oklahama*, 140 S.Ct. at _____.

The land given ostensibly in perpetuity to the Creek Nation when they were removed from the Eastern United States comprised a large portion of Eastern Oklahoma prior to its admission as a state, and includes the city of Tulsa. As Chief Justice Roberts writes in his dissent, the disestablishment of this and other Native American settlements did not occur in a single Congressional Act, but in a series of events over a long period of time evidencing Congressional intent and the understanding of both the indigenous and non-indigenous populations that tribal government would be dissolved and that the indigenous people would be assimilated into the state government.

As recently as in *Nebraska v. Parker*, 577 U. S. 481 (2016), the Chief Justice points out, the Court consistently has held that it is necessary to examine all of the circumstances to find Congressional intent. They include the parceling out of land held in fee simple by the tribe to individual Native Americans and non-Native Americans who are free to convey their holdings to others, and the acquiescence of tribal government in developments that appear to recognize its disestablishment.

This decision vacates the 1997 conviction and sentence of Jimcy McGirt, serving life plus 1,000 years for the sexual abuse of a four-year-old girl. Its impact on the convictions of other Native American prisoners, and in other areas of law involving indigenous litigants, remains to be seen.

2. Jurisdiction Over Non-indigenous Defendants and Victims

*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 and 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.

B. Grand Jury Proceedings

1. Authority of the Court to Quash Subpoenas

*In re 2018 Grand Jury of Dallas County v. John Doe*, 939 N.W.2d 50 (Iowa 2020)
Because the grand jury is a body independent from the court, the district court lacks the authority to quash grand jury subpoenas or to disband the grand jury.

– In the face of constitutional violations, the court may dismiss the indictment.

2. Challenges to the Makeup of the Grand Jury – Timing

*In re 2018 Grand Jury of Dallas County v. John Doe*, 939 N.W.2d 50 (Iowa 2020)
Assuming, without deciding, that Iowa R.Crim.P. 2.3(2)(a) requires that challenges to the makeup of a grand jury under *State v. Plain*, 898 N.W.2d 801 (Iowa 2017) and its progeny be filed before the grand jury is sworn, preservation of the issue does not require that the challenge be ruled upon at that stage of the proceedings.

3. Government Subpoena of Non-Testifying Defense Experts

*In re 2018 Grand Jury of Dallas County v. John Doe*, 939 N.W.2d 50 (Iowa 2020)
An expert retained by the defense who is not expected to testify is the work product of the defense, and may not be subpoenaed by the State to testify before the grand jury, unless the State demonstrates extraordinary circumstances.

– The parties in *Doe* agreed that the opinions and research of a non-testifying expert is work product. Justice Appel found that Iowa Rule of Civil Procedure 1.508(2) applies in criminal cases.

*In re 2018 Grand Jury of Dallas County v. John Doe*, 939 N.W.2d 50 (Iowa 2020)

Under Iowa R.Crim.P. 2.10(5) plea discussions between defense counsel and the state are not admissible, while evidence derived from the discussions may be admissible, so defense counsel's statement during plea negatiations that he has retained an expert whose findings would be helpful to the defense does not waive the work product privilege, provided counsel does not disclose the actual statements of the expert.

C. 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.

D. Statutory Construction – 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. Mr. Williams did his dirty deed 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."

E. Motions and Rulings

1. Notice of Defenses – Mental Status – Restoration of Competency

*State v. Veal*, 930 N.W.2d 319 (Iowa 2019)
Where defendant initially is determined to be incompetent to stand trial, 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. Motions to Dismiss

a. 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.

b. Prosecutorial Violation of Plea Agreement

*State v. Beres*, 943 N.W.2d 575 (Iowa 2020)
The district court abuses its discretion in permitting the state to file charges against the defendant that it agreed, as part of a plea agreement to another charge, it would not file in exchange for defendant's willingness to cooperate in the investigation, after the state elected not to interview the defendant.

– Applying principles of contract law, Justice Mansfield stressed that the defendant is entitled to specific performance of promises made as part of the plea agreement. In a lone concurrence, Justice Appel argued that performance of the agreement should be required as a matter of due process.

# IV. Trial Issues

A. Jury Selection

1. 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."

2. Dismissal of Jurors for Hardship

*State v. Leedom*, 938 N.W.2d 177 (Iowa 2020)
While courts generally should permit defense counsel to question potential jurors before they are dismissed due to hardship, failure to do so does not warrant a new trial where the record clearly supports findings that the panelists would suffer hardship by remaining on the jury.

— In a footnote, Justice Waterman appears to support a recommendation of the Committee on Jury Selection that each person called to serve be granted one deferral without being questioned.

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*, 935 N.W.2d 874 (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*, 935 N.W.2d at 882 (Appel, J., concurring).

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

*State v. Lorenzo Baltazar*, 935 N.W.2d 862 (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?

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

*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 reveal 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.

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

*State v. Trane*, 934 N.W.2d 447 (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 constitute 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.

5. Hearsay – Exceptions

a. Iowa R.Evid. 5.803(4) (Statements Made for Diagnosis or Treatment)

*State v. Walker*, 935 N.W.2d 874 (Iowa 2019)
Despite the fact that they were made 18 days after the alleged sexual assault, statements made by a four-year-old sexual assault victim, including her identification of the assailant, to a physician from the Child Protection Response center were made for the purpose of treatment rather than investigation and, absent evidence that they were made with an investigatory rather than a treatment-oriented motive, are excepted under Iowa R. Evid. 5.803(4) from the rule against admission of hearsay, as statements made for the purpose of medical diagnosis or treatment.

– Justice McDonald acknowledged that an evidentiary showing might be made in another case that would counter the statements' admissibility under this exception.

b. Iowa R. Evid. 5.801(d)(2) (Statements of Parties Opponents)

*State v. Shorter*, 945 N.W.2d 1 (Iowa 2020)
While out of court statements of parties opponents, including a criminal defendant, are admissible as substantive evidence under Iowa R. Evid. 5.801(d)(2), they are not conclusive evidence, and it is error for the district court to instruct the jury that they may be considered as if they were made in court under oath.

c. Iowa R.Evid. 5.807(a)(1) (Residual Exception to the Hearsay Rule) – Circumstantial Guarantees of Trustworthiness

*State v. Veverka*, 938 N.W.2d 197 (Iowa 2020)
The district court errs in a pretrial ruling excluding evidence of an out of court statement made by the victim of alleged child sexual abuse under the residual exception of Iowa R. Evid. 5.807 without considering the proper circumstantial guarantees of trustworthiness articulated in cases such as *State v. Rojas*, 524 N.W.2d 659 (Iowa 1994).

– *Veverka* was an interlocutory appeal by the state challenging the district court's rulings on its pretrial motion to adjudicate preliminary questions of law. Justice McDonald noted that admission of evidence under the residual exception should be rare.

6. Iowa Code 622.10 — Victim's Medical Records

*State v. Leedom*, 938 N.W.2d 177 (Iowa 2020)
Where the complaining witness in a child sexual abuse prosecution made statements to a therapist, who was a mandatory reporter, and the therapist elected not to report them, and where there is evidence that the complaining witness had previously made admittedly false claims against others, the defendant has met his burden under Iowa Code Section 622.10(4) for requiring the district court to conduct an independent review of the witness' medical records to determine whether they contain exculpatory evidence that must be turned over to the defendant.

— The reversal in *Leedom* was conditional, with a new trial being warranted only if (1) in camera review results in a finding that the medical reports are exculpatory, and (2) the defendant's right to present a defense outweighs the privacy interest of the complaining witness.

*State v. Leedom*, 938 N.W.2d 177 (Iowa 2020)
The complaining witness in a prosecution for sexual abuse does not waive the doctor/patient evidentiary privilege, permitting the defendant's access to medical reports, by submitting to cross-examination and testimony in depositions arranged by the defense.

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. Theory of Defense

*State v. Bynum*, 937 N.W.2d 319 (Iowa 2020)
Defendant charged with making a false report that the victim committed the offense of carrying weapons is not entitled, to establish that the defendant was merely guilty of making a false report to law enforcement, to an instruction informing the jury that the victim would have an affirmative defense to the carrying weapons charge of having a valid permit to possess the weapons, where there is no evidence that the victim had a permit.

– Having a valid permit is an affirmative defense to the weapons charge that must be established by the charged individual. It is not an element.

3. Statements of Parties Opponents

*State v. Shorter*, 945 N.W.2d 1 (Iowa 2020)
While out-of-court statements of parties opponents, including a criminal defendant, are admissible as substantive evidence under Iowa R. Evid. 5.801(d)(2), they are not conclusive evidence, and it is error for the district court to instruct the jury that they may be considered as if they were made in court under oath.

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 this requirement 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

*In re 2018 Grand Jury of Dallas County v. John Doe*, 939 N.W.2d 50 (Iowa 2020)
While it may have been improper for the prosecutor to contact and attempt to question an expert who had been retained by the defense, but who was not expected to testify, the district court does not abuse its discretion in declining to disqualify the prosecutor from the case, where the prosecutor's actions were not egregious.

*State v. Leedom*, 938 N.W.2d 177 (Iowa 2020)
The prosecution does not commit reversible misconduct in a sexual abuse trial in calling an expert witness to explain why youthful victims delay reporting of sex abuse and why their description of events is incomplete, where the witness does not comment on the credibility of the victim.

*State v. Leedom*, 938 N.W.2d 177 (Iowa 2020)
An argument by the prosecutor to the jury that has the effect of watering down the instruction that reasonable doubt is doubt on the level that would lead one to "hesitate" in making major decisions is not reversible when it is cured by the court's instructions to the jury.

*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 no apparent plan by the prosecution to mislead the jury, and the misstatement was corrected in testimony to the jury.

2. 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.

3. New Trial – Weight of the Evidence

*State v. Trane*, 934 N.W.2d 447 (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.

4. 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.

5. Motion to Correct Illegal Sentence – Proper Subject

*Goodwin v. Iowa District Court for Davis County*, 936 N.W.2d 634 (Iowa 2019)
An argument that the district court failed to apply the proper standards articulated in *Miller v. Alabama*,567 U.S. 460 (2012) and *State v. Lyle*, 854 N.W.2d 378 (Iowa 2014) prior to imposing a minimum sentence of incarceration on a defendant who committed his offense prior to reaching 18 years old is not an argument that the district court imposed an illegal sentence, but rather that the district court failed to follow proper guidelines in imposing it, so it is not a claim that may be raised by the defendant at any time.

– This is not an instance, Justice Waterman explained, where the postconviction applicant was taking the position that his sentence was disproportionate to the seriousness of the offense, as in

*State v. Bruegger*, 773 N.W.2d 862 (Iowa 2009). Thus, it was not an argument that the sentence constituted cruel and unusual punishment. Joined by Justice Wiggins, Justice Appel countered in his dissent that the theory behind cases such as *Lyle* and *State v. Roby*, 897 N.W.2d 127 (Iowa 2017) is that the *Lyle* factors exist to implement the protection of Article I, section 17 of the Iowa Constitution, so a sentence imposed in violation of *Lyle* is cruel and unusual. *Goodwin v. Iowa District Court for Davis County*, 936 N.W.2d at 655-60 (Appel, J., dissenting).

In a special concurrence, Justice McDonald continues in his crusade to take back the ground gained during the past decade, by arguing that not only the Iowa cases expanding on *Miller* were wrongly decided, but that *Miller* itself was wrongly decided. *Goodwin v. Iowa District Court for Davis County*, 936 N.W.2d at 649-50 (McDonald, J., concurring specially).

H. 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. Procedures – Reasons for Sentence

1. Incorrect Belief There is No Discretion

*State v. Moore*, 936 N.W.2d 436 (Iowa 2019)
Where, during sentencing on a conviction of one count of intimidation with a dangerous weapon under Iowa Code § 907.3, a forcible felony, defense counsel indicates that the district court does not "have too much wiggle room here" but to impose the statutory five-year minimum sentence, the prosecutor remains silent and the district court does not disagree, the court fails to exercise its discretion under Iowa Code § 901.10(1) to reduce the minimum in the face of mitigating circumstances, and defendant is entitled to be resentenced.

– Justice Waterman found this case to be on point with *State v. Ayers*, 590 N.W.2d 25 (Iowa 1999), in which reversal and remand were appropriate where the record "is clear the sentencing

court incorrectly believed it had no discretion as to the five-year mandatory minimum sentence requirement."

2. 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.

3. 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.

4. Defendant's "Family Stock" or Genetics

*State v. Damme*, 944 N.W.2d 98 (Iowa 2020)
While references by the court in imposing sentence to the defendant's "family stock" or genetics are highly disapproved by the Supreme Court, such a reference is not reversible where it is made by the court in mitigation of sentencing.

– Justices Appel and McDonald dissented separately, with the latter arguing that *any* reference to genetics or race is an improper sentencing factor, and grounds for reversal. This opinion places Justice McDonald, for me, in a new light.

5. Defendant's Immigration Status

*State v. Avalos Valdez*, 934 N.W.2d 585 (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. Mandatory Minimums

a. Juvenile Offenders

*State v. Majors*, 940 N.W.2d 372 (Iowa 2020)
The district court does not abuse its discretion in imposing a minimum sentence before parole eligibility upon a defendant who committed his offense as a juvenile, when it properly considers all of the factors set out in *State v. Lyle*, 854 N.W.2d 358 (Iowa 2014) before doing so.

– This was treated by the Court as an argument that the district court abused its sentencing discretion, not as a constitutional issue. While, under *Lyle*, mandatory minimum sentences for juveniles are expected to be rare, the district court and the majority of the Supreme Court found that all the *Lyle* factors were established. Majors was just under 18 years old when he committed his offense. The offense was well planned. He did not show a level remorse that would point to a prospect of rehabilitation. He apparently consulted with other inmates at the Iowa Medical and Classification Center as to how to put himself in the best position to obtain resentencing.

Justice Appel authored an extensive dissent, responding to each of the points raised by Justice Waterman. He was joined by Justice Wiggins, who has since departed from the Court. There is a very ominous footnote in the majority opinion noting that the Court did not consider overruling *Lyle* and *State v. Roby*, 897 N.W.2d 124 (Iowa 2017) in *Majors* because it was not raised by the State. *State v. Majors*, 940 N.W.2d at 386 (fn. 2). Justice McDonald has advocated doing so, and Chief Justice Christensen appears to agree.

b. Iowa Code §901.12 Reductions for Pleading Guilty

*Campuzano v. Iowa District Court for Polk County*, 940 N.W.2d 431 (Iowa 2020)
The provision of Iowa Code §901.12 that retroactively reduces by one-half mandatory minimum sentences for certain drug offenses where the defendant pleads guilty expressly does not apply to defendants who receive enhanced sentences under Iowa Code §124.401(1)(e) for committing drug offenses while in the immediate possession of a firearm.

– Justice Appel argued in his dissent that Campuzano qualifies for the reduction because he was *convicted* under Iowa Code §124.401(1)(b), which is an offense to which §901.12 applies. He was merely sentenced under §124.401(1)(e).

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

*State v. Heard*, 934 N.W.2d 433 (Iowa 2019)
Assuming that proof that the defendant committed a class "A" felony when he or she was over 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.

3. Habitual Offenders – 18 U.S.C § 924(e) – Federal Armed Career Criminal Act – Precursors

a. Violent Felonies

*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.

b. Serious Drug Offenses – State Convictions

*Shular v. United States*, _____ U.S. _____, 140 S.Ct. 779, _____ L.Ed. 2d _____ (2020)
In determining whether a prior state conviction is a prior serious drug offense giving rise to 18 U.S.C. § 924(e) Armed Career Criminal Enhancement, the elements of the state offense are compared to the elements specified by federal statute and there is no need to compare the state offense to a "generic" offense.

– A state offense is a "serious drug offense" if it "involv[es] manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." 18 U.S.C. §924(e)(2)(A)(ii). Armed Career Criminal enhancement also arise where the defendant has prior convictions of felony crimes of violence, including "burglary." Unlike the enhancement for prior drug felonies, the statute does not specify the elements of burglary, creating circumstances in which defendants in states with broader definitions of burglary are punished more severely under §924(e). There, the courts look at the common law,

generic definition of the offense to conduct the categorical analysis.

Justice Ginsburg declined to utilize the rule of lenity in this case because there is no ambiguity to resolve. In his concurring opinion, Justice Kavanaugh argued that the rule of lenity should be applied only in cases of "grievous" ambiguity.

4. 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.

5. 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*, 935 N.W.2d. 695 (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. 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.

d. Determination of Amounts

*State v. Beres*, 943 N.W.2d 575 (Iowa 2020)
In determining the amount of restitution owed by a defendant to a crime victim, the court must find substantial evidence that the loss for which restitution is requested was caused by the defendant's offense, and it is not sufficient for the state to provide the court with a collection of expenses incurred by the victim and for the crime victim compensation coordinator to offer a conclusory opinion that the losses resulted from the defendant's actions.

– Justice Appel referred, as an appropriate but not exclusive vehicle for proving up loss claims, to the "Crime Victim Compensation Program Medical Expense Verification Form" developed by the Crime Victim Compensation Program, in which the medical provider sets out the amounts of the claims, certifies them to be correct, that they were incurred by the victim and that they resulted from the defendant's actions.

6. Sex Offender Registration – Sufficiency of Evidence – *Alford* Pleas

*State v. Chapman*, 944 N.W.2d 864 (Iowa 2020)
Where defendant entered a plea under *North Carolina v. Alford*, 400 U.S. 25 (1970) to a charge of child endangerment the sentencing court, in determining whether the defendant should be placed on the sex offender registry, is permitted to consider only the portions of the minutes of testimony that establish the elements of child endangerment, and may not consider other statements in the minutes that may show that the defendant acted with sexual intent.

– Hearsay statements made by the victim's mother that did not specify the sexual nature of the offense did not constitute evidence establishing sexual intent beyond reasonable doubt. Chapman argued that, because the court found insufficient evidence supporting the registration requirement, the effort to impose the requirement must be dismissed, as a matter of double jeopardy. Double jeopardy does not apply, Justice Oxley responded, because registration exists for public safety purposes, and not for punishment. The case was remanded to allow for an evidentiary hearing to determine if some evidence "in the record" supports a finding that Chapman's offense was sexually motivated. It is unclear how much new evidence will be permitted on remand.

Justice Appel concurred, but took the position that registration is punitive. His opinion contains some very pointed language about "those pesky independent-minded state courts," unlike the Iowa courts in recent times, that "mesmerized by federal precedent, come high water or not,

uncritically cited the 'frightening and high' risk of recidivism as revealed truth no fewer than eleven times in Iowa caselaw. These courts engaged in no independent analysis, simply concluding that because the United States Supreme Court said it, it must be true."

7. Revocation – 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.

8. Expungement – Requirements

*Doe v. State*, 943 N.W/2d 608 (Iowa 2020)
The requirement for expungement of a dismissed charge under Iowa Code § 901C.2 that all financial obligations be paid requires only that the defendant satisfy all financial obligations in the case being dismissed, and does not requirement payment of obligations in all cases in which the defendant is a party.

– Justice McDonald arrived at this result through the application of various rules of statutory construction.

# VI. Appeal and Collateral Review

A. Direct Appeal

1. Right to Appeal

a. Guilty Plea – Sentencing

*State v. Damme*, 944 N.W.2d 98 (Iowa 2020)
The 2019 amendment to Iowa Code §814.6 precluding the direct appeal of a guilty plea unless the defendant is able to show good cause was intended to eliminate frivolous challenges to convictions, and direct appeals of sentences following guilty pleas are justified by good cause.

– Justice Waterman did apply, however, the Iowa Code §814.7 bar on raising claims of ineffective assistance of counsel on direct appeal.

b. 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.

c. Restitution – Interim Order

*State v. Davis*, 944 N.W.2d 641 (Iowa 2020)
While the district court may not enter a final order of restitution until determinations are made as to (1) the full amount of restitution due and (2) the defendant's ability to pay (for forms of restitution for which ability to pay are to be taken into account), and while interim orders of restitution are not enforceable and are not appealable, a final judgment on a criminal conviction that contains an interim restitution determination that appears to be enforceable is appealable.

– Besides direct appeal, Iowa Code § 910.7 contains a mechanism for challenging restitution. Justice McDonald argued in his dissent that this is a sufficient remedy.

2. Preservation of Error

a. Federal – Sufficiency

*Holguin Hernandez v. United States*, _____ U.S. _____, 140 S.Ct. 762, _____ L.Ed.2d _____ (2020)
Defendant's argument at sentencing that the court should impose a sentence of no time at all or some period of time of less than a year was sufficient to preserve for appeal an argument that the imposed sentence of one year (at the bottom of the advisory United States Sentencing Guidelines range) was an unreasonable sentence.

– Federal R.Crim.P. 51(b) provides that, to preserve error for appellate review, and

argument must inform the court "of [1] the action the party wishes the court to take, or [2] the party's objection to the court's action and the grounds for that objection."

b. Offer of Proof

*State v. Leedom*, 938 N.W.2d 177 (Iowa 2020)
Defendant does not preserve for appeal objections to the district court's pretrial rulings in limine where no offer of proof is made during trial.

c. Federal – Plain Error

*Davis v. United States*, _____ U.S. _____, 140 S.Ct.1060, _____ L.Ed.2d _____ (2020)
There is no limitation on review for plain error that precludes the appellate court from considering issues that are factual in nature.

d. Breakdown in Attorney/Client Relationship

*State v. Petty,* 925 N.W.2d 190 (Iowa 2019)
Where the record does not contain evidence as to whether or not the attorney/client relationship has broken down, defendant's objection to the denial by the district court of his motion for new counsel is not sufficiently preserved for direct appeal, and the issue is preserved for postconviction relief.

e. 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 offender 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.

f. 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.

g. Federal Court – Party Presentation

*United States v. Sineneng-Smith*, _____ U.S. _____, 140 S.Ct. 1575, _____ L.Ed.2d _____ (2020)
The court system in the United States is based upon a theory of party presentation, under which the courts consider only the arguments advanced by the adversaries so, absent extraordinary circumstances, it is improper for the federal circuit court of appeals, after reviewing arguments advanced by counsel for the parties in the case, to order various amicus groups to present briefing on issues not raised by the parties.

3. Mootness – Exceptions

*State v. Avalos Valdez*, 934 N.W.2d 585 (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 prisoner 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 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* remains 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).

d. Hearsay

*State v. Veverka*, 938 N.W.2d 197 (Iowa 2020)
Although district court rulings on the admission of evidence are reviewed for abuse of discretion, the court has no discretion to deny admission of relevant hearsay that falls within an enumerated exception to the hearsay rule, and no discretion to admit hearsay that does not, and thus decisions on the admission of hearsay are reviewed for error of law.

e. Limitations on Postconviction Relief Applications

*Thongvanh v. State*, 938 N.W.2nd 2 (Iowa 2020)
District court findings on whether applications for postconviction relief are barred by the statute of limitations are reviewed for error.

B. State Postconviction Relief

1. Availability – Grounds for Relief

a. Actual Innocence – Lesser Offenses

*Dewberry v. State*, 941 N.W.2d 1 (Iowa 2019)
The principle under *Schmidt v. State*, 909 N.W.2d 778 (Iowa 2018), that a free-standing claim of actual innocence may be raised as a basis for postconviction relief, applies only where the defendant is actually innocent of the offense, and not where evidence establishes only that the defendant is guilty of a lesser offense of that of which he or she was convicted.

– It is fairly safe to assume that the Court's groundbreaking decision in *Schmidt* in 2018 would have come out differently in 2019, after its dramatic shift to the right. In *Dewberry*, Justice McDonald does not overrule *Schmitt* outright. Instead he imposes a "he who is without sin" limitation on it. If you admit to causing a victim's death, for example, through negligence or recklessness, and are thus guilty of manslaughter, you may not benefit from evidence establishing that you did not premeditate or intend to kill in challenging a conviction of murder in the first degree.

Justice McDonald employs an interesting device in the first paragraph of the opinion in which he quotes language from a concurring opinion by Sandra Day O'Connor in a separate case, complete with a case cite, then scrubs the name of the defendant in that case and replaces it with Mr. Dewberry's:

"Dispositive of this case," he writes, is a "fundamental fact that [Dewberry] is not innocent, in any sense of the word."

b. Retroactive Changes in the Law

*Thongvanh v. State*, 938 N.W.2nd 2 (Iowa 2020)
The decision in *State v. Plain*, 898 N.W.2d 801 (Iowa 2016) that overruled the holding in *State v Jones*, 490 N.W.2d 787 (Iowa 1992) mandating the absolute disparity test in determining whether minorities were significantly under-represented on jury panels, did not announce a watershed change to a procedural rule that would impact the credibility of the proceedings, and thus is not retroactive to cases that had become final before it was decided.

2. Procedure

a. Limitations

(1) New Rule of Law (also sections dealing with jury selection and the right to a fair cross-section)

*Thongvanh v. State*, 938 N.W.2nd 2 (Iowa 2020)
A defendant whose conviction is final is not barred by the limitation of Iowa Code 622.3 from arguing that he was denied a jury from a fair cross section of the community utilizing the analysis in *State v. Plain*, 898 N.W.2d 801 (Iowa 2016) that overruled the holding in *State v Jones*, 490 N.W.2d 787 (Iowa 1992) mandating the absolute disparity test in determining whether minorities were significantly under-represented on jury panels, because *Plain* represented an unmistakable change in the law.

— Having found that Thongvanh was not time-barred from raising the *Plain* issue in postconviction, Justice Wiggins went on to deny the application. *Plain* did not announce a watershed change to a procedural rule, which is the standard for determining retroactivity of procedural changes.

(2) Following Resentencing

*Sahinovic v. State*, 940 N.W.2d 357 (Iowa 2020)
While the resentencing of the defendant may restart the three-year limitation period for filing for postconviction relief under Iowa Code § 822.3 raising sentencing issues, it does not restart the limitation period for challenging the defendant's *conviction*, and such actions must be filed within three years of the conviction becoming final.

b. 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.

c. 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 -- Time for Appeal

*Banister v. Davis*, _____ U.S. _____, 140 S.Ct.1698, _____ L.Ed.2d _____ (2020)
A motion under Fed.R.Civ.P. 59(c) to amend or modify the court's ruling on a habeas corpus petition is not a second or subsequent petition for habeas corpus, which generally is not permitted under 28 U.S.C. §2244(b), so notice of appeal of the ruling on the habeas petition filed within 30 days of the disposition of the Rule 59(c) motion is timely even if it is filed more than 30 days after the decision on the petition.

– A habeas petition is considered a civil action, subject to the rules of civil procedure, unless overridden statutorily. Justice Alito argues in his dissent that habeas essentially is quasi-criminal, and the §2244(b) bar does override Rule 59 (c).

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. 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).