2016-17 IOWA CRIMINAL CASE LAW UPDATE

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

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I. Constitutional Law

A. Art. I, Section 8 – Commerce Clause – Federal Jurisdiction – Hobbs Act Drug Robberies

Taylor v. United States, _____ U.S. _____, 136 S.Ct. 2074, _____ L.Ed.2d _____ (2016)
Because, under *Gonzales v. Raich*, 545 U.S. 1 (2005) Congress possesses the authority under the Commerce Clause to regulate the national market for marijuana, even in cases involving purely intrastate drug transactions, Congress also has the authority to regulate, under the Hobbs Act, 18 U.S.C. § 1951(a), robberies of drug operations, and it is not necessary to prove that the robbery itself has an effect upon interstate commerce.

– *Taylor* is limited to Hobbs Act robberies of drug operations, and does not necessarily apply to robberies of other enterprises.

B. Art. VI, cl. 2 – (Supremacy)

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

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

– Article VI, cl. 2 of the United States Constitution makes the federal law the supreme law of the land. Congress is given the authority to "establish a . . . uniform Rule of Naturalization" in U.S. CONST. Art I, § 8, cl. 4. In *Martinez*, Justice Appel discusses the two forms of preemption, the theory enforcing the Supremacy Clause. Field preemption comes to play when the entire area of law is occupied by federal law, while conflict preemption exists when a state remedy differs from the federal remedy to the extent that the federal purpose is frustrated.

Both forms of preemption are in play here.

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

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

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

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

D. Second Amendment – Protected Weapons – Stun Gun

Caetano v. Massachusette, _____ U.S. _____, 136 S.Ct. 1027, _____ L.Ed.2d _____ (2016)
A stun gun is among the weapons protected by the Second Amendment after *District of Columbia v. Heller*, 554 U.S. 570 (2008).

– Justice Per Curiam takes each point of the Massachusetts Supreme Court analysis and explains how it contradicts the language of *Heller*, raising the possibility that the state court might have saved the Massachusetts statute banning stun guns with better analysis.

The Court found three flaws in the state court's analysis. A stun gun is not protected by the Second Amendment, the Massachusetts Supreme Court holds, because stun guns "were not in common use at the time of the Second Amendment's enactment." But the *Heller* opinion makes it specifically clear that the Amendment extends to weapons not in existence at the time of adoption. Massachusetts then claims it can prohibit stun guns because they are "dangerous and unusual" – unusual because they did not exist at the time of the enactment of the constitution. This boils down to the same argument previously addressed and rejected by the Court.

Finally, according to the Massachusetts Court, stun guns are not protected because they are not readily adapted for military use. But *Heller* stressed that this was not a requirement.

E. Fourth Amendment

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

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

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

2. Seizure – Reasonable Suspicion – Seizure of Boat

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

3. Warranted Searches – Iowa Code § 808.3 – Search Warrant – Sufficiency

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

– The magistrate also failed to strike out the "do not support" language on the boilerplate form, but this did not invalidate the warrant. Justice Appel wrote a detailed dissent, stressing that issuance of a warrant "which, among other things, may authorize a home invasion by authorities – is among the most delicate and sensitive legal process known under our constitutional system. The process of issuing a valid search warrant is not a bureaucratic bother in which a lackadaisical, close-enough attitude toward legal requirements is good enough." Justice Appel characterized as the "twin pillars of Iowa search and seizure law" (1) the refusal to consider extrinsic evidence to support warrants, and

the examination of the four corners of the warrant to gauge its validity, and (2) Iowa's rejection of the good faith exception to the warrant requirements. Both are endangered by the 4-2 majority's decision.

4. Warrantless Searches

a. "Government Action"

State v. Brown, 890 N.W.2d 315 (Iowa 2017)
An off-duty police officer, concerned that his stepson may be dealing drugs and that the stepson may possess a gun that he may use to harm himself or others, is acting as a stepfather and not a law enforcement officer when he orders the stepson to step out of his vehicle and searches him, finding a gun, and then in a second incident finds marijuana and a gun in a search of the stepson's vehicle then, in both cases, notifies his superiors who take over the case.

– As this was a case of first impression, Justice Zagar was tasked with selecting which of two tests to apply in determining whether there was government action, and thus a Fourth Amendment event. The first is to determine whether the officer is acting as an instrument or agent of the government. The second is to evaluate the officer's actions to measure whether they were the actions of law enforcement or someone acting in a different capacity. Justice Zagar adopted the latter test.

b. *Terry* Stops – Terminating Stop After Ground for Stop is Resolved

State v. Coleman, 890 N.W.2d 284 (Iowa 2017)
Under article I, section 8 of the Iowa Constitution, once the reasonable suspicion that justified the stop of the defendant's vehicle is resolved, the stop must terminate immediately and completely, to the extent that law enforcement may not even request to see the driver's license and registration.

– Justice Appel expresses uncertainty as to whether this decision is more extensive in its scope than the United States Supreme Court decision in *Rodriguez v. United States*, 135 S.Ct. 1609 (2015). In his dissent, Justice Waterman is emphatic that it is, in that, under *Rodriguez*, law enforcement may still request identification after the purpose of the stop is fulfilled. Because this holding may conflict with *Rodriguez*, Justice Appel bases it in the Iowa Constitution.

Trial counsel did not argue this position under the Iowa Constitution, or explain why the Court should divert from federal interpretation of the Fourth Amendment. Because

neither the federal not the state constitutions were mentioned specifically, the Court felt free to explore the independent state analysis and supply its own reason for diverging.

c. Searches Incident to Arrest – Blood Alcohol Testing

Birchfield v. North Dakota _____ U.S. _____, 136 S.Ct. 2160, _____ L.Ed.2d _____ (2016)
Because of its relatively non-intrusive nature, the testing of breath for blood alcohol is excepted categorically from the Fourth Amendment warrant requirement as a search incident to arrest, while the more intrusive testing of blood is subject either to a warrant requirement or to the necessity of demonstrating an exigency justifying a warrantless test.

– Joined by Justice Ginsburg, Justice Sotomayor took the position that the difficulties of obtaining a warrant for prior breath testing are sufficiently minimal that a warrant should be required for both. On the other end of the spectrum, Justice Thomas expressed the opinion that both breath and blood testing should categorically be excepted from the warrant requirement as exigent circumstances.

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

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

d. Automobile Exception

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

– Because of the automobile's inherent mobility, the notice to the occupant that there will be

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

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

e. Student Searches

State v. Lindsey, 881 N.W.2d 411 (Iowa 2016)
Spontaneous statements by a seriously injured high school football player that no one besides a particular friend should handle his equipment bag, together with the student's history of being suspended from school for drug activity and of being accused in the past of firearms possession generated reasonable suspicion that the bag contained guns or drugs, justifying its seizure by school officials and a search of its contents..

– This suspicion, together with the fact that the bag made a metallic thud when it landed on the ground, justified not only seizing and opening the equipment bag, but also justified searching a second bag inside the equipment bag.

In reaching this result, Justice Appel adopted the federal interpretation of the Fourth Amendment in *New Jersey v. T.L.O.,* 469 U.S. 325 (1985) under which, while students have reduced expectations of privacy, school searches must be (1) reasonable at the time of inception, and (2) reasonable in their scope.

f. Searches of Probationers – Special Needs

State v. Brooks, 888 N.W.2d 406 (Iowa 2016)
A probation officer is entitled to enter the residence of a probationer without a warrant under the special needs doctrine where the entry is prompted by facts relating to the purposes of probation supervision, and not by the purposes of law enforcement.

– The Court reached the same conclusion with respect to searches of parolees in *State v. King*, 867 N.W.2d 106 (Iowa 2015). Mr. Brooks challenged the entry of the apartment he rented from his father under article I, section 8 of the Iowa Constitution. In *Brooks*, Justice Mansfield characterized the three factors articulated in *King* for whether an entry is justified under the special needs doctrine are "(1) the nature of the privacy interest intruded upon by the search, (2) the character of the intrusion, and (3) the nature of the governmental concerns and the efficacy of the search policy." *State v. Brooks*, 888 N.W.2d at 414.

The fact that one of the probation officers in *Brooks* wore a Sheriff's uniform and carried a firearm did not render the entry for law enforcement purposes, where the true reason for the entry related to the defendant's supervision.

In his dissent, Justice Appel expressed his discomfort with the special needs exception to the warrant requirement. He also stated his belief that the exclusionary rule should apply in probation revocation proceedings. *State v. Brooks*, 888 N.W.2d at 418-21 (Appel, J., dissenting)

g. Consent

(1) Implied Consent

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

– Without a doubt, *Pettijohn* applies equally to the implied consent provisions involving automobiles. In view of the facts that Mr. Pettijohn was intoxicated when

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

(2) Closed Container – Apparent Authority

State v. Jackson, 878 N.W.2d 422 (Iowa 2016)
Although an individual with actual authority to consent to the search of a premises gives consent to search a room in the apartment, that consent does not extend to searches of closed containers in the room, unless the State establishes by a preponderance of the evidence that law enforcement is reasonable in believing that the consenting individual also has authority to consent to a search of the closed container.

– Under *Illinois v. Rodriguez*, 497 U.S. 177 (1990), law enforcement may conduct a warrantless search of a premises if it relies reasonably upon the consent of a person with the apparent authority to give consent, even if it is determined subsequently that the person has no actual authority. The Supreme Court has not addressed the situation present in *Jackson* where law enforcement, pursuing suspects in an armed robbery, enter an apartment and are given permission by one of the occupants to search his room. During the search, law enforcement found a backpack in that room, and made no effort to question the occupants about its ownership. They searched the backpack, and found evidence linking another occupant to the robbery.

The basic question addressed by Justice Wiggins was whether the burden was on the State to establish that the consenting party had apparent authority to do so, or whether the burden was on the defendant to establish that the consenting party did not. Jurisdictions are split on this issue, and the 4-3 majority selected the former.

In a concurring opinion, Justice Appel advocated dispensing under article 1, section 8 of the Iowa Constitution with the notion of apparent authority, and holding that valid consent may be given only by individuals with actual authority to do so. In the current climate of Iowa jurisprudence, he suggested, Mr. Jackson's attorney was ineffective in not advancing the independent state constitutional claim.

h. Attenuation

Utah v. Strieff, _____ U.S. _____, 136 S.Ct. 2056, _____ L.Ed.2d _____ (2016)
Where law enforcement stops a vehicle without reasonable suspicion, but commits no flagrant misconduct, and determines during the stop that the stopped individual is the subject of an outstanding arrest warrant, the discovery of the warrant attenuates the link between the illegality of stop and the evidence discovered, and the evidence is not excluded.

– Under *Brown v. Illinois*, 422 U.S. 590 (1975) the factors considered in applying the attenuation doctrine are (1) the passage of time between the unconstitutional conduct and the discovery of the evidence, (2) whether there were intervening circumstances, and (3) whether law enforcement engaged in flagrant misconduct.

F. Fifth Amendment

1. Self-Incrimination – *Miranda* – Custody

State v. Schlitter, 881 N.W.2d 380 (Iowa 2016)
Although the defendant was the subject of the investigation into the death of a child, the purpose of his meeting was law enforcement was their attempt to induce him to confess to the child's death, officers questioned the defendant in an interview room with his back to the wall, there was substantial verbal pressure placed on the defendant during questioning to confess and to submit to a polygraph examination, the defendant was confronted with some evidence of his guilt, and there were some impediments placed upon his ability to leave during questioning, under the totality of circumstances a person in the position of the defendant would not reasonably believe that he was in custody, and therefore the defendant was not in custody for the purposes of *Miranda*, when he had cooperated voluntarily with law enforcement prior to the interview, came to the office voluntarily, and officers gave him the opportunity to implicate his girlfriend rather than himself.

– Chief Justice Cady employed the four-factor test from *State v. Countryman*, 572 N.W.2d 553, 558 (Iowa 1997) in reaching his conclusion:

> (1) the language used to summon the individual; (2) the purpose, place, and manner of interrogation; (3) the extent to which the defendant is confronted with evidence of her guilt; and (4) whether the defendant is free to leave the place of questioning.

Justice Appel dissented in part, with an exhaustive discussion of the principles involved in the totality of circumstances analysis used in applying *Miranda*. Justice Appel's opinion will be helpful in future cases to establish that interviews were custodial in nature, therefore implicating *Miranda*.

2. Double Jeopardy

a. Dual Sovereignty – Puerto Rico

Puerto Rico v. Sanchez Valle, _____ U.S. _____, 136 S.Ct. 1863, _____L.Ed.2d _____ (2016)
Because the ultimate source of government and law in the Commonwealth of Puerto Rico is the United States federal government, Puerto Rico and the United States government are not dual sovereigns, and the double jeopardy clause precludes multiple prosecutions in the two jurisdictions for the same offense.

– The states are sovereigns separate from each other and from the United States government. Indian tribes are as well. Under the dual sovereignty principle, Double Jeopardy does not bar prosecutions in different states, or in a state court and federal court, for the same offense. *Heath v. Alabama*, 474 U.S. 82 (1985). What constitutes different sovereigns is not a function of how independently from each other the jurisdictions perform. The inquiry is whether the powers of each derive from the same "ultimate source." *United States v. Wheeler*, 435 U.S. 313 (1978)

Writing for the majority, Justice Kagan traces the history of Puerto Rico as a United States territory, and how Congress ultimately facilitated its path towards self-government. Joined in dissent by Justice Sotomayor, Justice Breyer explains that Puerto Rico's path towards self-governance was little different from those of the states,[1] and that Puerto Rico certainly enjoys greater independence than Indian tribes.

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[1]Other than the original thirteen, which pre-existed the federal government. The Court has found that each new state is "vested with all the legal characteristics and capabilities of the first 13." *Puerto Rico v. Sanchez Valle,* 136 S.Ct. at 1871 (fn. 4). *Coyle v. Smith*, 221 U.S. 559 (1911).

b. Issue Preclusion – Inconsistent Verdicts – Retrial After Appellate Reversal

Bravo Fernandez v. United States, _____ U.S. _____, 137 S.Ct. 352, _____ L.Ed.2d _____ (2016)

Retrial is not barred by Double Jeopardy issue preclusion where defendant is convicted on one count and acquitted on another based on apparently identical facts, after the conviction is reversed on appeal for reasons unrelated to sufficiency of the evidence.

– The Court recognized the principle of issue preclusion in criminal cases in *Ashe v. Swenson*, 397 U.S. 436 (1970), finding that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." When the jury reaches inconsistent verdicts on counts involving the same issue, however, the acquittal does not preclude prosecution in cases involving the same issue. *United States v. Powell,* 469 U.S. 57 (1984). Relitigation is precluded only if acquittal was a deliberate decision by the jury, and the burden is on the defendant to establish that it was. If a jury reaches different conclusions on the same question, it is not a rationale decision. There may be various reasons for its verdict besides a mere determination on the central issue of fact (i.e. compromise). In a criminal case, the jury's reasoning cannot be explored, because the government has no right to appeal.

Where the jury acquits on one count, but is hung on the other, the acquittal does preclude retrial on the central issue, as there is no conflicting decision, simply a failure to decide. *Yeager v. United States*, 557 U.S. 110 (2009).

Bravo involved the situation where the jury renders inconsistent verdicts, but the guilty verdict on one count is reversed on appeal for procedural reasons. There is no issue preclusion under this circumstance, because there was still too much irrationality in the fact-finding process to conclude that the jury made a deliberate decision on the ultimate issue of fact.

G. Sixth Amendment

1. Right to Counsel

a. Use of Uncounseled Conviction as a Predicate for Habitual Offender Status

United States v. Bryant, _____ U.S. _____, 136 S.Ct. 1954, _____ L.Ed.2d _____ (2016)
Because the Indian Civil Rights Act of 1968 confers a right of counsel only upon defendants actually sentenced to terms exceeding one year, an uncounseled prior conviction for which the defendant received only a fine was a valid conviction and thus may be used as a predicate for an 18 U.S.C. § 117(a) conviction of domestic assault in Indian Country by a Habitual Offender.

– Because the prior conviction did not result in imprisonment, it would be valid for use as a predicate in an habitual offender prosecution. *Nichols v. United States*, 511 U.S. 738 (1994).

b. Attachment of Right

(1) Complaint

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

(2) Implied Consent Chemical Test

State v. Senn, 882 N.W.2d 1 (Iowa 2016)
Defendant's right to counsel under Iowa Const. art. I, sec. 10, was not violated by the presence of law enforcement in the room while the defendant spoke to counsel over the telephone about whether to submit to chemical testing following the defendant's arrest for operating while intoxicated.

– Iowa Code § 804.20 permits the defendant to consult confidentially with an attorney at the location in which the defendant is being held in custody. It does not provide that defendant may consult privately with counsel during a telephone call from the jail. Mr. Senn was unable to find an attorney able to make a personal trip to the jail in time to respond to the implied consent request for a chemical test. He was able to speak to an attorney on the phone, but law enforcement was present in

the room and could hear the defendant's side of the conversation.

In cases culminating in the plurality opinion in *Kirby v. Illinois*, 406 U.S. 682 (1971) the Sixth Amendment right to counsel has been interpreted to attach only at the initiation of judicial criminal proceedings by indictment, information or complaint, etc. The question in *Senn* was whether the article 1, section 10 right to counsel applies to stages of the trial preceding the formal charge. The text of the Iowa provision offers some support, as it applies not only in criminal prosecutions, but also "in cases involving the life, or liberty of an individual."

Does this broaden the reach of the right to counsel in Iowa, to the extent that counsel was required at a pre-charging request for a chemical test? The result in *Senn* was that it didn't. But *Senn* was a plurality opinion. Led by Justice Waterman, three justices found that there is no right to counsel under the Iowa Constitution during implied consent testing. Three justices, led by Justice Appel and, to a lesser extent, Justice Wiggins, found that an implied consent test is a stage of trial at which there is a right to counsel.

The swing vote was Chief Justice Cady, who concurred in the result only. *Assuming* that the right to counsel had attached for Mr. Senn, Mr. Senn did not establish, in Justice Cady's mind, that it was violated by making him speak to counsel over the phone in the presence of law enforcement. Applying the principle of constitutional avoidance, Chief Justice Cady resolved the case without addressing the constitutional challenge to § 804.20.

The time will come when it will be necessary to address the constitutional challenge. It appears that Chief Justice Cady will line up with the *Senn* dissenters. When that day comes, counsel may attach for defendants in Iowa during implied consent chemical test requests, pre-charge lineups and pre-charge plea negotiations. The defense bar should keep an eye out for opportunities to raise this question.

c. Counsel During Questioning – Questioning by Jailhouse Informants

State v. Marshall, 882 N.W.2d 68 (Iowa 2016)
Introduction of the testimony of the defendant's cellmate concerning the defendant's statements about his participation in the charged offense violated the defendant's right to counsel, where the informant had a proffer agreement with the government pursuant to which he had previously cooperated against two other targets, where a police investigator "may have" asked the informant about the defendant, where the informant's codefendant was aware that police were investigating the defendant and probably passed that information on to the informant, and thus the informant was an agent for the state, and where the informant deliberately elicited information about the offense by helping the defendant prepare a written account of the offense, telling the defendant it was in his interest to tell his side of the story.

--The primary inquiry in determining whether a defendant's right to counsel has been violated by the use of jailhouse informants, under *Massiah v. United States*, 377 U.S. 201 (1964), *United States v. Henry*, 447 U.S. 264 (1980), and their progeny is whether the informant (1) was an agent of the government, and (2) deliberately elicited information from the defendant. The defendant has the burden of proving that these conditions exist but, in view of the way in which the majority applied them in *Marshall*, the bar is pretty low. The finding of an agency relationship was based upon a "maybe" and a "probably," while the deliberate elicitation amounted to the defendant approaching the informant to enlist his assistance in telling his side of the story to attempt to establish his guilt of a lesser charge.

As always, Justice Appel's opinion contains a wealth of background on the issue, including an extensive discussion of numerous factors that might give rise to a finding of an agency relationship.

d. Counsel of Choice – Freezing Defendant's Assets

Luis v. United States, _____ U.S. _____, 136 S.Ct. 1083, _____ L.Ed.2d _____ (2016)
The Sixth Amendment right to counsel is violated by the pretrial freezing of defendant's untainted assets that may be subject to restitution following conviction, where the freeze deprives the defendant of assets necessary to hire counsel of his or her choice.

– The government is entitled under 18 U.S.C. § 1345, in certain health care and banking fraud prosecutions, to freeze (1) property obtained through the offense, (2) property traceable to the offense, and (3) other property of equivalent value. The Court has approved freezing

assets in the first two categories, in *United States v. Monsanto*, 491 U.S. 600 (1989), and other cases, as not violative of the Sixth Amendment. In Justice Breyer's plurality opinion, and Justice Thomas' concurrence, the Court declined to extend these holdings to the third category of assets.

As might be expected, the opinions in *Luis* are rife with body slams on public defenders and appointed counsel who obviously provide a species of representation well below that of the attorneys Luis wished to hire.

e. Ineffective Assistance

(1) Breach of Duty

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

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

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

State v. Virgil, 895 N.W.2d 873 (Iowa 2017)
In a prosecution for domestic abuse assault, where the central disputed issues of fact were whether the defendant and the victim were cohabiting as household members, defense counsel was ineffective in failing to request a jury instruction defining the terms "cohabiting" and "household member."

– In *State v. Kellogg*, 542 N.W.2d 514 (Iowa 1996), the Court articulated six factors

to determine whether the parties were cohabiting for the purpose of a domestic abuse proceeding. Additionally Iowa State Bar Association Uniform Criminal Jury Instruction 830.4 (2015) contains a detailed definition of cohabiting. Virgil's attorney appeared to be unaware of either. In the Court's unanimous opinion, Justice Waterman stated that defense counsel should be familiar with both.

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

State v. Harris, 891 N.W.2d 182 (Iowa 2017)
Especially where evidence of movement as an element of going armed with intent was relatively weak, counsel was ineffective in failing to object to a marshaling instruction on the offense that did not contain the element of going.

– The Court did reject Mr. Harris' sufficiency of the evidence claim, finding that there was no evidence to establish that the defendant acquired the weapon at the scene of the assault and that he did not carry the weapon to the scene from another location.

State v. Schlitter, 881 N.W.2d 380 (Iowa 2016)
Where defendant is charged with child endangerment resulting in death, and the jury is instructed that there are four possible alternative ways in which the offense may be committed, and the jury finds the defendant guilty via a general verdict, counsel is ineffective in failing to make what would be a meritorious motion for judgment of acquittal arguing that one alternative is unsupported by sufficient evidence.

State v. Ary, 877 N.W.2d 686 (Iowa 2016)
Trial counsel breaches an essential duty to the defendant in filing a notice of depositions and request for extended discovery on the morning after the expiration of a deadline set by the district court, at which time the court indicated there would be no further extensions, without offering cause for the delay or even acknowledging missing the deadline.

– Because the Court could not determine if Ary was prejudiced by counsel's breach, the issue was preserved for postconviction relief.

(2) Prejudice

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

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

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

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

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

2. Right to Jury Trial – Right to Impartial Jury

a. Impartial Jury – Establishing Underrepresentation

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

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

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

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

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

The Court concludes that none of the tests is flawless, and the best solution is to utilize them in combination. Mr. Plain's conviction is affirmed conditionally, but remanded to the district court to determine, in view of the developments announced in his case, whether he was denied a representative jury.

b. *Batson* Claim

Foster v. Chatman, _____ U.S. _____, 136 S.Ct. 1737, _____ L.Ed.2d _____ (2016)
Notwithstanding the prosecution's litany of ostensive race-neutral reasons for striking all of the black jurors on the panel, the state court determination that the strikes did not show purposeful discrimination was clearly erroneous where all of the black jurors on the panel were on a list of "definite NO's", where the names of all black jurors where highlighted in green and the letter B appeared next to each, and where the characteristics that prosecutors listed as reasons for striking the black jurors applied equally to white jurors who were not stricken.

c. Right to Question Jurors About Deliberations – Racial Discrimination

Pena Rodriguez v. Colorado, _____ U.S. _____, 137 S.Ct. 855, _____ L.Ed.2d _____ (2017)
There is, under the Sixth Amendment, an exception to the rule that juror testimony about what occurred during deliberations may not be used to impeach the jury's verdict where a threshold showing is made that one or more jurors made statements exhibiting overt racial bias, casting doubt upon the fairness and impartiatlity of proceedings and that racial bias was a factor in the vote of that juror or jurors.

– Under Colorado Rule of Evidence 606(b), and those of most other jurisdictions, the only exceptions to the no-impeachment rule are (1) whether there was improper extraneous information presented during deliberation, (2) whether the jurors were subject to any outside influence, and (3) if there was a mistake in the form of verdict. Because of the unique nature of racial bias, Justice Kennedy found in the Court's 5-3 decision, a constitutionally-mandated exception also exists. Writing for himself, the Chief Justice and Justice Thomas, Justice Alito likens jury deliberation to other privileged communications. Conversations with an attorney, a doctor or a spouse may include information necessary to present a defense, but they are not admissible in evidence.

3. Speedy Trial – Sentencing

Betterman v. Montana, _____ U.S. _____, 136 S.Ct. 1609, _____ L.Ed.2d _____ (2016)
The Speedy Trial guarantee of the Sixth Amendment applies to the period between arrest and trial, and does not guarantee a speedy sentencing hearing.

– Once the defendant pleads guilty or is convicted at trial, the presumption of innocence no longer applies. The defendant usually is receiving credit on his or her sentence during this time. And, while speedy sentencing is not guaranteed under the sixth amendment, it may be protected statutorily. Justice Sotomayor suggests in a concurrence that a test may be constructed on due process grounds similar to the due process speedy trial test articulated in *Barker v. Wingo*, 407 U.S. 514 (1972).

H. Eighth Amendment

1. Mandatory Sentences for Juvenile Offenders

a. *Miller v. Alabama* – Retroactive Effect

Montgomery v. Louisiana, _____ U.S. _____, 136 S.Ct. 718, _____ L.Ed.2d _____ (2016)
The decision of the United States Supreme Court In *Miller v. Alabama*, 132 S.Ct. 2455 (2012) that the Eighth Amendment proscribes mandatory sentences of life without parole for defendants convicted of crimes committed as juveniles, announced a new substantive rule of constitutional law, and must be given retroactive application by the states.

b. Juvenile Sentences of Life Without Parole

State v. Sweet, 879 N.W.2d 811 (Iowa 2016)
Under article I, sec. 17 of the Iowa Constitution, imposition of a sentence of life without the possibility of parole for a defendant who committed murder before turning 18 is cruel and unusual punishment.

– *Sweet* is perhaps the final, or at least the latest, development in the Iowa Supreme Court's interpretation of *Miller v. Alabama*, 132 S.Ct. 2455 (2012). *Miller* precludes a statutory scheme that makes life without parole mandatory in cases involving juveniles. The sentencing court must have individual discretion, and a sentence of life without parole should be reserved for the rare cases in which the defendant is beyond rehabilitation. With the possible exception of Massachusetts, Iowa becomes the first jurisdiction to apply the *Miller* analysis as a matter of state constitutional law to find that life without parole may never be imposed upon a juvenile defendant. Scientific research has determined that the adult

personality is not fully formed until a person is 25. Justice Appel's primary line of reasoning is that, if even scientists are unable to determine if a particular 18-year-old is capable of rehabilitation, a sentencing judge certainly is not in a position to make that determination.

Chief Justice Cady offers an interesting alternative that might be considered by the legislature in the future. He proposes that the defendant be sentenced to life without parole, but that there be a judicial reconsideration mechanism at some point after the defendant reaches full adulthood.

c. Mandatory Minimums

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

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

d. Denial of Probation and Deferred Judgments for Forcible Felonies

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

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

e. Lifetime Parole for Sex Offenses

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

– There is a mandatory minimum period before the defendant is eligible release, but Chief Justice Cady indicated that Mr. Graham did not challenge this aspect of his sentence. Additionally, the question might be revisited if, as a matter of policy, the parole board was found to systematically refuse to release defendants from the special sentences.

2. Death Penalty Cases – Victim Impact Evidence

Bosse v. Oklahoma, _____ U.S. _____, 137 S.Ct. 1, _____ L.Ed.2d _____ (2016)
While, in *Payne v. Tennessee*, 501 U.S. 808 (1991), the Supreme Court overruled implicitly the holding in *Booth v. Maryland*, 482 U.S. 496 (1987) that it is improper to introduce at a capital sentencing hearing victim testimony concerning the personal characteristics of the victim and the impact of the loss on the victim's family, *Payne* did not overrule portions of *Booth* that proscribed victim impact testimony about the nature of the offense, the personal characteristics of the defendant and the victim's opinion as what the appropriate sentence should be, and introduction of evidence of this nature remains barred under *Booth*.

– The Oklahoma courts found that *Payne* overruled *Booth* in its entirety. Justice Per Curiam noted that only the Supreme Court can overrule one of its precedents.

3. Excessive Fines – $150,000 Mandatory Restitution for Offenses Involving Death

State v. Richardson, 890 N.W.2d 609 (Iowa 2017)
An argument that mandatory restitution payments are excessive is evaluated under the excessive fines clauses of the Eighth Amendment and Iowa Const. art. I, § 17, and not under the cruel and unusual punishment clauses.

– The two provisions are not interchangeable, Justice Mansfield explains.

State v. Richardson, 890 N.W.2d 609 (Iowa 2017)
The mandatory $150,000 minimum restitution requirement under Iowa Code § 910.3B in cases resulting in death is not grossly disproportionate to the offense[3] so , unlike mandatory sentences of incarceration, so it does not constitute an excessive fine under Iowa Const,, art. I, sec. 17, in cases involving offenders who were under the age of 18 at the time of their offenses.

[3] *State v. Izzolena*, 609 N.W.2d 541 (Iowa 2000).

– *Richardson* is a 4-3 decisions, with Chief Justice Cady being the defector from the majority that has expanded, in a number of decisions under the Iowa constitution, upon the Supreme Court decision in *Miller v. Alabama*, 132 S.Ct. 2455 (2012).

The Court also denied Ms. Richardson's as applied challenge. Notwithstanding all of the equities she presented relating to her personal history and characteristics, the restitution award was not excessive in view of the gravity of the offense. Justice Mansfield noted that the Court might review a juvenile defendant's restitution payment plan, if it is so excessive it interferes with the rehabilitation process.

I. Fourteenth Amendment

1. Substantive Due Process – Sexually Violent Predator Commitment – Return to Transitional Release

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

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

2. Procedural Due Process

a. Vagueness – United States Sentencing Guidelines

Beckles v. United States, _____ U.S. _____, 137 S.Ct. 886, _____ L.Ed.2d _____ (2017)
The due process principle of vagueness applies to statutes that limit the Court's discretion by establishing a statutory sentencing range, but not to sentencing guidelines that merely guide the Court in exercising its discretion.

– In *Johnson v. United States*, _____ U.S. _____, 135 S.Ct. 2551, 192 L.Ed.2d 5691 (2015) the Court invalidated, on vagueness grounds, one of three alternative definitions of what

constitutes a "prior felony crime of violence" precursor to sentencing a defendant as an Armed Career Criminal in federal court. A defendant charged with a federal firearms offense faces a statutory range of sentence of up to ten years. An armed career criminal faces a fifteen year minimum sentence and a maximum of life imprisonment. Several United States Sentencing Guidelines employ nearly identical definitions giving rise to other enhancement provisions. The most prominent, and the one at play in *Beckles*, is career offender status, which subjects defendants in prosecutions for controlled substance offenses or felony crimes of violence to dramatically increased sentences where the defendant was previously convicted of at least two controlled substance offenses or crimes of violence.

Johnson was applied retroactively to reduce sentences of armed career criminals still serving sentences of fifteen years or more. Career offenders, on the other hand, will see no such relief.

b. Admission of Unreliable Evidence

More v. State, 880 N.W.2d 487 (Iowa 2016)
While Compositional Bullet Lead Analysis (CBLA) evidence, used at defendant's 1984 murder trial, subsequently was discredited by scientific research, and even by the Federal Bureau of Investigation itself, the evidence was not so inherently unreliable that even permitting its consideration by the jury rendered his trial fundamentally unfair.``

c. *Brady v. Maryland* – Failure to Turn over Exculpatory Evidence

Wearry v. Cain, _____ U.S. _____, 136 S.Ct. 1002, _____ L.Ed.2d _____ (2016)
Defendant's Due Process right under *Brady v. Maryland*, 378 U.S. 83 (1963) to pre-trial disclosure of exculpatory evidence is violated in a capital murder prosecution where the government fails to disclose (1) that the primary informant against the defendant had mentioned to friends that he planned to "make sure [the defendant] gets the needle cause he jacked over me," (2) that another informant had sought a cooperation agreement with the prosecution despite his protestations that he was gaining nothing by testifying against the defendant, and (3) medical records that would establish that one of the individuals alleged by the primary informant to have played an active role in the murder was physically unable to do so and, where the failure to disclose these matters undermined confidence in the jury verdict, defendant is entitled to a new trial.

– This case came to the Court on a writ of certiorari, and was decided by Justice Per Curiam without briefing or argument. This was Justice Alito's major complaint in dissent – that

cases like Mr. Wearry's are often more complex than they appear in the certiorari petition, and should have been brought up through habeas to allow for more complete development in the lower federal courts. Doing it that way, in Justice Alito's view, "leads to better results, and it gives the losing side the satisfaction of knowing that at least its arguments have been heard."

See, I'm not like that. It hurts me more to lose when I've had the opportunity to make what I believe is an irrefutable argument. If I don't have that opportunity, I can rationalize in the back of my mind that "they don't know anything, because they didn't have the benefit of my analysis."

d. Judicial Recusal

Williams v. Pennsylvania, _____ U.S. _____, 136 S.Ct. 1899, _____ L.Ed.2d _____ (2016) The chief justice of the state supreme court who, as the lead state district attorney, had approved seeking the death penalty in a murder prosecution, had made a critical decision in that prosecution, and Due Process thus requires that the justice recuse himself from participating in consideration of a postconviction challenge to the conviction.

– This sweetheart of a guy who managed to slither from his role as D.A. to the helm of the state supreme court ran for his judicial seat bragging about sending 45 defendants to death row. When the lower court stayed Mr. Williams' execution on a *Brady v. Maryland*, 373 U.S 83 (1963) claim, he complained in a concurrence that the lower court "lost sight of its role as a neutral judicial officer" and stayed execution "for no valid reason." He then turned his attention to counsel who represented Mr. Williams in postconviction:

> Chief Justice Castille denounced what he perceived as the "obstructionist anti-death penalty agenda" of Williams's attorneys from the Federal Community Defender Office. . . PRCA courts "throughout Pennsylvania need to be vigilant and circumspect when it comes to the activities of this particular advocacy group," he wrote, lest Defender Office lawyers turn postconviction proceedings "into a circus where [they] are the ringmasters, with their parrots and puppets as a sideshow."

Because it is virtually impossible to ascertain what impact the one jurist's bias had

upon others on the panel on which he sat,[4] a violation of this nature is not amenable to harmless error analysis. The failure of an appellate judge to recuse him- or herself in a proceeding in which he or she was involved previously as an attorney is structural error.

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

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

– Colorado argued that the only vehicle for return of funds is through their Exoneration Act, and that this should be sufficient. But the Exoneration Act requires defendants to prove their actual innocence by clear and convincing evidence. Justice Ginsburg rejected this, as the defendant has no burden of proof where there is no valid conviction. The big point of contention here is whether, under these circumstances, the Court applies the *Mathews v. Eldridge*, 424 U.S. 319 (1976) test for a procedural due process violation, or the test of *Medina v. California*, 505 U.S. 437 (1992). In a concurring opinion, Justice Alito argued for application of *Medina*, under which the Court determines whether the defendant was exposed to some procedure that offends a fundamental principle of justice. Justice Ginsburg utilized *Mathews*, which considers (1) the private interest at play, (2) the risk that utilizing the principles in question will result in erroneous deprivation of that private interest, and (3) the nature of the governmental interest.

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

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[4]In this case, when the motion to recuse was filed, the chief justice referred it to himself and denied it.

f. Death Penalty Cases

Lynch v. Arizona, _____ U.S. _____, 136 S.Ct. 1818, _____ L.Ed.2d _____ (2016)
In a capital case, where the defendant's future dangerousness is in issue and the sentencing alternatives are death or life imprisonment, the defendant has the Due Process right to have the jury instructed that, if given a life sentence, he would be ineligible for parole,.

– In *Lynch*, Justice Per Curiam essentially affirms what the Court held in *Simmons v. South Carolina*, 512 U.S. 154 (1994). Not a particular garden spot for criminal defendants, Arizona believed that *Simmons* doesn't apply there, because there is the opportunity for life without possibility of release for 25 years. But, since Arizona has done away with parole, the only mechanism for release currently is executive clemency.

As is often the case, Justice Thomas responds to the majority's legal with a rundown of the very gruesome facts of the case, basically arguing, "You want to talk about Due Process – look at *this*!!" Justice Alito joins the dissent.

II. Substantive Offenses

A. Accomplice Liability – Aiding and Abetting – Sufficiency

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

B. Assaults – Domestic Assault in Indian Country by a Habitual Offender – Prior Convictions – Uncounseled Convictions

United States v. Bryant, _____ U.S. _____, 136 S.Ct. 1954, _____ L.Ed.2d _____ (2016)
Because Indian Civil Rights Act of 1968 confers a right of counsel only upon defendants actually sentenced to terms exceeding one year, a prior uncounseled conviction for which the defendant received only a fine was a valid conviction and thus may be used as a predicate for an 18 U.S.C. § 117(a) conviction of domestic assault in Indian Country by a Habitual Offender.

– Because the prior conviction did not result in imprisonment, it would be valid for use as a predicate in an habitual offender prosecution. *Nichols v. United States*, 511 U.S. 738 (1994).

C. Bank Fraud – Sufficiency

Shaw v. United States, _____ U.S. _____, 137 S.Ct. 462, _____ L.Ed.2d _____ (2016)
Because a bank has a property interest in money on deposit, the defendant who conducts a scheme to obtain the funds of a bank customer defrauds the financial institution under 18 U.S.C. §1344(1).

– Mr. Shaw advanced various creative arguments for why his conduct did not amount to bank fraud. Each was rejected by Justice Breyer.

D. Bribery – Official Act

McDonnell v. United States, _____ U.S. _____, 136 S.Ct. 2355, _____ L.Ed.2d _____ (2016)
State governor's acts of arranging meetings, hosting events, and contacting other state officials relating to a product sold by a friend of the governor's who had provided the governor and his spouse with $175,000 in loans, gifts and other benefits are not "official acts," subjecting the government to prosecution for bribery, unless they involved a decision or action on a "question, matter, cause, suit, proceeding or controversy."

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

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

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

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

F. Domestic Abuse – Cohabiting – Defined

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

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

G. Driving Offenses

1. Implied Consent – Validity of Consent – Boating

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

– Without a doubt, *Pettijohn* applies equally to the implied consent provisions involving automobiles. In view of the facts that Mr. Pettijohn was intoxicated when he was stopped by law enforcement, that he was arrested and transported to the police station, that the advised consent advisory notified him of the civil consequences of failure to comply but not that he had a right not to comply, and that the particular advisory read to him stated incorrectly that the suspension of his boating privileges would be as long as the suspension following a criminal conviction, among other things, his consent was not voluntary.

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

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

Excellent work on this by Grant Gangestad and his cohorts.

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

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

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

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

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

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

H. Extortion – Federal Hobbs Act Extortion – Taking Money from Conspirator

Ocasio v. United States, _____ U.S. _____, 136 S.Ct. 1423, _____ L.Ed.2d _____ (2016)
Commission of a Hobbs Act extortion under 18 U.S.C. §§ 1951 and 371, which requires that the defendant conspire to obtain money from another under color of official right, may occur where the defendant obtains money from another conspirator, and does not require an unwilling participant.

– Mr. Ocasio was a Baltimore Police Officer who was involved in a scheme involving a local auto repair company. Officers would refer accident victims to the company in exchange for kickbacks. The repair shop owners were not able to commit extortion, but they could be part of the officers' conspiracy to obtain the kickbacks.

The concept that Hobbs Act extortion may include what is considered bribery as well as what is considered extortion arose in *Evans v. United States*, 504 U.S. 255 (1992).

I. Forgery and Identity Theft – Federal Preemption

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

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

– Article VI, cl. 2 of the United States Constitution makes the federal law the supreme law of the land. Congress is given the authority to "establish a . . . uniform Rule of Naturalization" in U.S. CONST. Art I, § 8, cl. 4. In *Martinez*, Justice Appel discusses the two forms of preemption, the theory enforcing the Supremacy Clause. Field preemption comes to play when the entire area of law is occupied by federal law, while conflict preemption exists when a state remedy differs from the federal remedy to the extent that the federal purpose is frustrated.

Both forms of preemption are in play here. Justice Appel's opinion follows closely the United States Supreme Court decision in *Arizona v. United States*, 132 S.Ct 2492 (2012).

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

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

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

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

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

I get his point. As much as possible, we defer to the lower courts. Every Justice who has served on the Court understands this. Do they need a lecture on this from a member who has sat on the bench for a period of hours? We know you're a smart man. We know your judicial philosophy. Who are you writing this for? Maybe he's saying, "Thank you, Mister Trump, for thinking of me."

K. Insider Trading – Sufficiency – Gifts to Relatives

Salman v. United States, _____ U.S. _____, 137 S.Ct. 420, _____ L.Ed.2d _____ (2016)
Under *Dirks v. SEC*, 463 U.S. 646 (1983) a tipper receives a personal benefit when he or she "makes a gift of confidential information to a trading relative or friend," and when a subsequent tippee trades on confidential information knowing it was originally received as a gift from the tipper that person commits insider trading.

L. Motor Vehicle Offenses – OWI – Penalties –- Restitution for "Emergency Response"

State v. Iowa District Court for Scott County, 889 N.W.2d 467 (Iowa 2017)
The provision of Iowa Code § 321J.2(13)(b) that requires the defendant in an OWI prosecution to pay restitution "for the costs of the emergency response" applies when there is an accident of some other urgent event, but does not apply to the mere stop of the defendant by law enforcement, which is an investigative event.

M. Robbery – Federal Hobbs Act Robberies – Federal Jurisdiction

Taylor v. United States, _____ U.S. _____, 136 S.Ct. 2074, _____ L.Ed.2d _____ (2016)
Because, under *Gonzales v. Raich*, 545 U.S. 1 (2005) Congress possesses the authority under the Commerce Clause to regulate the national market for marijuana, even in cases involving purely intrastate drug transactions, Congress also has the authority to regulate, under the Hobbs Act, 18 U.S.C. § 1951(a), robberies of drug operations, and it is not necessary to prove that the robbery itself has an effect upon interstate commerce.

– *Taylor* is limited to Hobbs Act robberies of drug operations, and does not necessarily apply to robberies of other enterprises.

N. Sexual Offenses

1. Federal – Child Pornography – Sentencing -- Enhancement for Prior Convictions

Lockhart v. United States, _____ U.S. _____, 136 S.Ct. 958, _____ L.Ed.2d _____ (2016)
Under the provision of 18 U.S.C. § 2252(b)(2) for a ten-year mandatory minimum in cases involving child pornography where the defendant has a prior conviction of a crime involving aggravated sexual abuse, sexual abuse and abusive sexual conduct involving a minor or ward, the defendant is subject to the minimum if he or she has a prior conviction of aggravated sexual abuse or sexual abuse of an adult, and the limitation to convictions involving a minor or a ward applies only to abusive sexual conduct.

– In reaching this conclusion, Justice Sotomayor considered a variety of factors, including legislative history and Congressional intent. Primarily, however, she relied upon a principle of statutory construction called the "rule of the last antecedent." If the statute contains a list of antecedents followed by a qualifier, the qualifier generally modifies the last antecedent on the list, although it is not mandatory. Justice Kagan responded with a number of examples, including very recent decisions of the Court, in which the rule has not been adhered to.

2. Sex Offender Treatment Program

a. Non-Sexual Offenses

Iowa v. Iowa District Court for Jones County, 888 N.W.2d 665 (Iowa 2016)
The Iowa Department of Corrections possesses the authority to require an inmate to participate in the Sex Offender Treatment Program (SOTP), in a case in which the defendant is convicted of a non-sexual offense, but where the offense has a sexual component, after the defendant has been provided basic notice and ability to respond.

– A due process hearing is not required where the defendant is convicted of a sex offense, because the procedures leading to conviction satisfies due process requirements. The standard of proof is lower (some evidence) and rules of evidence do not necessarily apply. The SOTP assignment may be based upon the statement of the victim appearing in the minutes of testimony.

b. Review

Pettit v. Iowa Department of Corrections, 891 N.W.2d 189 (Iowa 2017)
Because failure to submit to an Iowa Department of Corrections sex offender treatment program (SOTP) may result in the loss of good time and because, under Iowa Code § 903A.4, an inmate disciplinary hearing is not a contested case subject to the administrative procedures of Iowa Code Chapter 17A, SOTP classification is not reviewable under Chapter 17A, and the inmate must contest classification under the postconviction relief provision of Iowa Code § 822.2(f).

3. Sex Offender Registration – Notification of Jurisdiction Offender is Leaving

Nichols v. United States, _____ U.S. _____, 136 S.Ct. 1113, _____ L.Ed.2d _____ (2016)
Under the plain language of 18 U.S.C. § 2250(a), the federal Sex Offender Registration and Notification Act (SORNA), a registered sex offender is not required to notify a jurisdiction the person is leaving, so the registered sex offender who travels to a jurisdiction that does not have a registration requirement without giving notification does not violate SORNA.

– Under SORNA, the offender must register in all jurisdictions in which he or she resides, is employed, or attends school. When the offender moves, etc., he or she is required to notify one of the "involved jurisdictions." That jurisdiction notifies the other involved jurisdictions. The jurisdiction the offender is coming from is not an involved jurisdiction. A subsequent statute, codified as 18 U.S.C. § 2250(b), does require such notification.

4. Sexually Violent Predator Commitment – Violation of Conditional Release – Due Process

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

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

O. Weapons

1. False Statement on Application to Acquire a Firearm

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

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

2. Federal Possession of a Firearm by Person Previously Convicted of Misdemeanor Crime of Domestic Violence, 18 U.S.C. § 922(g)(9) – Prior Offense – "Use of Physical Force"

Voisine v. United States, _____ U.S. _____, 136 S.Ct. 2272, _____ L.Ed.2d _____ (2016)
While a prior misdemeanor crime of domestic violence making it illegal to possess a firearm under 18 U.S.C. § 922(g)(9) must involve the "use. . .of physical force," 18 U.S.C. § 921(a)(33)(A), the physical force need not be intentional, and may be reckless.

P. Theft – Theft by Taking – Sufficiency

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

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

III. Pre-trial Issues

A. Rules of Construction

1. General

State v. Iowa District Court for Scott County, 889 N.W.2d 467 (Iowa 2017)
The provision of Iowa Code § 321J.2(13)(b) that requires the defendant in an OWI prosecution to pay restitution "for the costs of the emergency response" applies when there is an accident or some other urgent event, but does not apply to the mere stop of the defendant by law enforcement, which is an investigative event.

– Justice Mansfield's opinion in this case explores a range of rules of construction. He agreed the statute was ambiguous when it came to defining "emergency response." The state relied upon the doctrine of *ejusdem gereris*, in which specific words in a phrase control the general ones. The defendant relied upon *noscitur a sociis*, under which particular words are defined by words surrounding them. It is important, Justice Mansfield stressed, to examine the object of the statue. Because the statute is ambiguous, the rule of lenity might apply. Statutes should be considered as a whole, rather than interpreting the meaning of separate phrases. Courts should strive to achieve a practical construction of statutory language.

A controlling factor was the legislature's use in the statute of the term "emergency," which would be superfluous if the state's interpretation was adopted.

2. Rule of the Last Antecedent

Lockhart v. United States, _____ U.S. _____, 136 S.Ct. 958, _____ L.Ed.2d _____ (2016)
If statute contains a list of antecedents followed by a qualifier, the qualifier generally modifies the last antecedent on the list, although it is not mandatory that it be interpreted that way.

– 18 U.S.C. § 2252(b)(2) provides for a ten-year mandatory minimum in cases involving child pornography where the defendant has a prior conviction of a crime involving aggravated sexual abuse, sexual abuse or abusive sexual conduct involving a minor or ward,. The defendant in *Lockhart* had a

prior conviction of sexual abuse in which his victim was an adult. He argued that the qualifier "involving a minor or ward" applied to all three of the classes of predicate offenses, and thus he was not subject to the minimum. The qualifier applies only to abusive sexual conduct., Justice Sotomayor found, so his prior conviction gave rise to the minimum. Justice Kagan responded with a number of examples, including very recent decisions of the Court, in which the rule has not been adhered to.

3. Severability Doctrine

Breeden v. Iowa Department of Corrections, 887 N.W.2d 602 (Iowa 2016)
Where a portion of a statute is found to be invalid, remaining portions of the statute may be severed and continue to have validity if the remaining statute can have effect without the stricken portion and where to do so would not confound legislative intent.

4. "Only"

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

B. Jurisdiction – Territorial Jurisdiction

State v. Rimmer, 877 N.W.2d 652 (Iowa 2016)
Where defendants commit acts of insurance fraud in Wisconsin and Illinois, and file claims with a Wisconsin insurance company, there is territorial jurisdiction in Iowa where defendants reported the claim over the telephone to an adjustor located in Iowa, despite the fact that defendants were not aware of the adjustor's location.

– Justice Waterman's opinion in *Rimmer* is a textbook review of the principles of territorial jurisdiction under Iowa law. The test is not the same as that governing personal jurisdiction in civil cases. It is not a minimum contacts test. Personal jurisdiction arises when the defendant is in the jurisdiction, even if the defendant is brought in under government authority. A criminal case can be prosecuted in any jurisdiction in which one of the elements occurred, satisfying the vicinage clause of the Sixth Amendment. Due process is not violated by punishing the defendant for a crime in Iowa, when he did not know that he was committing a crime in Iowa, as long as he knows he was doing so in some state. Prosecution of such defendants in Iowa was also consistent with Iowa Code § 803.1, governing state criminal jurisdiction.

C. Appointment of Counsel – Withdrawal – Taxing Costs to the State Public Defender

State Public Defender v. Iowa District Court, 886 N.W.2d 595 (Iowa 2016)
The district court exceeds its authority in taxing court costs and travel costs of the parties to the State Public Defender when the assistant public defender appointed to represent a juvenile in a delinquency proceeding promptly withdraws on the ground of a conflict of interest with other clients.

– I don't know anything about District Associate Judge Stephen A. Owen, but I would be willing to bet that this case is the tip of the iceberg, and that relations between the court and the public defender in Story County are strained, to say the least. Or maybe it was just a bad day. But everything about the order taxing costs was wrong. For one thing, costs were taxed to the State Public Defender, who isn't even a party to the delinquency action. Under the statute, Iowa Code § 232.141, coasts of juvenile proceedings are taxed to the county, not the parties. The public defender on the case did absolutely nothing wrong, and had moved to withdraw within two hours of the appointment. Nevertheless, Judge Owen castigated the public defender for not moving quickly to get new counsel appointed. But under Iowa Code § 13B.9(4)(a), it is the responsibility of the court, not the public defender, to appoint substitute counsel in the event of the conflict. And the public defender had provided the court with a list of potential substitutes at the time of withdrawal.

Hopefully, Judge Owen and the local public defender can bury the hatchet, and they can work together in a more productive manner in the future.

D. Discovery and Disclosure of Evidence

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

a. Extent of Required Disclosure

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

– Justice Appel devotes a lot of space in the Shorter opinion to the development of what he admits is a hotly contested area of the law. It appears that the Court intends to announce a rule or apply some clear guidance, but in the end does not.

b. Identification Testimony

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

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

2. Subpoeanas duces tecum – ex parte

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

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

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

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

advances his or her cause. In addition to all the other solemn burdens shouldered by the prosecutor, the prosecutor must protect witnesses from undue pressure brought on by the defense team -- who do *not* carry guns, wear badges and uniforms and draw from an arsenal of coercive devices available only to the government.

Give me a break.

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

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

3. *Brady* – Materiality

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

– Joined by Justice Ginsburg, Justice Kagan argued in dissent that the outcome of trial in this case *would have* been different.

E. Limitations

1. Roles of Judge and Jury

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

2. Continuing Offense

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

– Generally, the limitation period begins to run when the last act constituting the offense has been

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

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

3. Fraud Extension

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

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

F. Motions and Rulings

1. Motions to Extend Discovery Deadlines

State v. Ary, 877 N.W.2d 686 (Iowa 2016)
The district court does not abuse its discretion in denying a motion to take depositions and for expanded discovery where the court had previously extended deadlines to the previous day noting that there would be no further extensions, and the defendant offered no reason for missing the deadline, nor even acknowledged missing the extended deadline.

– Repeating language from *State v. Gates*, 306 N.W.2d 720, 726 (Iowa 1981), Justice Wiggins cautions "that in exercising their discretionary authority over the administration of discovery matters, 'courts must strike a careful balance between the interest in economizing discovery and the rights afforded criminal defendants.'"

2. Motion for Recusal of Judge

State v. Toles, 885 N.W.2d 407(Iowa 2016)
Statements to the defendant by the district court at sentencing that the court is very familiar with the defendant's name, both as a prosecutor and as a judge, and that the fact that the court knows the defendant's middle name is not good for the defendant, does not alone demonstrate bias or prejudice against the defendant, and the court is not required to recuse itself.

3. Speedy Trial

a. Arrest

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

– The Court has swung back and forth on this issue over the years, but *Williams* expressly overrules *State v. Wing*, 791 N.W.2d 243 (Iowa 2010), which employed the constitutional definition of arrest. Stare decisis, Chief Justice Cady observes, must give way when current case law is incorrect. The only thing that has changed, Justice Wiggins responds, is the makeup of the Court, and stare decisis should not give way simply because there are different butts in the seats.[5]

b. Good Cause for Delay

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

– What the district court actually did in *McNeal* was to commence jury selection two days before the deadline, and then to recess until witnesses were available. The Court declined to decide if this measure was sufficient to satisfy the rule. All justices appeared to be in

[5]This is my characterization, not Justice Wiggins'.

agreement that *McNeal* does not constitute an across-the-board holding that the Rule 2.33(2)(b) deadline can be avoided by conducting voir dire within the 90-day period and then recessing until the prosecution is prepared to go to trial.

The sufficiency of the finding of good cause is reviewed for abuse of discretion. In his concurrence, Chief Justice Cady notes that, if he was the trial judge, he may not have proceeded in this manner. But the manner in which it was handled in *McNeal* was within the court's discretion.

Joined by Justices Hecht and Wiggins, Justice Appel disagreed.

State v. Taylor, 881 N.W.2d 72 (Iowa 2016)
The state did not meet its burden of establishing good cause for a delay in trial beyond the 90-day speedy trial limit of Iowa R.Crim.P. 2.33(2) where the defendant was in custody at the Mitchellville Correctional Facility, which is within Iowa, and the state made no showing of due diligence in contacting her, and where the defendant engaged in plea negotiations with the state only after the 90-day period had run.

– The state attempted to argue that the motion to dismiss was untimely. Justice Appel responded that the timeliness argument has prevailed where the motion was filed after a verdict was returned, *State v. Paulsen,* 265 N.W.2d 581 (Iowa 1978), but never when it was advanced before trial.

4. Notice of Defenses – Insanity – Right to Access to Expert

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

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

1. Consequences of Plea

State v. Fisher, 877 N.W.2d 676 (Iowa 2016)
A defendant entering a plea of guilty to a charge of possession of controlled substances must be informed that, as a consequence of his conviction, his driver's license will be suspended for 180 days.

-- In a *per curiam* decision in *State v. Carney*, 584 N.W.2d 907 (Iowa 1998), the Court ruled previously that the license suspension was a collateral consequence of a conviction of OWI, and the court has no

responsibility to advise the defendant of that consequence in taking an OWI plea. A conviction of drug possession is a different circumstance. Suspension of the license of a driver convicted of drunk driving serves a public safety goal. It is not necessarily punitive. Taking the license of a drug possessor is, on the other hand, solely punitive.

State v. Fisher, 877 N.W.2d 676 (Iowa 2016)
The imposition of a 35 percent criminal penalty surcharge, a drug-abuse resistance education surcharge of $10, and a $125 law enforcement initiative surcharge are part of the punishment following conviction of possession of controlled substance so, in taking a plea of guilty, the court is required to advise the defendant of these consequences.

2. Immigration Consequences – Duty of Counsel

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

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

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

IV. Trial Issues

A. Jury Selection

1. Improper Questioning

State v. Martin, 877 N.W.2d 859 (Iowa 2016)
The trial court did not abuse its discretion in denying a mistrial when any prejudice from improper voir dire questioning by the prosecutor was effectively mitigated by limitations placed upon questioning and cautioning instructions to the jury.

– The district court, the Court of Appeals, and the Supreme Court agreed that the prosecutor in *Martin*

skated close to the line of impropriety at times during voir dire. Several questionable lines of questioning were not objected to by the defense, so they were not considered by the Court. The prosecutor gave jurors a "civics lesson" in which he explained, essentially, that since the county attorney is elected by the voters he must be trustworthy to avoid losing his job.[6] And there was a suggestion that the jury would not be hearing certain evidence that would support the state's case. These were not objected to.

Defense counsel did object to the prosecutor's vouching for a law enforcement witness as a "good guy," when questioning a juror who knew the officer. This was a valid effort to assess the juror's ability to be objective. The same was true for questions about the credibility of confidential informants.

Justice Hecht was more troubled about hypothetical questions asking panelists to place themselves in the shoes of drug dealers and to informants. As soon as defense counsel objected, the district court halted the questioning and subsequently informed the jury that they should not consider statements of lawyers as evidence. This was sufficient.

2. Motion to Disqualify the Jury

State v. Ary, 877 N.W.2d 686 (Iowa 2016)
The district court's denial of the defendant's motion to disqualify the jury after a panelist spoke at length about his strong particular prejudices in cases such as the defendant's was not reversible, where defense counsel had numerous opportunities to question panelists, as a group and in private, as to whether at least one of them was prejudiced by the panelist's comments, and failed to do so.

B. Evidence

1. Sealed Records of Founded Adult Abuse Claims – Iowa Code 235B.9

State v. Olutunde, 878 N.W.2d 263 (Iowa 2016)
Once the record of a final report of a founded complaint of adult abuse has, after the passage of ten years, been sealed under Iowa Code § 235B.9, the district court is not authorized to reopen the report during a new prosecution of the same defendant for adult abuse.

– The statute means what it says. The two circumstances under which the period before sealing may

[6]Justice Hecht pointed out that, while the county attorney is elected, assistants are not. So the prosecutor's representations were not entirely accurate.

be extended are (1) where good cause for extending the period is found before the records are sealed, and (2) where the defendant commits a similar act of adult abuse before the record is sealed. Neither of these were present here.

Justice Waterman left open the question of whether the contents of the sealed record may be used to impeach the defendant if he subsequently claims to have never committed adult abuse.

2. Iowa R.Evid. 5.106 – Completeness

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

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

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

a. Prior Assaults by Defendant

State v. Richards, 879 N.W.2d 140 (Iowa 2016)
The defendant's intent remains relevant where the defendant relies upon a theory of self-defense, so the district court does not abuse its discretion in a prosecution for domestic abuse causing injury in admitting evidence of prior domestic assaults by the defendant upon the same victim.

– There is a hefty jurisdictional split on this issue. Justice Hecht emphasized that the *Richard* ruling is not a retreat from the Iowa Court's understanding that Rule 5.404(b) is a rule of exclusion, not inclusion.

State v. Richards, 879 N.W.2d 140 (Iowa 2016)
The prejudice prong of Iowa R.Evid. 5.404(b) is the same as under Iowa R.Evid. 403, requiring the court to determine whether the danger of undue prejudice substantially outweighs its probative valuse.

– In cases such as *State v. Barnes*, 791 N.W.2d 817 (Iowa 2010) and *State v. Duncan*, 710 N.W.2d 34 (Iowa 2006), the inquiry has been whether the probative value of the evidence substantially outweighs its prejudice. Decisions such as *Barnes* and *Duncan* are overruled on

this issue in *Richards.*

b. Judicial Discretion

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

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

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

4. Expert Testimony – Iowa R. Evid. 5.703 – Comparative Bullet Lead Analysis – Reliability

More v. State, 880 N.W.2d 487 (Iowa 2016)
Where the state relied heavily upon Compositional Bullet Lead Analysis (CBLA) evidence at defendant's 1984 murder trial, the fact that such evidence subsequently was discredited by scientific research, and even by the Federal Bureau of Investigation itself, constituted non-cumulative newly discovered evidence that could not have been discovered through due diligence at the time of trial.

– Mr. More did not receive a new trial on this ground, however, as his conviction was supported by other evidence and the new developments would not have resulted in a different verdict.

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

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

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

6. Hearsay

a. What Constitutes Hearsay

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

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

b. "Backdoor Hearsay"

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

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

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

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

– Huser attempted unsuccessfully to admit the statements under the "inextricably intertwined" theory, arguing that the codefendant's declarations were inextricably intertwined with the charged offense. According to Justice Appel, this doctrine "is a narrow exception reserved

for situations in which evidence of another crime is admitted because of necessity in explaining the underlying crime charged." It did not apply in Mr. Huser's case.

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

C. Motions

1. Mistrial – Trial Publicity

State v. Gathercole, 877 N.W.2d 421 (Iowa 2016)
The trial court does not abuse its discretion in failing to grant mistrial or to order that jurors be polled when a local newspaper releases an article, at least online, that contains factual misstatements about the evidence, where the article did not raise serious concerns of prejudice because the misstated fact was not one disputed by the parties, where there the true facts were made known to the jury during trial, and where there is no reasonable possibility that the jury read the article.

– Under *State v. Bigley*, 202 N.W.2d 56 (Iowa 1972) the court must poll the jury about exposure to a factually inaccurate news story where the story raises "serious questions of possible prejudice." The test is both a qualitative and quantitative one. The qualitative aspect refers simply to how closely related the coverage is to the case, and to the defenses raised. The quantitative component involves the likelihood that the material will reach the jury, and takes into account the admonitions given by the court, the prominence of the report both within the publication and in the community, the frequency with which it was reported, and the credibility of the publisher.

Justice Hecht urges courts to utilize one of two strongly-worded admonitions to the jury published by the United States Judicial Conference Committee on Court Administration and Case Management.

2. Post-Trial Motions

a. Motion for New Trial – Weight of the Evidence – Proper Standing

State v. Ary, 877 N.W.2d 686 (Iowa 2016)
Where the district court denies defendant's motion for new trial stating, "I believe the evidence was sufficient for the jury to convict on all three counts that they rendered a verdict on. I think there was sufficient evidence in the record the State presented," the Court employs the incorrect standard in considering a motion for new trial arguing the verdict was against the weight of the evidence.

b. Motions in Arrest of Judgment

(1) Necessity

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

– But, because the Supreme Court had not previously set out the rule governing the extent of the required colloquy, the Court went ahead and considered the merits of Mr. Harrington's claim (and he prevailed). This is what I like about our Supreme Court in contrast with the Court when *I* practiced there (1985-1994). In those days, the Court simply would have found the issue to be waived, and would never have come down in favor of the defendant on the merits.

(2) Waiver – Sufficient Advice in Written Guilty Plea

State v. Fisher, 877 N.W.2d 676 (Iowa 2016)
While, under *State v. Meron*, 675 N.W.2d 537 (Iowa 2004), it is not necessary for the court taking a plea to a serious misdemeanor to engage in the Iowa R. Crim.P. 2.8(2)(d) colloquy advising the defendant that challenges to a guilty plea must be made in a motion in arrest of judgment to preserve them for appeal, the written plea of guilty must comply substantially with that requirement, and where a written plea does not advise the defendant that failure to file a motion in arrest forecloses appeal, the failure to file a motion in arrest of judgement does not preclude the defendant from appealing his guilty plea.

– This case presents an interesting illustration of the current Supreme Court's growing lack of fondness for motions to withdraw as appellate counsel under Iowa

R. App. P. 6.1005 on the ground that an appeal is frivolous. The district court appointed counsel to represent Mr. Fisher on appeal. Appellate counsel moved to withdraw under Rule 6.1005. The Supreme Court denied the motion, requiring counsel to provide more detail concerning the plea and sentencing. Appellate counsel filed a total of three Rule 6.1005 motions before the Supreme Court removed that attorney and substituted Phil Mears. Phil lost the case in the Court of Appeals, but was successful on further review.

D. Prosecutorial Misconduct – Referring to the Complaining Witness as the "Victim"

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

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

E. Jury Instructions

1. Implicit Bias

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

– Justice Hecht stresses that courts do have a responsibility to address issues of implicit racial bias. Justice Appel's special concurrence contains a thoughtful summary of research on the issue of implici bias in the court system. Most helpful is his reference to a publication of the National Center for State Courts, Jerry Kang, *Implicit Bias: A Primer for Courts* 1-6 (August 2009) http://wp.jerrykang.net.s110363.gridserver.com/wp-content/uploads/2010/10/kang-Implicit-Bias-Primer-for-Courts-09.pdf.[7]

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

2. Malice Aforethought – Permissive Inferences

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

3. "Attempt"

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

F. Jury Deliberations – Use of Jury Testimony to Impeach Verdict

Pena Rodriguez v. Colorado, _____ U.S. _____, 137 S.Ct. 855, _____ L.Ed.2d _____ (2017)
There is, under the Sixth Amendment, an exception to the rule that juror testimony about what occurred during deliberations may not be used to impeach the jury's verdict where a threshold showing is made that one or more jurors made statements exhibiting overt racial bias, casting doubt upon the fairness and impartiatlity of proceedings and that racial bias was a factor in the vote of that juror or jurors.

V. Sentencing

A Particular Sentences

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

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

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

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

2. Enhancements for Prior Convictions

a. Habitual Offender – Admission by Defendant – Procedures Required

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

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

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

b. 18 U.S.C. § 924(e) (Armed Career Criminal Act) – Prior Violent Felony

Mathis v. United States, _____ U.S. _____, 136 S.Ct. 2243, _____ L.Ed.2d _____ (2016)
Where there is a generic formulation of an enumerated prior crime of violence giving rise to enhancement under the Armed Career Criminal Act (18 U.S.C. § 924(e), the *Taylor v. United States*, 495 U.S. 575 (1990) categorical approach of comparing the elements of the relevant alternative of the crime under the state statute with the elements of the enumerated offense is not employed where the state statute articulates various *means* of committing the offense, some of which match the generic offense and some of which do not.

– This case comes out of the Southern District of Iowa, and involves the Iowa burglary statute as a prior violent felony for ACCA purposes. To commit a generic burglary, one must enter a home illegally with the intent to commit a crime. A defendant in Iowa can be guilty of burglary by entering a home illegally, but he or she me also commit burglary by entering an automobile or a boat. If Iowa law required the jury to find unanimously that it was a home the defendant burgled, then the categorical approach would be used in a subsequent federal sentencing to determine whether the particular defendant committed the elements of a house burglary. If so, that burglary would be an ACCA predicate. Iowa law does not require a

unanimous finding, however. A defendant may be convicted of burglary where jurors are split on whether the premise was a house, a car or a boat. Even where, as in *Mathis* it can be determined from court records that the prior burglary was of a house, the fact that it was a house was a means of committing the offense, not an element.

In *Descamps v. United States*, 133 S.Ct. 2276 (2013), the Court held that if there are alternatives under state law, some of which match the elements of the generic offense and some of which do not, but the elements are not divisible in a way that would allow a determination that the prior conviction was for the generic offense, it is not proper to utilize the categorical analysis and, thus, a conviction under the state statute may not be used as an ACCA predicate. The *Mathis* majority reached the same conclusion with respect to state offenses with various means to commit which do not have to be found unanimously by the jury.

3. Good Time Accumulation

a. Removal of Minimum

Breeden v. Iowa Department of Corrections, 887 N.W.2d 602 (Iowa 2016)
The slower (18/85 of a day for each day incarcerated) rate of accumulation of good time credit under Iowa Code § 903A.2(1)(b) for sentences subject to an Iowa Code § 902.12 (2015) mandatory minimum sentence no longer applies when the mandatory minimum is determined to be unconstitutional, and affected defendants are entitled to the 1 2/10 of a day credit for each day served prescribed in Iowa Code § 903A.2(1)(a).

– The district court applied the severability doctrine of statutory interpretation and found that the slower accumulation rate still applied, although the defendants were no longer subject to the 70 percent minimum sentence. Justice Waterman determined that the *raison d'etre* for the slower accumulation rate was connected to the statutory minimum. The legislature would not have intended the slower rate to apply where there is no minimum.

b. Loss of Accrual for Failure to Participate in Treatment

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

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

4. Bond Seizure to Pay Costs

State v. Letscher, 888 N.W.2d 880 (Iowa 2016)
There is no statutory authority in Iowa for the district court to forfeit appearance bond at sentencing, and to use it to pay financial obligations.

– In several jurisdictions there is such authority, and authority existed under the Iowa Code prior to the 1977 rewrite. The bond that Mr. Letscher signed permitted costs, etc., to be deducted from it, but did not agree to forfeiture during sentencing.

5. Restitution

a. Mandatory $150,000 Restitution in Homicide Cases – Juveniles

State v. Richardson, 890 N.W.2d 609 (Iowa 2017)
Throughout the Iowa Code, restitution is not treated as part of the defendant's sentence, and thus the provision of Iowa Code § 901.5(14) that permits the court to suspend or defer an otherwise mandatory sentence where the defendant was under the age of eighteen when the offense was committed, does not apply to the mandatory $150,000 restitution provision of Iowa Code § 910.3B.

b. Reduction for Insurance Payment

State v. DuBois, 888 N.W. 2d 52 (Iowa 2016)
While defendant may be entitled to a reduction in restitution for funds recovered by the victim through insurance and other sources, defendant is not entitled to the reduction of restitution to the amount of the victim's insurance deductible, where the victim does not request payment from the insurer.

6. Forfeiture – Federal – Joint and Several Liability

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

B. Sentencing – Reasons for Sentencing – Consecutive Sentencing

State v. Hill, 878 N.W.2d 269 (Iowa 2016)
Even if there is a statutory presumption that sentences will run consecutively to one another, where the district court has discretion to impose concurrent sentences, it must articulate reasons for imposing consecutive sentences, and general reasons for imposing the particular total sentence are not appropriate.

– The court is not precluded from using the boilerplate reasons set out in the form sentencing order. But the court must identify them as justifying consecutive sentences. Essentially, the court must acknowledge that it possesses the authority to impose concurrent sentences. To the extent that *State v. Hennings*, 791 N.W.2d 838 (Iowa 2010) and *State v. Johnson*, 445 N.W.2d 337 (Iowa 1989) may be read to hold that the district court's statement of reasons apply to all aspects of the sentence, including its consecutive nature, Justice Waterman noted that *Hennings* and *Johnson* are overruled.

VI. Appeal and Collateral Review

A. Direct Appeal

1. Procedural – Notice of Appeal – Deferred Restitution

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

– Justice Thomas explains that the time limitation on filing notice of appeal is not a jurisdictional rule. It is a claim-processing rule. But it is a mandatory claim-processing rule, and it is the one claim-

processing rule a violation of which cannot be remedied after the limitation has passed.

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

2. Appealable Issues

a. Stare Decisis

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

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

b. Forfeiture of Bond in Sentencing

State v. Letscher, 888 N.W.2d 880 (Iowa 2016)
While forfeiture of appearance bond is generally regarded as an issue collateral to the criminal case, subject to separate civil proceedings, where bond is forfeited as part of the sentencing order it may be challenged in the appeal of the criminal case like any other sentencing issue.

– And because sentencing issues may be raised for the first time on appeal, the defendant may raise the issue on appeal despite the fact that the issue was not raised at the district court level.

3. Preservation of Error

a. Timing of Objection

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

b. Constitutional Claims – Assertion of State Constitutional Claims v. Federal

State v. Ary, 877 N.W.2d 686 (Iowa 2016)
Where defendant raises a constitutional claim at trial, but does not specify that it is based upon the state or federal constitutions, and where the defendant does not set out a framework for interpreting the issue differently under the state constitution, the reviewing court will consider the claim under both the state and federal constitutions and, in most cases, will apply the federal constitutional framework in analyzing the claim.

– In *Ary*, Justice Wiggins provides an excellent review of the developing case law governing the preservation of constitutional issues under the state constitution as opposed to under parallel federal constitutional provisions:

> To preserve error on a constitutional claim, counsel should inform the district court of the constitutional basis for any motion a party makes. When a party raises only a specific *federal* constitutional basis for a claim in district court and does not raise the question of ineffective assistance of counsel on appeal, the parallel state constitutional question is not preserved. *State v. Prusha*, 874 N.W.2d 627, 630 ([Iowa] 2016). However, when a party does not indicate the specific constitutional basis for a claim to which parallel provisions of the federal and state constitutions apply, we regard both the federal and state constitutional claims as preserved. *State v. DeWitt*, 811 N.W.2nd 460, 467 (Iowa 2012); *State v. Harrington*, 805 N.W.2d 391, 393 n.3 (Iowa 2011); *King v. State*, 797 N.W.2d 565, 571 (Iowa 2011). When counsel does not advance a distinct analytical framework under a parallel state constitutional provision, we ordinarily exercise prudence by applying the federal framework to our analysis of the state constitutional claim, but we may diverge from federal caselaw in our application of that framework under the state constitution. *See In re Det. Of Matlock*, 860 N.W.2d 898, 903 (Iowa 2015); *State v. Short*, 851 N.W.2d 474, 491 (Iowa 2014); *State v. Baldon*, 829 N.W.2d 785, 822-23 (Iowa 2013) (Appel, J., concurring specially); *State v. Bruegger*, 773 N.W.2d 862, 883 (Iowa 2009); *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 6-7 (Iowa 2004).

c. Federal Plain Error Review – Guideline Computation Error

Molina Martinez v. United States, ____ U.S. ____, 136 S.Ct. 1338, _____ L.Ed.2d ____ (2016)
To establish plain error under Fed.R.Crim.P. 52(b) where the sentencing court erroneously calculates the defendant's sentence under the United States Sentencing Guidelines but where the sentence was within the properly-calculated range, the defendant generally need not present additional evidence that his or her substantial rights were effected, as the erroneous calculation itself may often establish a deprivation of a substantial right.

– There may be circumstances that may show that the sentencing decision was based upon factors other than the guideline calculation, so *Molina-Martinez* does not establish an absolute rule.

4. Standard of Review

a. Limitations

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

b. Jury Selection

State v. Martin, 877 N.W.2d 859 (Iowa 2016)
Control of jury selection is within the discretion of the district court, so review of arguments of improper voir dire is for abuse of discretion.

– Justice Hecht noted in *Martin* that neither of the parties suggested that the issue of improper voir dire has a constitutional component, and reserved the question of whether review under that circumstance might be *de novo*.

State v. Ary, 877 N.W.2d 686 (Iowa 2016)
The Supreme Court has determined in various cases (*State v. Gavin*, 360 N.W.2d 817 (Iowa 1985) and *State v. Staker*, 220 N.W.2d 613 (Iowa 1974)) that review of an argument that defendant was denied a fair trial by an impartial jury based on rulings during jury selection is either *de novo* or for abuse of discretion, but where the outcome is the same under either standard, the Court declines to decide which standard applies.

c. Sentencing

State v. Hill, 878 N.W.2d 269 (Iowa 2016)
While sentencing decisions are reviewed for abuse of discretion, where a particular sentence is not mandatory, the court must exercise its discretion.

– Particularly, where there is a presumption of consecutive sentences, but the district court retains the discretion to sentence concurrently, the court must acknowledge that discretion and articulate reasons for selecting a consecutive sentence.

d. Sentencing – *Miller* Sentencings of Juveniles

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

5. Harmless Error – Structural Error

Williams v. Pennsylvania, _____ U.S. _____, 136 S.Ct. 1899, _____ L.Ed.2d _____ (2016)
A due process challenge to the failure of an appellate judge to recuse him- or herself in a proceeding in which he or she was involved as an attorney is structural error.

– Because it is virtually impossible to ascertain what impact the one jurist's bias had upon others on the panel on which he sat, a violation of this nature is not amenable to harmless error analysis.

6. Ripeness

Taft v. Iowa District Court, 879 N.W.2d 634 (Iowa 2016)
The Iowa Code §229A.8A(2) criteria for placement of a person committed under the Sexual Violent Predator Act into a transitional release program apply only to persons who are eligible for release, so constitutional challenges to the § 229A.8A(2) criteria lodged by a person not otherwise eligible for release are not ripe for appellate review.

B. State Postconviction Relief

1. Availability – Sex Offender Treatment Program Classification

Pettit v. Iowa Department of Corrections, 891 N.W.2d 189 (Iowa 2017)]
Because failure to submit to an Iowa Department of Corrections sex offender treatment program (SOTP) may result in the loss of good time and because, under Iowa Code § 903A.4, an inmate disciplinary hearing is not a contested case subject to the administrative procedures of Iowa Code Chapter 17A, SOTP classification is not reviewable under Chapter 17A, and the inmate must contest classification under the postconviction relief provision of Iowa Code § 822.2(f).

2. Newly Discovered Evidence – Prejudice

More v. State, 880 N.W.2d 487 (Iowa 2016)
While the state relied heavily upon Compositional Bullet Lead Analysis (CBLA) evidence at defendant's 1984 murder trial, and such evidence subsequently was discredited by scientific research, and even by the Federal Bureau of Investigation itself, the new developments, while qualifying as non-cumulative newly discovered evidence that could not have been discovered through due diligence at the time of trial, would not have resulted in a different verdict where defendant's conviction was supported by other evidence.

– Several jurisdictions have wrestled with the impact of the discreditation of CBLA evidence upon final convictions. Justice Appel painstakingly reviews their approaches in the *More* majority. More also raised the issue under the Due Process Clause, but the Court determined that the evidence was not so inherently unreliable that even permitting its consideration by the jury rendered his trial fundamentally unfair.

3. Remedies – Claim that Guilty Plea Lacked Factual Basis

Yocum v. State, 891 N.W.2d 418 (Iowa 2016)
Where defendant claims in postconviction that counsel was ineffective in permitting him to plead guilty to an offense for which there was no factual basis, the verdict is upheld where a factual basis for the plea can be established from the record made below.

– According to Justice Per Curiam, the Court has a number of alternatives when faced with a claim that the factual basis for the plea is insufficient. If there, as in *Yocum*, a sufficient factual basis is made in the record, the plea is upheld. If the defendant has pleaded to the wrong offense, and no factual basis may be made, the plea is vacated and the case is dismissed. If it appears that a factual basis can be made, the case is remanded back to the district court.

C. Federal Habeas Corpus – Extent of Review

1. Deference to the state court

Woods v. Etherton, _____ U.S. _____, 136 S.Ct. 1149, _____ L.Ed.2d _____ (2016)
Where reasonable jurists could disagree upon whether the content of an anonymous tip was offered to show its truth or simply to explain law enforcement's reaction to it, and upon whether the defendant was prejudiced by it being placed in evidence, the state court is not objectively unreasonable in finding in favor of the government and in finding that appellate counsel was not ineffective in failing to raise the issue on appeal.

Kernan v. Hinojosa, _____ U.S. ____, 136 S.Ct. 1603, _____ L.Ed.2d _____ (2016)
Where the state district court denies a prisoner's challenge, on *ex post facto* grounds, to a new law restricting the prisoner's access to good time on the ground that the challenge was filed in the wrong district, and where the highest state appellate court summarily affirms the denial, the federal habeas court errs in assuming that the state appellate court's ruling was not on the merits of the constitutional claim, and that it is not bound to follow the deferential review of state interpretations of federal law mandated by the AEDPA.

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

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

3. State Application of Federal Law

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

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

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

4. State Procedural Rule

Johnson v. Lee, _____ U.S. _____, 136 S.Ct. 1802, _____ L.Ed.2d _____ (2016)
The California rule announced in *In Re Dixon*, 41 Cal. 2d 756, 264 P.2d 513 (1953) that inmates may not raise issues for the first time in postconviction proceedings that could have been raised on direct appeal is firmly established in California and, despite the fact that summary dismissals of postconviction petitions on this ground do not always specifically cite *Dixon*, regularly followed, so the *Dixon* rule is an adequate procedural ground barring federal review of a California conviction.

– If a challenge to a state conviction is defaulted under a firmly established and regularly followed procedural rule, the federal habeas court will generally refuse to hear it.

5. Remedies – Retroactive Application of New Rules

Montgomery v. Louisiana, _____ U.S. _____, 136 S.Ct. 718, _____ L.Ed.2d _____ (2016)
The decision of the United States Supreme Court In *Miller v. Alabama*, 132 S.Ct. 2455 (2012) that the Eighth Amendment proscribes mandatory sentences of life without parole for defendants convicted of crimes committed as juveniles, announced a new substantive rule of constitutional law, and must be given retroactive application by the states.

– Under *Teague v. Lane*, 489 U.S. 286 (1989), new constitutional rules relating to procedural matters generally are not retroactive. A substantive rule is one that precludes prosecution of a certain class of offender or offense. Such a conviction is never valid, and thus may be challenged in Habeas.

In one of his final written opinions as a living human being, Justice Scalia decried the fact that a conviction that is perfectly valid when obtained may be upset after, in this case, fifty years.

Welch v. United States, ____ U.S. ____, 136 S.Ct. 1257, ____ L.Ed.2d ____ (2016)
The decision of the United States Supreme Court in *Johnson v. United States*, 135 S.Ct. 2551 (2015) that struck down, as constitutionally vague, language in the "residual clause" of the definition of a felony crime of violence as a predicate for sentencing as an Armed Career Criminal under 18 U.S.C. § 924(e) is a new substantive rule, and applies retroactively to cases of defendants imprisoned as armed career criminals whose convictions have become final.

6. Harmless Error – Structural Error – Unobjected

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

VII. Miscellaneous Issues

A. Remedies for Wrongfully Imprisoned Person – Iowa Code § 663A.1(1) -- Guilty Plea

Rhoades v. State, 880 N.W.2d 431 (Iowa 2016)
Notwithstanding the fact that a defendant's conviction based upon a plea of guilty was ultimately found void by the Iowa Supreme Court on grounds that it was unsupported by sufficient evidence, compensatory relief for a wrongful conviction under Iowa Code § 663A is categorically unavailable to defendants who pleaded guilty.

– Justice Appel leads us down a long, circuitous road in getting to this holding, hinting in many spots that exceptions might be made where pleas were void, etc. But ultimately he found that the plain language of the statute limits relief to the wrongfully convicted defendants who went to trial. Nevertheless, Justice Appel's opinion in *Rhoades* is packed to the gills with great language about wrongful convictions and other subjects.