2016 Case Law Update

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Presented by
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2015-16 IOWA CRIMINAL CASE LAW UPDATE

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

I. Constitutional Law

A. Separation of Powers, Iowa Const. art. III, §1

Nguyen v. State, _____ N.W.2d _____ (Iowa 2016)
Because the Iowa Legislature has never considered whether a conviction of felony murder could be based upon the willful injury or other assault that caused death, the Iowa Supreme Court in *State v. Heemstra*, 721 N.W.2d 549 (Iowa 2006) did not encroach on the legislative function but merely interpreted the law and did not violate the separation of powers provision of Iowa Const. art. III, § 1, either when it decided *Heemstra* or when it determined that *Heemstra* was prospective only in its application.

B. Fourth Amendment

1. Expectations of Privacy – Hotel Rooms

State v. Tyler, 867 N.W.2d 136 (Iowa 2015)
Despite the fact that the defendant in a prosecution for murder in the first degree may have had rented a hotel room for the sole purpose of delivering her infant child and perhaps even killing it, where the defendant rented the room, paid for it, then rented the room and paid for a second night when it became available, and left the do not disturb sign on the door in the meantime, the defendant demonstrated a legitimate expectation of privacy in the hotel room.

– Justice Zager points out that to establish a legitimate expectation of privacy in the room Ms. Tyler must demonstrate that she had "(1) a subjective expectation of privacy and (2) the expectation was reasonable."

A person may have an expectation of privacy in a hotel room. But not all hotel occupants have *reasonable* expectations. The classic example is the person who rents a room for the sole purpose of packaging and distributing drugs. *State v. Brooks*, 760 N.W.2d 197 (Iowa 2009).

The factors that worked in Ms. Tyler's favor were that she rented the room in her own name, she brought her personal property into the room, she placed a do not disturb sign on the door, and the fact that it appeared she was checking into the room to conceal from her family the fact that she was having a child.

On rhis ground, Ms. Tyler's case was remanded[1] to determine whether the search of the room was justified by an exigency such as the community caretaking exception to the warrant requirement,

[1]The case was already remanded on other grounds.

or by the principle of inevitable discovery.

One intriguing question is Justice Waterman's position on this issue. He begins his partial dissent/partial concurrence indicating, "I respectfully concur in part IV and dissent from part III of the majority opinion," then proceeds to explain his disagreement with portions of the majority opinion that result in reversal of Ms. Tyler's conviction, and his agreement with the parts of the opinion that result in affirmance. He does not, however mention the Fourth Amendment issue which, at the very least, results in a remand. The Fourth Amendment issue arose in Part IV of the majority opinion. Nevertheless, he concludes his opinion with the statement, "I would affirm Tyler's conviction."

2. Search – Satellite-Based Monitoring System

Grady v. North Carolina, _____ U.S. _____, 135 S.Ct. 1368, _____ L.Ed.2d _____ (2015)
The Fourth Amendment protects against the unreasonable collection of information not just in criminal prosecutions, so requiring a person on release for a sex offense to submit to a satellite-based monitoring system is a "search."

– Justice Per Curiam expanded upon the *United States v. Jones* (2012) holding that the attachment of a global positioning satellite device to monitor a vehicle is a Fourth Amendment search. The Court remanded the case to the state court to determine, by considering the totality of circumstances, whether the search was reasonable.

3. Warrant Searches – Probable Cause

a. Defendant's Prior Criminal History

State v. McNeal, 867 N.W.2d 91 (Iowa 2015)
The defendant's prior criminal history may be relevant in determining whether probable cause exists to support the issuance of a warrant, and it is not improper for the issuing court to consider such information.

b. Anonymous Tips

State v. McNeal, 867 N.W.2d 91 (Iowa 2015)
During an investigation of a series of construction site burglaries in which the defendant has been identified as a suspect, the district court, in determining whether probable cause supported a warrant to search a trailer belonging to the defendant, was entitled to find that information provided by a confidential informant is credible where law enforcement verifies "(1) the location of the trailer as reported by the tipster; (2) that the trailer possessed the features as reported by the tipster; and (3) that the trailer belonged to [the defendant] as reported by the tipster," and where law enforcement provided the additional detail that the trailer had recently been moved.

– Justice Zager determines that the circumstances of this case are distinguishable from those in *State v. Kooima*, 833 N.W.2d 202 (Iowa 2013) in which an anonymous tip that a group of men were leaving a bar in a state of intoxication, and nothing more, was not sufficient to support probable cause. The cases probably *are* distinguishable. However, I'm not sure I know where the line is. So you defense attorneys keep arguing that the anonymous tips are not sufficient, and you prosecutors keep arguing that they are. And, in time, maybe the Court will sort it out.

McNeal makes the additional argument that if the Court were to excise the anonymous tip and the district court's reliance upon his prior criminal history, discussed below, the remainder of the circumstances were insufficient to establish probable causes for a warrant to search the trailer. Justice Zager devotes about seven pages of his slip opinion to his response that well yes, they actually were. The reliance upon a cooperating informant who was complicit in Mr. McNeal's offenses was appropriate. The informant was named. He placed himself at risk by cooperating. Most of what he told law enforcement was corroborated. And many of his statements ran against his penal interest. There was a definite nexus between the trailer and the items law enforcement was seeking, in that construction tools often are stored in trailers much like Mr. McNeal's.

Finally, there was no reason the issuing judge could not rely in part on the expertise of law enforcement officers who believed that, based upon all of the circumstances, construction tools would be found in the trailer.

4. Warrantless Searches

a. Traffic Stops

(1) Illuminated License Plates

State v. Lyon, 862 N.W.2d 391 (Iowa 2015)
Iowa Code § 321.388 requires that (1) a license number be illuminated with a white light near the rear plate, and (2) the number be "clearly legible from a distance of fifty feet to the rear" so while, under *State v. Reisetter*, 747 N.W.2d 792 (Iowa App.2008), a law enforcement officer does not have reasonable suspicion to stop a vehicle on the grounds that the plate is not clearly legible when the officer is traveling 100 feet behind the vehicle, the officer does have reasonable grounds for a stop where the officer believes the vehicle has no light at all illuminating the plate.

(2) Extension for Dog Sniff

Rodriguez v. United States , _____ U.S. _____, 135 S.Ct. 1609, _____ L.Ed.2d _____ (2015)
The stop of a vehicle based upon traffic violations observed by law enforcement is valid only as long as necessary to handle the observed violation, and it is unreasonable to extend the stop beyond that time for the purpose of conducting a dog sniff of the vehicle for drugs.

– *Rodriguez* is a 5-4 decision, the majority opinion written by Justice Ginsburg. The split is interesting, with Chief Justice Roberts and Justice Scalia siding with the majority. The case came out of the District of Nebraska (the defendant represented by Assistant Federal Defender Shannon O'Connor on the eve of his retirement) which followed the Eighth Circuit rule that adding ten minutes or so to the length of a stop is a *de minimus* intrusion. The dog sniff does not further the inquiry into the traffic violation, Justice Ginsburg explains, but is aimed rather at detecting evidence of wrongdoing.

The case was remanded for a determination as to whether detention for the dog sniff was justified by reasonable suspicion of criminal activity.

In the matter of property seized from Pardee, 872 N.W.2d 384 (Iowa 2015)
Where an out-of-state traveler was stopped by a highway patrolman for having a partially non-working taillight and for following a semi too closely, the length of the stop exceeded the time reasonably necessary to investigate the grounds for the stop where law enforcement engaged in extensive questioning of the traveler for reasons unrelated to the grounds for the stop and where law enforcement subsequently detained the vehicle's occupants to bring in a drug dog.

– This case is not the appeal of a criminal conviction, but rather the seizure of $33,000 during the stop. Mr. Pardee was actually acquitted of charges stemming from the proceeds of the stop. The district court refused to return the cash on a theory of issue preclusion. Issue preclusion doesn't apply, Justice Mansfield found, because Mr. Pardee was *acquitted*. An acquittal does not resolve the forfeiture issue in favor of the government.

b. Searches Incident to Arrest – Containers in Vehicle Not Within Reach

State v. Gaskins, 866 N.W.2d 1 (Iowa 2015)
Police are not entitled, as a search incident to arrest, to search a locked safe in the back of a vehicle when the defendant has been removed from the vehicle and taken into custody, even though prior to the defendant's removal from the vehicle law enforcement discovered evidence of drug activity in the vehicle and had probable cause to believe evidence of drug activity would be found in the safe.

– As in recent years, the Court capped off its 2014-15 term with a grand finale of decisions, including *Gaskins* and several others. As in many other end-of-term opinions, *Gaskins* was a 4-3 split, and was characterized by some of the most intense, almost personal, infighting to date between the two well-delineated factions of the Court.

Gaskins is also another instance in which the Court found more protection under the search and seizure provisions of article I, section 8 of the Iowa Constitution than the federal courts have found under the Fourth Amendment.

In *Arizona v. Gant*, 556 U.S. 332 (2009) the United States Supreme Court held that law enforcement may search a vehicle incident to arrest only if the person being arrested is within reaching distance of the vehicle *or* if law enforcement has probable cause to believe the vehicle contains evidence consistent with the grounds for the original arrest. There was

no dispute but that law enforcement had probable cause to believe the latter applied in *Gaskins.* Applying article I, sec. 8, however, Justice Hecht announced that the policy underlying searches incident to arrest[2] do not support the second *Gant* alternative.

Five of the seven justices authored opinions. But the real battle lines in *Gaskins* were drawn in Justice Appel's special concurrence and Justice Waterman's dissent. Frustrated by the increasing frequency of decisions in which the Iowa interpretations have diverged from federal interpretations of parallel provisions, Justice Waterman advances a detailed argument that, among other things, the Court should adopt neutral criteria for doing so. Meticulously, Justice Appel deconstructs each of Justice Waterman's arguments.

The dissent also argues profusely that the search of Griffin's safe was justified under the automobile exception to the warrant requirement. The majority had determined that this argument was not preserved sufficiently below, another point vigorously disputed in both dissents. Justice Appel, however, *does* address the automobile exception and, joined by two other justices, hints strongly that the automobile exception may also be on the endangered list under the Iowa Constitution. **The defense bar should pay particular attention to this language** and, while it was unnecessary to address Gaskins' ineffective assistance claim, Justice Appel warns that, to avoid being held ineffective, "defense counsel should have a working knowledge of the larger state constitutional trends around the country."

c. Persons on Probation or Parole --Special Needs Exception to Warrant Requirement – Searches by Parole Officers

State v. King, 867 N.W.2d 106 (Iowa 2015)
A parole officer has a special need to conduct searches of the residences of parolees, when the searches are conducted to further the objectives of supervision and not for the purposes of law enforcement investigation, where the officer has reasonable suspicion that a condition of release is being violated and the search does not extend in scope beyond areas related to the suspicion.

– At first (and maybe second, and third) glance, *King* appears to represent a giant step

[2]This is the first time in any case I recall seeing the acronym SITA used for a search incident to arrest.

backward by the Court. Beginning with *State v. Ochoa*, 792 N.W.2d 260 (Iowa 2010) and running through *State v. Baldon*, 829 N.W.2d 785 (Iowa 2013) and *State v. Short*, 851 N.W.2d 474 (Iowa 2014) the Court progressively carved out protection under article I, section 8 of the Iowa Constitution for persons on parole. There was some suggestion in *State v. Kern*, 831 N.W.2d 149 (Iowa 2013) that a warrantless search by a probation officer, and not law enforcement, might be justified as a special needs search. Here, Chief Justice Cady crossed over with the dissenters in the earlier cases, and wrote the *King* majority.

As always, Judge Appel writes a scholarly dissent, at one point making the intriguing suggestion that the doctrine of "reasonable expectations of privacy" is a concept that itself has been on parole, and the time has come to "revoke" that parole.

d. Search of Person – Consent

State v. Prusha, _____ N.W.2d _____ (Iowa 2016)
Consent to a search of the person given by an individual stopped and questioned by law enforcement at 1:10 a.m. was not involuntary under the totality of circumstances, where there was no indication the person suffered from any impairment or disability, the individual was stopped by a single law enforcement officer rather than a group, the officer did not assert any claim of authority to conduct a search, and there was no indication that the encounter between law enforcement and the individual was lengthened by the request for the search.

– On appeal, Prusha attempted to use his case to persuade the Court to hold that police must advise an individual of his or her right to decline consent to search, as it suggested it might do in *State v. Pals*, 805 N.W.2d 767 (Iowa 2011). At the district court level, Mr. Prusha challenged admission of statements he made on state, as well as federal, constitutional grounds. He also mentioned "the statutes of the State of Iowa," but not the Iowa Constitution, in challenging the search. Thus, Justice Hecht found, he failed to preserve his request that the Court find an independent state constitutional ground to challenge the legality of the search.

C. Fifth Amendment – Self-Incrimination – *Miranda* – Custody

State v. Tyler, 867 N.W.2d 136 (Iowa 2015)
Where law enforcement told the defendant that they wished to speak with her about the death of her infant child and she agreed, where they inquired several times about the state of her health, where, while she was taken to the police station and questioned, she was not handcuffed or placed in the car by force, where she was given a number of breaks during three hours of questioning, where questioning occurred in a carpeted, well-lit room where only two law enforcement officers were present at any one time and those officers were plain-clothed, where officers told the defendant that they were not there to judge her, where law enforcement used language that was not accusatory, and where the door remained unlocked and the defendant was assured she was free to leave at any time, the defendant was not in custody for Fifth Amendment purposes.

– When Ms. Tyler was interviewed later, she was told that law enforcement was now planning to charge her. At that point she was asked whether she wished to retract the admissions she had made and she indicated she did not. She was then given the *Miranda* warnings and proceeded to confirm all of her pre-*Miranda* admissions.

Despite the fact that she had very recently given birth and had lost a substantial volume of blood, the majority concluded that, considering the totality of the circumstances, Ms. Tyler's *Miranda* waiver was voluntary.

Finally, for many of the same reasons set out in resolving the *Miranda* claims, the majority found that the confession itself was voluntary, independent of *Miranda*.

The partial dissents by Justices Hecht and Appel focused on the Fifth Amendment holdings. In Justice Hecht's view, Ms. Tyler was in custody. Law enforcement told her she was free to leave, knowing this was what they had to say to avoid having to give the *Miranda* advice. Law enforcement contacted Ms. Tyler to give a statement, and not vice versa. Contrary to Justice Zager's view, Justice Hecht saw the police as being confrontational at the outset. The invitation to accompany police to the police station was an indication of custody, and questioning lasted three hours. There were lengthy breaks, but each concluded with law enforcement reviewing with Ms. Tyler the inculpatory statements she made earlier.

Having found that Ms. Tyler was in custody when she was questioned, Justice Hecht advocated applying analysis in the plurality decision in *Missouri v. Seibert*, 542 U.S. 600 (2004) that disapproved of the law enforcement practice of redeeming an interrogation conducted in violation of *Miranda* with a "mid-stream" *Miranda* admonition. Law enforcement here did not employ any curative measures prior to requestioning Ms.

Tyler after giving the warnings, and she was not informed that her earlier statement could be used against her.

Justice Appel wrote to argue that the Court should diverge from the holding of the United States Supreme Court in *Oregon v. Elstad*, and ultilize the fruit of the poisonous tree doctrine of *Wong Sun v. United States*, 371 U.S. 471 (1963) in evaluating *Miranda* violations.

D. Sixth Amendment

1. Right to Counsel

a. Iowa Const. art. I, section 10– Simple Misdemeanors

State v. Young, 863 N.W.2d 249 (Iowa 2015)
Defendant is entitled to counsel under article I, Section 10 of the Iowa Constitution in a prosecution for a simple misdemeanor, where the charge carries the possibility of incarceration, even if the defendant does not receive a sentence of incarceration.

– This is another area where at least majority of the Court, led by Justice Appel, interprets the Iowa Constitution to provide more protection than that afforded by federal courts under a parallel provision of the United States Constitution. Recently, the United States Supreme Court held in *Nichols v. United States*, 511 U.S. 738 (1994) that there is no right to counsel in misdemeanor cases where the defendant does not actually receive a prison sentence. One explanation for the more expansive Iowa approach is that article I, section 10 provides the right to counsel "[i]n all criminal prosecutions, *and in cases involving the life, or liberty of an individual*." The more limiting language in the latter obviously refers to something other than criminal prosecutions – for example, civil proceedings that might result in a loss of life or liberty.

The import of the *Young* holding is that, pursuant to the due process provision of article I, section 9 of the Iowa Constitution, an uncounseled conviction of a simple misdemeanor may not be used to enhance a sentence for a subsequent criminal conviction unless there is evidence of a valid waiver.

b. Ineffective Assistance

(1) Breach of Duty

Maryland v. Kulbicki, _____ U.S. _____, 136 S.Ct. 2, _____ L.Ed. 2d _____ (2015)
Where, at the time of defendant's 1995 trial, comparative bullet lead analysis we still an accepted form of forensic evidence, trial counsel was not ineffective in failing to challenge the analysis by introducing a report supporting the analysis and then pointing out the flaws that led ultimately to its discreditation.

State v. Lopez, 872 N.W.2d 159 (Iowa 2015)
Trial counsel is ineffective in failing to object to actions of the prosecuting attorney undermining at sentencing the plea agreement of the parties under which the parties would recommend jointly that the defendant receive a deferred judgment and probation, where the prosecutor displayed photographs of the child endangerment victim suggesting, at least by implication, that the defendant would be a danger to the community if placed on probation.

– While the prosecutor gave lip service to the plea agreement, her actions at sentencing clearly appear to have been a key factor in the judge's decision to impose a period of incarceration. The prosecutor did not, however, violate the agreement in presenting victim impact statements of the father of the victim and of the guardian ad litem, both recommending imprisonment, provided that the prosecutor did not seek out their testimony. Both were entitled to present statements at sentencing.

Justice Waterman's opinion in *Lopez* is an excellent review of the case law involving enforcement of plea agreements.

(2) Prejudice

State v. Lopez, 872 N.W.2d 159 (Iowa 2015)
Where counsel is ineffective in failing to object to the prosecution's breach of a plea agreement by undermining the joint sentencing recommendation, the question in determining whether the defendant was prejudiced is not whether the defendant would have received a different sentence had counsel objected, but rather whether defendant would have been offered the opportunity to withdraw his or her plea or whether the court would schedule a new sentencing hearing in which the prosecutor would be required to comply with the agreement.

– Essentially, prejudice is presumed under these circumstances.

2. Right to Jury Trial – Death Penalty Cases – Hybrid Jury Verdicts

Hurst v. Florida, _____ U.S. _____, 136 S.Ct. 616, _____ L.Ed.2d _____ (2016)
Florida's hybrid death penalty sentencing scheme, under which the jury makes a recommendation that the defendant receive either the death penalty or a life sentence and the judge makes the factual findings necessary to reach a verdict, violates the Sixth Amendment right to have all facts that increase punishment found by a jury.

– In reaching this decision, Justice Sotomayor follows *Ring v. Arizona,* 536 U.S. 584 (2002), and expressly overrules *Hildwin v. Florida*, 490 U.S. 638 (1989) and *Spaziano v. Florida*, 468 U.S. 447 (1984), in which the Court found that specific findings of fact need not be made by a jury in imposing the death sentence.

3. Confrontation – "Testimony"

Ohio v. Clark, _____ U.S. _____, 135 S.Ct. 2173, _____L.Ed.2d _____ (2015)
While not all statements to non-law enforcement individuals automatically are non-testimonial, a three-year-old child's statement to her teacher identifying her mother's boyfriend as the source of her injuries was given in response to a question made for the purpose of determining whether the child needed protection, and not for the purpose of eliciting testimony against the boyfriend, and thus was not testimonial for Sixth Amendment purposes.

– All nine justices joined in the result, although three joined in the judgment only. Joined, by Justice Ginsburg, Justice Scalia, the White Knight of the Confrontation Clause, lambasted Justice Alito for characterizing the decision in *Crawford v. Washington*, 541 U.S. 36 (2004) "as nothing more than 'adopt[ing] a different approach.'" Justice Scalia takes particular exception to dicta in the majority opinion that the primary-purpose test is merely one of the circumstances which implicate the Confrontation Clause:

> The Confrontation Clause categorically entitles a defendant *to be confronted with the witnesses against him*; and the primary-purpose test sorts out, among the many people who interact with the police informally, *who is acting as a witness and who is not*. Those who fall into the former category bear testimony, and are therefore acting as "witnesses," subject to the right of confrontation. There are no other mysterious requirements that the Court declines to name.

Addressing a different issue, Justice Scalia argues, "[a] suspicious mind (or even one that is merely not naive) might regard this distortion as the first step in an attempt to smuggle longstanding hearsay exceptions back into the Confrontation Clause – in other words, an attempt to return to *Ohio*

v. Roberts. But the good news is that there are evidently not the votes to return to that halcyon era for prosecutors; and that dicta, even calculated dicta, are nothing but dicta."

E. Eighth Amendment

1. Mandatory Sentences for Juvenile Offenders

a. Imposition – Factors

State v. Seats, 865 N.W.2d 545 (Iowa 2015)
Under article I, section 17 of the Iowa Constitution, a district court imposing a sentence of life imprisonment without the possibility of parole on a defendant who was a juvenile at the time the offense was committed must consider each the factors set out in *Miller v. Alabama*, 132 S.Ct. 2455 (2012).

– Cerro Gordo County District Court Judge Colleen Weiland must be scratching her head on this one, because nearly everyone else involved in this case is doing just that. Because *State v. Lyle*, 854 N.W.2d 378 (Iowa 2014) had not yet been decided prior to sentencing,[3] Justice Wiggins benevolently elected to remand Mr. Seats' sentencing back to Judge Weiland to do a better job of considering the *Miller* factors. But, as Justice Mansfield points out in his dissent, Judge Weiland *had* considered each of the *Miller* factors explicitly in reimposing Mr. Seats' sentence of life without parole for a murder he committed when he was 17 years old.

The real battle in this case should have been between Justice Mansfield and Justice Hecht, who wrote an articulate special concurrence arguing that, like sentences for non-homicide offenses, sentences of life imprisonment without the possibility of parole categorically violate article I, section 17 of the state constitution when they involve defendants who commit the offenses as juveniles.

Why this was not the issue, when it was sufficiently raised and argued, is the $64,000 question. Justice Wiggins' take on this is that, if Seats goes back down to the district court and receives the same sentence – and based upon the extensive record Judge Weiland made the *first* time it is likely that he will – Mr. Seats may simply go back up and

[3]Although *Miller* and *State v. Ragland*, 854 N.W. 2d 378 (Iowa 2014) (decided August 16, 2013) **had** come down prior to Mr. Seats' November 22, 2013 resentencing hearing.

relitgate the issue before the Supreme Court *then*. The suggestion is that he would have Justice Wiggins' vote. He definitely has Justice Hecht's vote. It's hard to believe he would not also garner Justice Cady's and Justice Appel's. The opinions are already written – it's just a question of who signs on to them. The view of the majority is that we are remanding the case, so it is not necessary to address the sweeping constitutional issue. Justice Mansfield responds that the mechanism of avoidance is not appropriate where the prevailing party receives a remedy *less* than what he or she is requesting. What Mr. Seats was looking for was a ruling that he *may not* receive a sentence of life without parole. What he got was a ruling that the district court fell short procedurally, and essentially another bite of the apple.

Justice Mansfield does throw us something of a bone in his dissent. A sentence of life without parole does not categorically violate article I, section 17. Where the district court *does* fail to apply the *Miller* standard in imposing it, what is the role of the appellate court? He rejects the state's suggestion that a *Miller* violation is simply a procedural violation, subject to error review. Where a juvenile offender receives a sentence of life without parole, the appellate court must review the sentence *de novo*, and make a substantive determination as to whether the *Miller* factors were supported by substantial evidence. He does, however, conduct such a review in this case, and finds that they are.

Rapidly, Justice Hecht is joining Justice Cady and especially Justice Appel as the scholars on what some consider to be the liberal wing of the Court. Like them, he is writing long, well-researched and well-reasoned opinions breaking new ground using interpretations of the state constitution.

One thing I have noticed about Justice Hecht, however, is his almost-Shakespearean creation and use of acronyms. I had never heard the acronym "SITA" used to signify a search incident to arrest until I read his opinion in *State v. Gaskins*, issued just a few days after *Seats*. And now, in *Seats*, I see the extensive use of "LWOP" for life without parole. Maybe I've just missed it, but I don't think I've seen that before. And, to top it off, he got

Justice Mansfield to follow suit in his dissent.

The primary message that should flow from *Seats*, is that any attorney who has a client sentenced to life without the possibility of parole for a homicide committed when the client was a juvenile **should argue that such a sentence categorically violates article I, section 17 of the Iowa Constitution.** Justice Hecht has written your brief for you. If Mr. Seats doesn't get there first, you may be able to make some law.

b. Remedy

State v. Yvette Marie Louisell, 865 N.W.2d 590 (Iowa 2015)
In resentencing a defendant previously convicted of murder in the first degree and sentenced to a mandatory sentence of life without parole for an offense committed before the defendant was 18, following the holdings in *Miller v. Alabama*, 132 S.Ct. 2455 (2012) and its progeny that mandatory sentences of life without the possibility of parole violate the Eighth Amendment in cases in which the defendant was under 18 years of age at the time of the offense, the district court does not have the authority under Iowa law to substitute a sentence of twenty-years and time served, since the Iowa Code does not provide for such a sentence, nor is there authority to impose an alternative sentence of life with the possibility of parole after twenty-five years.

– The remedy adopted by Justice Hecht in the 4-3 majority opinion was to substitute a sentence of life with the possibility of parole. In 2015, the legislature modified Iowa Code § 902.1 to provide three sentencing alternatives for juveniles convicted of murder in the first degree: (1) life without parole, (2) life with parole, or (3) life with the possibility of parole after a period of time articulated by the sentencing judge. Writing for the dissent, Justice Mansfield noted that, when a sentence is vacated as unconstitutional, for example, the case is generally remanded to the district court which applies the law in place at the time of resentencing, if the current law addresses the constitutional defect. The sentence selected by the district court may, in fact, be legitimate under the 2015 modification. Justice Mansfield would have remanded the case to the district court for resentencing under the current statute.

At this point in history, the issue appears to be an academic one. In all of the cases in which *Miller* has resulted in an Iowa defendant being made eligible for parole, only Kristina Fetters has been released by the parole board. Ms. Fetters was terminally ill, and died soon afterward.

2. Death Penalty

a. Procedures

(1) Joint Penalty Proceedings for Co-Defendants

Kansas v. Carr, _____ U.S. _____, 136 S.Ct. 633, _____ L.Ed.2d _____ (2016)
The Eighth Amendment does not preclude a joint penalty phase hearing for co-defendants in capital cases.

– In Justice Scalia's view, this was a Due Process question, and not an Eight Amendment one.

(2) Jury Instructions – Mitigating Factors – Standard

Kansas v. Carr, _____ U.S. _____, 136 S.Ct. 633, _____ L.Ed.2d _____ (2016)
Because, under the Kansas death penalty scheme, the question of whether mitigating factors outweigh aggravating factors is a matter of judgment, and not a legal or even factual determination, the Eighth Amendment does not require the district court to instruct the jury that this determination need not be made beyond reasonable doubt.

– Yeah, but what would it hurt?

b. Means of Execution – Injunctive Relief

Glossip v. Gross, _____U.S. _____, 135 S.Ct.2726, _____ L.Ed.2d _____ (2015)
The district court properly declined to grant a preliminary injunction precluding execution of inmates using a three-drug protocol using, as the first step of the protocol, midazolam, where the inmates failed to establish that the protocol would cause an elevated risk of severe pain as compared to that caused by known available alternatives.

– The first step of the three-drug process is administration of the drug that deadens the prisoner to the severe pain caused by the second and third steps. Two other drugs have been found to be effective in meeting this objective – sodium thiopental and pentobarbital. But the manufacturers of these drugs have refused to make them available for executions. The effectiveness of midazolam is questionable.

Justice Alito wrote the majority opinion and Justice Sotomayor wrote the four-justice dissent on the central issue. The salient battle in this case, was between Justice Breyer on one side and Justices Thomas and Scalia on the other, as they openly debate the constitutionality of continued use of the death penalty in the United States. Because of the proven unreliability of verdicts in capital cases and the inherent delays, Justice Breyer takes

the position that the death penalty is cruel. It is now unusual, in that it is being used less and less and in fewer and fewer jurisdictions.

F. Fourteenth Amendment

1. Due Process

a. Iowa Due Process – Iowa Const. art. I, § 9 – Retroactive Application of New Rule of Law

Nguyen v. State, _____ N.W.2d _____ (Iowa 2016)
The application by the Iowa Supreme Court of the felony merger doctrine in *State v. Heemstra*, 721 N.W.2d 549 (Iowa 2006), was a new rule rather than clarification of an existing rule and was not a substantive watershed rule of criminal procedure implicating fundamental fairness and accuracy of the criminal proceeding, so under the due process provision of Iowa Const. art I, §9 is not required to be applied retroactively.

– The Court previously determined in *Goosman v. State*, 764 N.W.2d 539 (Iowa 2009) that retroactivity was not required under the federal due process clause. The Court saw no reason to depart under the Iowa Constitution from the federal interpretation of the parallel provision.

b. Void for Vagueness – Armed Career Criminal Act – Residual Clause

Johnson v. United States, _____ U.S. _____, 135 S.Ct. 2551, _____ L.Ed.2d _____ (2015)
The "residual clause" of 18 U.S.C. § 924(e)(2)(B), which expands the definition of a "violent felony (qualifying a defendant convicted of a federal firearms offense for a 15-year minimum prison sentence as an Armed Career Criminal if the defendant had been convicted of three such prior violent felonies or drug felonies) to include any felony that "includes conduct that presents a serious potential risk of physical injury to another," is constitutionally vague.

–The Supreme Court has tackled four cases in which it has attempted to divine an analysis that would resolve the question of which prior offenses constitute violent felonies and which do not. Justice Scalia has suggested in past opinions that such an analysis is too elusive. Justice Scalia wrote the *Johnson* majority.

The Career Offender enhancement under the United States Sentencing Guidelines also uses a similar definition. It is likely that *Johnson* will apply in that context as well. Whether *Johnson* will have retroactive effect to defendants sentenced under either provision remains to be seen.

c. Enhancement of Sentence w/Prior Uncounseled Misdemeanor Convictions

State v. Young, 863 N.W.2d 249 (Iowa 2015)
Because a defendant is entitled to counsel under article I, Section 10 of the Iowa Constitution in a prosecution for a simple misdemeanor, where the charge carries the possibility of incarceration, even if the defendant does not receive a sentence of incarceration, an uncounseled conviction of a simple misdemeanor may not, pursuant to the due process provision of article I, section 9 of the Iowa Constitution, be used to enhance a sentence for a subsequent criminal conviction unless there is evidence of a valid waiver.

2. Equal Protection – Iowa Const. art. I, § 6

Nguyen v. State, _____ N.W.2d _____ (Iowa 2016)
. Defendants convicted before the Iowa Supreme Court decision in *State v. Heemstra*, 721 N.W.2d 549 (Iowa 2006) are not similarly situated to those convicted after the *Heemstra* decision, so the Equal Protection Clause of Iowa Constitution art. I, § 6 is not violated where the *Heemstra* felony merger rule is applied only prospectively, and not retroactively.

II. Substantive Offenses

A. Burglary – Sufficiency – Occupied Structure – Abandoned Building

State v. Rooney, 862 N.W.2d 367 (Iowa 2015)
An abandoned house slated for demolition within days of the defendant's entry into it is not "adapted for overnight accommodation of persons" or "used for storage or safekeeping of anything of value," and thus is not an occupied structure as an element of burglary.

B. Controlled Substances

1. Federal – Analogue Controlled Substances – Scienter

McFadden v. United States, _____ U.S. _____, 135 S.Ct. 2298, _____ L.Ed.2d _____ (2015)
In a prosecution for distributing controlled substance analogues under 21 U.S.C. § 813, 802(32)(A) and 841(a)(1), the jury must be instructed that the defendant knew either (1) that the substance is a controlled substance, without necessarily being aware of its nature, or (2) the nature of the substance without necessarily being aware that it is a controlled substance.

– Chief Justice Roberts argued in his lone concurrence that a conviction should be obtained only when

the defendant knows he is distributing a controlled substance, regardless of the fact that he knows its

nature:

> A pop quiz for any reader who doubts the point: Two drugs – dextromethorphan and hydrocone – are both used as cough suppressants. They are also both used a recreational drugs. Which one is a controlled substance?

Justice Thomas remanded the case to determine whether error was harmless.

2. Sufficiency – Constructive Possession

State v. Reed, _____ N.W.2d _____ (Iowa 2016)
There is sufficient evidence to establish that defendant was in constructive possession of controlled substances found at a residence where the defendant would stay at the residence in the room where drugs were found, where law enforcement observed him spending several hours at a time at the residence, including the several hours prior to the search, where defendant's cell phone camera contained a photo of the location where drugs were found, where defendant's cell phone activity was consistent with that of a drug trafficker, where the defendant carried a sizable amount of cash when arrested, and where the defendant offered to assist law enforcement when he was arrested.

C. Financial Crimes – Fraudulent Practices

1. Aggregation of Losses

State v. Hoyman, 863 N.W.2d 1 (Iowa 2015)
In a trial for fraudulent practices for an offense occurring prior to 2014, in order to aggregate separate instances into a single offense under Iowa Code § 714.14 it must be shown that the defendant actually obtained money during each of the offenses.

– In 2014, the legislature replaced valuation based upon money, property or services "obtained" with money, property or services "involved in" each of the acts.

2. Instructions – Intent to Deceive

State v. Hoyman, 863 N.W.2d 1 (Iowa 2015)
While the statutory definition of fraudulent practices in Iowa Code § 714.8(4) does not explicitly include te intent to deceive, an element of intent to deceive is implicit in the requirement that the defendant commit the act "knowing the same to be false."

– The State cited numerous decisions in which other statutes were found not to require the intent to commit a fraud when that element was not expressly in the statute. Intent to deceive is different from intent to commit a fraud, Justice Mansfield explains.

D. Firearms Offenses

1. Possession of a Firearm by a Felon – Ability to Dispose of a Firearm Following a Felony Conviction

Henderson v. United States, _____ U.S. _____, 135 S.Ct. 1780, _____ L.Ed.2d_____ (2015)
Without assisting a violation of 18 U.S.C. § 922(g), a court sentencing a defendant on a felony has the authority to direct the government, at the defendant's request, to turn firearms that until then were legally in the defendant's possession over to a third-party, provided the defendant would have no opportunity to possess the firearms in the future or to control where they would go after that.

– For example, the defendant in *Henderson* wished to have the guns turned over to a registered firearms dealer, so that the guns could be sold in the public market and the proceeds would go to the

defendant. The holding is not, however, limited to these circumstances. The defendant could ask that the guns be turned over to a third party with whom he or she is acquainted, provided there are assurances that they would not, in the future, revert to the possession of the defendant. Whether or not to approve the transfer of the firearms to any person, of course, is within the discretion of the court.

2. Dangerous Weapons – Stun Gun

State v. Howse, _____ N.W.2d _____ (Iowa 2016)
A stun gun , whether functional or not, is a "portable device or weapon directing an electric current, impulse, wave or beam that produces a high-voltage pulse designed to immobilize a person" so, under Iowa Code § 702.7, it is *per se* a dangerous weapon.

– Section 702.7 delineates three ways an object can become a dangerous weapon, It may be an "instrument or device designed primarily for use in inflicting death or injury upon a human being or animal, and which is capable of inflicting death upon a human being when used in the manner for which it was designed." It can be any object "actually used in such a manner as to indicate that the defendant intends to inflict death or serious injury upon the other, and which, when so used, is capable of inflicting death upon a human being." Or it can be an item specifically listed in the final sentence of the section as a per se dangerous weapon. In *State v. Geier*, 484 N.W.2d 167 (Iowa 1992), the Court already found that the stun gun in that case qualified under the first sentence. In 2008, after *Geier*, the legislature added the "portable device or weapon" language, making the stun gun a per se dangerous weapon.

3. Sufficiency – Constructive Possession

State v. Reed, _____ N.W. 2d _____ (Iowa 2016)
Sufficient evidence did not support defendant's conviction of constructive possession of a firearm where fingerprints were found on the firearm that did not match the defendant or his girlfriend, where the defendant's cell phone camera contained photographs of weapons, but not the weapon for which he is charged, and where the weapon was found in a different room from that in which the defendant was staying.

E. Homicide – Murder – Alternative Means of Commission.

1. Direct Killing – Causation

State v. Tyler, 873 N.W.2d 741(Iowa 2016)
Where defendant struck his victim in the back of the head and knocked him down, at which time several other individuals kicked and stomped the victim until he died, the jury could find that but for the defendant's actions the victim would not have been killed, and there is sufficient evidence that the defendant's actions are the factual cause of the victim's death.

2. Aiding and Abetting

State v. Tyler, 873 N.W.2d 741(Iowa 2016)
Evidence is sufficient to submit to the jury a theory of aiding and abetting a murder where evidence supports a finding that the defendant assaulted the victim knowing that others subsequently would resume the assault and that the defendant acted with malice aforethought.

3. Joint Criminal Conduct

State v. Tyler, 873 N.W.2d 741(Iowa 2016)
Prosecution of defendant for murder under a theory of joint criminal conduct requires evidence that the first crime (which led to the second crime) was a joint crime, and where the theory of prosecution was that the first assault by the defendant was a joint crime with a second assault by others that resulted in death, it must be established that the first assault was a result of a plan.

F. Public Intoxication – Public Place

State v. Paye, 865 N.W.2d 1 (Iowa 2015)
Unless a person in possession of the property invites the general public to congregate there, he front steps of a private residence are not a "public place" in which a person could commit public intoxication under Iowa Code § 123.46(2).

– The Court found in *State v. Booth*, 670 N.W.2d 209 (Iowa 2013) that the front steps of an apartment house are a public place for this purpose, but left for another day the question of whether the same conclusion would apply to a private residence. It does not.

G. Sexual Offenses – Lascivious Acts – Sufficiency – Skin-to-Skin Contact

State v. Alvarado, _____ N.W.2d _____ (Iowa 2016)
A conviction of lascivious acts under Iowa Code § 709.8(1) does not require skin to skin contact, and may be accomplished by the touching of a prescribed body part through clothing.

– Part of Mr. Alvarado/s argument is that, while § 708.8(1) does not state that lascivious acts may be accomplished through clothing, Iowa Code § 709.12 specifically mentions touching through clothing as a means to commit indecent contact. The two sections overlap, because indecent contact cases may now be punished as lascivious acts. This is not entirely true, Justice Hecht responds. But even if it were true, statutes may

permissibly overlap in their coverage.

H. Threats – Scienter

Elonis v. United States, _____ U.S. _____, 135 S.Ct. 2001, _____ L.Ed.2d_____ (2015)
While 18 U.S.C. § 875(c), making it illegal to communicate a threat against another person, does not contain an explicit element of scienter, a criminal statute must contain some element of *mens rea* that separates a criminal act from a non-criminal one, so a jury instructions that requires the jury to find merely that a reasonable person would interpret the communication as a threat is not sufficient.

– Mr. Elonis was an aspiring rap star who focused his art upon things he would like to see happen to his estranged wife and his co-workers. He then published his work on Facebook. What I'm doing, he argued, is no different from what Eminem does, and it should not be punished criminally.

In his seven-justice majority opinion, Chief Justice Roberts did not determine whether the jury should be required to find that Mr. Elonis had the specific intent to convey a threat. But the negligence standard applied below wasn't sufficient. In a partial concurrence, Justice Alito took the Chief to task for his lack of specificity. In his opinion, the Court should have applied a recklessness standard. Justice Thomas took it one step farther and took the position that general intent was sufficient.

III. Pre-trial Issues

A. Iowa Code § 804.20

1. Right to Call Attorney or Family Member

State v. Lyon, 862 N.W.2d 391 (Iowa 2015)
While, under some circumstances, law enforcement has an obligation under Iowa Code § 804.20 to inform an arrestee who he or she is entitled to call, law enforcement is not required to inform the person of the purpose of the phone call, specifically that the arrestee has a right to speak to an attorney or family member to determine whether to submit to chemical testing.

2. Right to Meet Privately with Counsel – Necessity of Request

State v. Lamoreux, _____ N.W.2d _____ (Iowa 2016)
The defendant's right to consult privately with counsel under Iowa Code § 804.20 applies when requested by counsel, and law enforcement is not required to provide a private, confidential meeting place absent a request.

– Lamoreux's attorney visited him in jail at 1:23 a.m.. Counsel would have been aware from prior experience that the booking room in which he met the defendant was equipped with audio and video recording equipment. The state made no attempt to admit video or audio recordings of conversations

between the attorney and the client. Mr. Lamoreux moved to suppress, on this basis, his chermical test administered at the jail, to which he consented after meeting with counsel.

The Supreme Court affirmed the denial of his motion. According to Justice Mansfield, "we are reluctant to interpret section 804.20 as granting relief from a set of circumstances that were clearly accepted at the time. Furthermore, it is reasonable to expect an attorney who sees a surveillance system in operation to ask that the surveillance be turned off or that a different room be provided. Normally, in our legal system, attorneys have to ask for things and are good at doing so; that is why clients are willing to pay them." *State v. Lamoreux*, _____ N.W.2d at _____.

B. Limitations – Kidnaping

State v. Walden, 870 N.W.2d 842 (Iowa 2015)
Even where a charge of kidnaping is based upon a sexual abuse, kidnaping is not among the statutorily-enumerated offenses in Iowa Code § 802.2 for which the limitation period is ten years, so the appropriate limitation period under Iowa Code § 802.3 is three years.

– As Professor Bonfield drilled into my skull 33 years ago, "*expressio unius est exclusio alterius.*" Occasionally, the court employs the rule of statutory construction that avoids absurd results. But the statute says what it says.

C. Speedy Indictment – Different Offenses

State v. Penn-Kennedy, 862 N.W.2d 384 (Iowa 2015)
Where the defendant is arrested for public intoxication, and trial information is filed before the 45-day speedy indictment deadline, the speedy indictment provision of Iowa Rule of Criminal Procedure 2.33(2)(a) is not violated by filing of the additional charge of operating while intoxicated, arising from the same incident, past the 45-day deadline but before the limitation period had run.

– Public intoxication is not a lesser offense of OWI, so there is no argument that they are the same offense for speedy trial purposes.

D. Merger of Charges – Attempted Homicide and Voluntary Manslaugher

State v. Ceretti, 871 N.W.2d 88 (Iowa 2015)
While there is no matching of elements between Attempted Murder under Iowa Code § 707.11(1) and Voluntary Manslaughter under Iowa Code § 707.4(1), Iowa R. Crim.P. 2.22(3) requires that attempted crimes merge with completed crimes, and conviction of voluntary manslaughter merges into a conviction of attempted murder in a case involving the same attack on the same victim.

– *Ceretti* places a new twist on what is referred to in Iowa in cases such as *State v. Fix*, 830 N.W.2d 744(Iowa App. 2013) and *State v. Wissing*, 528 N.W.2d 561 (Iowa 1995) as the "one-homicide rule." Here the attempt

is actually the greater offense. Voluntary Manslaughter is considered a "diminished form of murder," so the rule was found to apply.

E Provision of Funds for Investigative Services – Ex Parte Hearing

State v. Dahl, _____ N.W.2d _____ (Iowa 2016)
Where defendant requests funds for appointment of a private investigator, and a question is raised as to whether investigative services are necessary to prepare the defense, and the court determines that the application may have merit but does not contain adequate information to make a ruling, the court should conduct an ex parte hearing to allow defense counsel to set out the basis for the request in such a way as to not inform the state as to defense strategy or work product.

– Following the principle of constitutional avoidance, Justice Wiggins based his decision on Iowa Code § 815.7(5) and the Supreme Court's supervisory powers and not upon the Sixth Amendment. Defendants are not entitled to use § 815.7(5) to conduct a fishing expedition. They must be able to demonstrate that there is an articulable reason for the request. But if the question is a close one, the defendant should be permitted to make the argument outside the presence of the prosecutor.

F. Motions and Rulings – Removal of Prosecutor – District Court Discretion

State v. Iowa District Court for Dubuque County, 870 N.W.2d 849 (Iowa 2015)
Where, in a private jailhouse conversation with her boyfriend, a defendant characterizes the prosecutor in her case (and the boyfriend's) in profane terms and threatens to shoot the prosecutor in the face, and the prosecutor moves subsequently to revoke the defendant's unsecured appearance bond, the district court abuses its discretion in removing the prosecutor, and all attorneys in her office, from handling the case where the district court reasons merely that continued participation by the prosecutor would "be 'inappropriate' under an 'unbiased prosecution' standard" and does not indicate whether the court believes there is an actual conflict or serious potential for conflict, and where there is no determination that the threats would directly impact the prosecutor or any attorney in her office.

– Justice Zager recognizes that judges, prosecutors and, yes, even defense lawyers are threatened and spoken badly of from time to time by defendants, and this in general is not a ground for removal. A prosecutor may not participate if he or she is involved personally in the litigation or is the actual victim of a crime by the defendant.

IV. Trial Issues

A. Evidence

1. Relevance – Victim's Propensity for Violence

State v. Webster, 865 N.W.2d 223 (Iowa 2015)
Although, in a prosecution for murder in which the defendant claims he killed the victim because he believed the victim was assaulting his girlfriend, evidence that the defendant once punched his pregnant wife in the belly has some relevance, the district court does not abuse its discretion in excluding the evidence where there was sufficient evidence of the victim's violence towards women through other witnesses, and the propensity evidence would be unduly prejudicial.

– In reaching this holding, the Court relied upon the first and fourth prongs of the four-pronged test of *State v. Martin*, 704 N.W.2d 665 (Iowa 2005):

> (1) the need for the proffered evidence "in view of the issues and other available evidence," (2) whether there is clear proof it occurred, (3) the "strength or weakness of the prior-acts evidence in supporting the issue sought to be prove[d]," and (4) the degree to which the evidence would improperly influence the jury.

The district court also precluded the defendant from offering evidence of the victim's "prison mentality." There was sufficient evidence of this already in the record.

2. Iowa R.Evid. 5.404(b) (Other Bad Acts – Identity)

a. Prior Assaults by Defendant

State v. Tyler, 873 N.W.2d 741(Iowa 2016)
Where defendant is charged with murder by striking a blow to the victim that knocks the victim down, allowing other friends of the defendant to kick and stomp the victim causing the victim's death, testimony that a witness observed the defendant engaged in fights involving the same individuals in the past is relevant to prove the defendant's knowledge and intent.

b. Flight

(1) Analysis under Rule 404(b)

State v. Wilson, _____ N.W.2d _____ (Iowa 2016)
The admissibility of evidence of flight does not go directly to an element of a charged offense, so it is considered under Iowa R. Evid. 5.404(b).

(2) Admissibility of Evidence

State v. Wilson, _____ N.W.2d _____ (Iowa 2016)
Where a number of significant events related to the investigation of crimes for which the defendant was charged occurred shortly before the defendant fled from law enforcement, a jury could infer that the defendant's flight indicated consciousness of guilt, and evidence of flight is admissible under Iowa R.Evid. 5-404(b).

State v. Wilson, _____ N.W.2d _____ (Iowa 2016)
In the absence of evidence of significant events in the investigation leading to police coming to the defendant's residence to arrest the defendant, evidence that the defendant hid in a hole in the basement when police arrived is not admissible evidence of flight, because there is no support for an inference that hiding in the basement was motivated by consciousness of guilt of the offense being investigated.

– Justice Wiggins' opinion in *Wilson* is a primer on the admissibility of flight evidence. On a case-by-case basis, the court looks at the circumstances under which the defendant sought to avoid law enforcement. The facts must support a "chain of inferences" linking the defendant's evasive actions to actual guilt. Justice Wiggins cites, though does not adopt explicitly a chain of four inferences set out in *2 McCormick on Evidence* § 263, at 314 (7th ed. 2013) and followed by many federal and state courts:

> For evidence the defendant sought to avoid apprehension to be probative of his or her actual guilt with respect to the crime charged, the evidence must support a chain of inferences (1) from the defendant's behavior to avoidance of apprehension, (2) from avoidance of apprehension to consciousness of guilt, (3) from consciousness of guilt to consciousness of guilt concerning the crime charged, and (4) from consciousness of gilt concerning the crime charged to actual guilt of the crime charged.

State v. Wilson, _____ N.W.2d at _____. The test in Iowa appears to boil down to being that, "before a court may admit evidence of prior acts of flight or avoidance, the court must assure itself there is adequate evidence to reasonably support the inferential chain between each act sought to be admitted and actual guilt for the crime charged. *State v. Wilson*, _____ N.W.2d at _____.

3. Expert Testimony – Iowa R. Evid. 5.703

a. Opinions Based Upon Non-Scientific Facts

State v. Tyler, 867 N.W.2d 136 (Iowa 2015)
Where, in a prosecution for murder in the first degree, the State Medical Examiner admits after autopsy that he is unable to determine whether the cause of death of the defendant's newborn infant was homicide, or whether the child was stillborn, the testimony of the medical examiner at trial that the cause of death was drowning and that the manner of death was homicide does not assist the jury, and thus is not proper expert testimony when it was based exclusively upon the admissions of the defendant that the child was crying and breathing after it was born and that she drowned the baby in the bathtub.

– Justice Zager stresses that *Tyler* does not establish a bright-line rule that experts may not rely at least partially upon the statements of witnesses, etc.. The conclusions, however, must be based upon the witness' unique expertise, and not upon conclusions the jury would be able to draw for itself from the other evidence.

Tyler is another magnificent decision released on what essentially was the final day of the 2014-15 term of the Court. Assistant Appellate Defender Maria Ruhtenberg advanced at least four viable, significant issues. In what could be his most scholarly opinion to date, Justice Zager rules in favor of Ms. Tyler on two issues, and in favor of the government on the remaining two. The decision spawned three three-justice partial dissents in which every other justice of the Court joined at least once. The majority opinion was left intact, however, because none of the dissents drew more than three justices away from the majority on any particular issue.

Employing something of a scattergun approach, Justice Waterman dissented on the Rule 5.702 issue, arguing that to restrict experts in this manner flies in the face of Iowa"s liberal acceptance of expert testimony. In *State v. Gaskins*, decided the same day, Justice Appel responded meticulously to each of Justice Waterman's many volleys. Unfortunately, no such response appeared in any of the opinions filed in this case.

b. Expert Testimony Vouching for the Credibility of Complaining Witnesses

State v. Tyler, 867 N.W.2d 136 (Iowa 2015)
In a prosecution for murder in the first degree, where the defendant initially denies that her infant child was born alive, then admits subsequently that the child was breathing and crying after it was born and that she drowned the child in the bathtub, the testimony of the state medical examiner that the cause of the child's death was drowning and the manner of death was homicide is an improper expert comment upon the credibility of the defendant's inculpatory statement, where the medical examiner's conclusion was based virtually exclusively upon the admissions and where the central issue of fact were the credibility of the defendant's various admissions.

4. Hearsay – Exceptions – Iowa R. Evid. 5.803(4) – Statements for the Purpose of Medical Diagnosis or Treatment

State v. Smith, _____ N.W.2d _____ (Iowa 2016)
While, under some circumstances, the identity of an assailant in a domestic abuse prosecution may be necessary for proper diagnosis or treatment of a victim, absent a particular showing of necessity, out of court statements by the victim identifying her assailant are not categorically admitted under the Iowa R.Evid. 5.804(4) hearsay exception for statements made for the purpose of medical diagnosis or treatment.

– The State, and Justice Waterman in his three-Justice dissent, argued that statements regarding identity should categorically be admitted in domestic abuse prosecutions, as they are in child abuse cases. Justice Waterman suggested that, on remand, the victim's statements may be admitted as excited utterances.

B. Motions – Post-Trial Motions – Motion to Dismiss – Juror Bias

State v. Webster, 865 N.W.2d 223 (Iowa 2015)
The district court does not abuse its discretion in denying a motion for new trial on the ground of juror bias, where the juror (ultimately) reveals her friendship with the family of the victim, where the district court finds as credible the juror's protestation that she can be impartial and where the juror's "liking" a Facebook comment by the victim's stepmother asking for strength appears to be nothing more than an expression of empathy.

– This decision is very fact-specific and, in the current judicial climate in Iowa, it is surprising that the Supreme Court did not reverse. Justice Hecht authored a partial dissent in which he also expressed surprise. In a prosecution for murder in the first degree, the juror had told a number of people prior to trial that she would not be chosen to serve because of her relation to the family. Yet she sat silent during voir dire because she was not specifically asked if any panelist had a daughter who was a friend of the victim's sister. After the verdict of murder in the second degree, she apologized to the victim's stepmother for not coming back with first-degree murder.

All of the opinions in *Webster* provide helpful analysis in cases involving juror bias and misconduct. And all of the opinions stress that district courts should be giving strong admonitions to jurors about accessing the social media during trial.

C. Jury Instructions -- Contradictory and Confusing Instructions

State v. Hoyman, 863 N.W.2d 1 (Iowa 2015)
Where the jury instructions, taken as a whole, are contradictory or confusing, a new trial is required.

V. Sentencing

A Particular Sentences – Enhancements for Prior Convictions – Uncounseled Simple Misdemeanors

State v. Young, 863 N.W.2d 249 (Iowa 2015)
Because a defendant is entitled to counsel under article I, Section 10 of the Iowa Constitution in a prosecution for a simple misdemeanor where the charge carries the possibility of incarceration, even if the defendant does not receive a sentence of incarceration an uncounseled conviction of a simple misdemeanor may not, pursuant to the due process provision of article I, section 9 of the Iowa Constitution, be used to enhance a sentence for a subsequent criminal conviction unless there is evidence of a valid waiver.

B. Sentencing Procedures

1. Victim Impact Statements

State v. Lopez, 872 N.W.2d 159 (Iowa 2015)
Because the child endangerment victim's father is an immediate family member of a victim under eighteen years of age at the time of the offense, Iowa Code § 915.10(3), and because a guardian ad litem is empowered to speak for a child unable to make an oral or written statement for him- or herself, Iowa Code § 915.21(1)(e), both are considered victims, and both are able to submit victim impact statements at sentencing.

2. Resentencing after Sentence Vacated – Authorized Sentences.

State v. Yvette Marie Louisell, 865 N.W.2d 590 (Iowa 2015)
In resentencing a defendant previously convicted of murder in the first degree and sentenced to a mandatory sentence of life without parole for an offense committed before the defendant was 18, following the holdings in *Miller v. Alabama*, 132 S.Ct. 2455 (2012) and its progeny that mandatory sentences of life without the possibility of parole violate the Eighth Amendment in cases in which the defendant was under 18 years of age at the time of the offense, the district court does not have the authority under Iowa law to substitute a sentence of twenty-years and time served, since the Iowa Code does not provide for such a sentence, nor was there authority to impose an alternative sentence of life with the possibility of parole after twenty-five years.

VI. Appeal and Collateral Review

A. Direct Appeal

1. Direct Appeal – Preservation of Error

State v. Webster, 865 N.W.2d 223 (Iowa 2015)
While arguments of juror misconduct and juror bias are somewhat separate issues, defendant's claim of juror bias is sufficiently raised despite counsel's reference to juror misconduct where counsel did argue that a juror was biased.

State v. Webster, 865 N.W.2d 223 (Iowa 2015)
The district court's ruling on a motion in limine generally is not sufficient to preserve error for review, and to do so the defendant must offer the evidence at trial that the district court indicated in its limine ruling it would not allow.

2. Standard of Review

a. Constitutional Issues – Probable Cause for Search Warrant

State v. McNeal, 867 N.W.2d 91 (Iowa 2015)
While constitutional issues, including Fourth Amendment issues, are reviewed *de novo*, in reviewing a district court ruling that a search warrant was supported by probable cause the appellate court does not make an independent determination of probable cause, but instead will "merely decide whether the issuing judge had a substantial basis for concluding probable cause existed."

– This standard flows from the strong preference for warranted searches, and the analysis comes from *State v. Gogg*, 561 N.W.2d 360, 363 (Iowa 1997).

b. Removal of Prosecutor Based Upon Conflict of Interest

State v. Iowa District Court for Dubuque County, 870 N.W.2d 849 (Iowa 2015)
The determination of whether a conflict of interest exists that warrants removal of a prosecutor from a case is a mixed question of fact and law.

– Justice Zager follows *State v. McKinley*, 860 N.W.2d 874 (Iowa 2015) in finding this is the appropriate standard:

> "Whether the facts show an actual conflict of interest or a serious potential for conflict is a matter of trial court discretion. . ." *[State v. McKinley*, 860 N.W. 2d at 874] (quoting *Pippins v. State*, 661 N.W.2d 661 N.W.2d 544, 548 (Iowa 2003)). "We review these conflict-of-interest determinations for an abuse of discretion." *Id.*; *State v. Smith*, 761 N.W.2d 63, 68 (Iowa 2003). "'An abuse of discretion occurs when the district court exercises its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable."'" *State v. Webster*, 865 N.W.2d 223, 231 (Iowa 2015)(quoting *State v. Rodriguez*, 636 N.W.2d 234, 239 (Iowa 2001)). "'A ground or reason is untenable when it is not supported by substantial

> evidence or when it is based on an erroneous application of the law.'" *Rodriguez*, 636 N.W.2d at 239 (quoting *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2001))."

State v. Iowa District Court for Dubuque County, 870 N.W.2d at 853.

c. Court's Supervisory Powers

State v. Dahl, _____ N.W.2d _____ (Iowa 2016)
While questions of statutory interpretation are reviewed for errors at law, the Supreme Court possesses the authority under its art. V, § 4 supervisory and administrative control over the inferior courts to implement protocols to protect the rights of litigants, including the provision of investigative services to indigent defendants.

3. Appellate Remedies

a. Conviction on a General Verdict Where Alternative Means of Committing Offense is Invalid

State v. Tyler, 873 N.W.2d 741(Iowa 2016)
Where, in a prosecution for murder, the jury is instructed on theories of direct killing, aiding and abetting, and joint criminal conduct and convicts the defendant by general verdict, and where the theory of aiding and abetting is not supported by the evidence, the remedy is a new trial for the defendant, because it is not possible to ascertain whether the jury convicted the defendant of the unsupported alternative.

– The federal approach, articulated in *Griffin v. United States*, 502 U.S. 46 (1991) is different. While the jury is not able to divine legally sufficient alternatives from legally insufficient ones, the jury is presumed to be able to reject factually unsupported alternatives. In cases such as *Tyler* and *State v. Hogrefe*, 557 N.W.2d 87 (Iowa 1996), Iowa joins other jurisdictions that do not engage in this presumption. *See State v. Jones*, 29 P.3d 351 (Hawaii 2001); *Commonwealth v. Plunkett*, 664 N.E.2d 833 (Mass. 1996); *State v. Ortega-Martinez*, 881 P.2d 231 (Wash. 1994).

b. Vacation of Beneficial Plea Agreement

State v. Ceretti, 871 N.W.2d 88 (Iowa 2015)
While in many cases the remedy for an appellate reversal of a beneficial sentence is remand for resentencing, where the defendant and the state have entered into a plea agreement that is beneficial to the defendant and the defendant successfully appeals a portion of the sentence, the remedy may be to vacate the plea and to place the parties in the position they were in prior to entering into the plea agreement.

– Joseph Ceretti was charged with murder in the first degree. He entered an *Alford* plea pursuant to an agreement under which he would plead to attempted murder (a class B felony)

and willful injury and voluntary manslaughter (both class C felonies), and receive consecutive sentences totaling 45 years. The district court imposed the agreed-upon sentence.

On appeal, Mr. Ceretti argued successfully that the conviction for voluntary manslaughter and the conviction for attempted murder should have merged at sentencing. On the theory that a defendant should not be able to bargain for a favorable deal and then take an appeal to obtain an even better deal, Justice Hecht vacated the plea. The parties will now have to go to trial or negotiate a different plea.

In the end, Mr. Ceretti may have won the battle, but he lost the war.

c. Resentencing v. Amending Sentencing Order

State v. Pearson, _____ N.W.2d _____ (Iowa 2016)
Where the defendant pleads guilty to sexual abuse in the third degree under Iowa Code § 709.4(2)(c)(4), a non-forcible felony, but the district court in its sentencing order indicates that the defendant is guilty of sexual abuse in the third degree under Iowa Code § 709.4(2)(b), a forcible felony, and the court of appeals vacates the judgement and sentence and remands the case to the district court with instructions that the district court "amend the judgment and sentence to reflect the defendant's intent in entering the plea," the district court errs in conducting a resentencing proceeding on remand and imposing a sentence twice as severe as that imposed in the original sentence.

– Justice Mansfield makes the valid point that Mr. Pearson appears to have waived objection to resentencing rather than simply amending the sentencing order to substitute the correct Code section. On remand, the government argued for the more severe sentence, which was ultimately imposed, while Mr. Pearson argued for probation. But Chief Justice Cady determines that Mr. Pearson himself, not his attorney, commented twice during the resentencing proceeding that he understood that all that was going to happen was that his sentence would be amended.

Because the district court originally pronounced sentence orally to charges to which Mr. Pearson did not plead guilty, and for which there was no factual basis, the case could not be remanded for a nunc pro tunc order.

B. State Habeas Corpus – Iowa Code § 663 – "In custody"

State v. Hernandez Garcia, 864 N.W.2d 122 (Iowa 2015)
A defendant whose sentence has been discharged completely may not challenge his conviction in an Iowa Code § 663 habeas corpus petition by arguing that federal immigration consequences render him "in custody."

– A lot of maybes flow from Justice Zager's opinion in *Hernandez*. Mr. Hernandez challenges a deferred judgment for which he successfully completed probation. Since 1970, habeas is unavailable to persons who have been "convicted of, or sentenced for, a public offense," as postconviction relief under what is now Iowa Code § 822 is now available to challenge criminal convictions. But a defendant who receives a deferred judgment is not "convicted of" an offense, so postconviction is not a proper remedy. Can that person use habeas? Maybe.

In both federal and state courts, habeas corpus is available to some defendants who are not actually imprisoned, but are constructively in custody by means of parole, supervised release, etc. The courts are split on whether constructive custody might extend to persons whose sentences are completely discharged, but remain subject to some collateral consequence. The majority say no. Can a person in Iowa use collateral consequences to establish custody in habeas cases? Maybe.

But not in this case. The purpose of habeas is to require the defendant to produce the defendant. Under any construction, the State of Iowa did not have Mr. Hernandez to produce. All of the projected consequences were federal.

Justice Zager also points out that Mr. Hernandez' petition could have been dismissed simply for failure to comply with the procedural requirements of Iowa Code § 663.1. It did not indicate by whom he was being held. He did not attach a copy of the "legal process currently causing the alleged unlawful restrain, or give any reason why it is not attached." And he did not provide any documentation supporting his belief that he was subject to detainer or to immigration proceedings for removal.

C. State Postconviction Relief – Limitation

Nguyen v. State, _____ N.W.2d _____ (Iowa 2016)
Where, in the pro se brief accompanying a postconviction relief petition, the defendant claims that the application of the felony murder rule by the Supreme Court in *State v. Heemstra*, 721 N.W.2d 549 (Iowa 2006) should be applied retroactively to him, and where the last date postconviction counsel could have made the retroactivity argument was the April 5, 2013 deadline for filing an Iowa R.App.P. 6.1205 petition for rehearing, defendant's subsequent filing of a claim of ineffective assistance of counsel fell within the three-year limitation period of Iowa Code § 822.3.

D. Federal Habeas Corpus – Extent of Review

1. Review of State Factual Determination

Brumfield v. Cain, _____ U.S. _____, 135 S.Ct. 2269, _____ L.Ed.2d _____ (2015)
In denying defendant a hearing on whether the Eighth Amendment prohibits his execution based upon his intellectual disability, as set out in *Atkins v. Virgina*, 536 U.S. 304 (2002), the state court based its decision "on an unreasonable determination of the facts in light of the evidence presented" where accounting for the margin of error of the defendant's IQ of 75 placed the defendant within the recognized range of intellectual disability, and where, contrary to state court findings, the evidence was sufficient that the defendant met the criteria for adaptive impairment.

– Justice Thomas may have been correct in his dissent that, at least in view of other decisions involving federal review of state convictions, the majority did not accord the state decision the level

of deference required under the Antiterrorism and Effective Death Penalty Act. But then Justice Thomas launches into what almost arises to the level of a bizarre memorial service to Mr. Brumfield's victim, an off-duty police officer shot during a robbery of a supermarket employee. The victim's son, Warrick Dunn, went on to play football in the NFL, to sponsor a variety of charities and valuable community service programs, and to write a book about, among things, the loss of his mother. Justice Thomas holds Dunn's achievements up against Brumfield's crimes, and essentially makes the argument that the victim's son has done so much good while the defendant has littered the criminal justice system with claims that he is not responsible for his offense. While joining in the dissent, even Justice Alito could not put his name on that one.

2. Prejudice

Davis v. Ayala, _____ U.S. _____, 135 S.Ct. 2187, _____ L.Ed.2d_____ (2015)
The exclusion of defense counsel during a *Bruton* hearing to determine whether the prosecutor's use of peremptory challenges to strike every African-American and Hispanic from the jury was harmless error, where the district court made specific findings supporting the exclusion of each juror on race-neutral grounds.

– At the outset of her four-Justice dissent, Justice Sotomayor notes that there is no dispute between her and Justice Alito, author of the majority opinion, concerning the appropriate standard of review. This does not appear to be accurate.

At the bottom line, Justice Alito applies to harmless error review the AEDPA standard that habeas relief is not available "unless the harmlessness determination itself was unreasonable." *Davis v. Ayala*, 135 S.Ct. at 2199 (relying on *Fry v. Pilar*, 551 U.S. 112, 119 (2007). Justice Sotomayor on the other hand emphasizes that, if the circumstances are in equipoise, and the court is in "grave doubt" as to whether error is harmless, the court must find that the error had a substantial injurious effect or influence on the verdict. *Davis v. Ayala*, 135 S. Ct. at 2211 (Sotomayor, J. dissenting).

Justice Sotomayor faults Justice Alito for analyzing the prejudice resulting from the seating of the jurors in question, where the real issue was the exclusion of defense counsel during presentation of the prosecutor's purported race-neutral grounds for exclusion. The prosecutor claimed that an *ex parte* hearing was necessary to preclude the defense from becoming aware of its trial strategy. "Grave

doubt" existed as to whether the exclusion affected the outcome of proceedings when Mr. Ayala had no advocate present to test the state's claims. This was compounded by the fact that, by the time Mr. Ayala's case came of for review, the jury questionnaires were lost. The state was supporting its strikes on the basis of answers on jury questionnaires. Its rationalizations could not be tested because the questionnaires no longer existed.

While concurring fully in the majority opinion, Justice Kennedy expressed eloquent concern over the fact that Mr. Ayala has now been in administrative segregation for 25 years. He cited a number of sources, including Charles Dickens' *Tale of Two Cities*, illustrating the devastating effect of confinement on the human psyche.

On the other end of the philosophical spectrum, Justice Thomas authored a one-paragraph concurrence arguing "that the accommodations in which Ayala is housed are a far sight more spacious than those in which his victims, Ernesto Dominguez Mendez, Marcos Antonio Zamora, and Jose Luis Rositas, now rest. And, given that his victims were all 35 years of age or under, Ayala will soon have had as much or more time to enjoy those accommodations as his victims had to enjoy this Earth."

VII. Miscellaneous Issues

A. Suit under 42 U.S.C. § 1983 – Qualified Immunity

Mullenix v. Luna, _____ U.S. _____, 138 S.Ct. 305, _____ L.Ed.2d _____ (2015)
Law enforcement officer who shot at a fleeing individual's vehicle, attempting to stop it but causing the person's death, retains qualified immunity from suit under 42 U.S.C. § 1983 as a matter of law, and is entitled to summary judgment, where there is no showing that the officer would understand from prevailing law that his specific actions violated a constitutional right of the person.

– It is not sufficient to rely upon the generalized claim that the officer "violated the clearly established rule that a police may not 'use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others.'" *Mullenix v. Luna* , _____ U.S. at _____. The inquiry involves the specific circumstances and the officer's specific actions.

B. Remedies for Wrongfully Imprisoned Person – Iowa Code § 663A.1(1).

State v. Nicoletto, 862 N.W.2d 621 (Iowa 2015)
Substantial evidence supported the district court's finding that several hours spent by a defendant in the county jail after sentencing and before posting appeal bond is not "imprisonment," so the defendant was not entitled to compensation under Iowa Code § 663A.1(1) for being a wrongfully imprisoned person.

– Would you want this guy to coach YOUR daughter? The freshman basketball coach has an adult relationship with a varsity player, a junior herself, that apparently goes on for a year. He gets busted – on several levels – and is charged with sexual exploitation by a school employee. His criminal conviction is reversed, because the statute as written at the time did not encompass coaches. My guess is that the whole thing would still be a little embarrassing for the freshman coach. He's probably not the most popular guy in town, I would imagine. I would imagine that parents of the players at that girl's school aren't thinking, "Well, the Supreme Court held that the coach's adult relationship with that high school junior didn't violate the plain language of the statute, so it's all good."

But THIS guy doesn't lay low and let time fix stuff. THIS guy goes back into court to try to get compensation for the few hours he spent in jail before he posted appeal bond. THIS is a guy who just doesn't lay down and quit. THIS is the guy that could bring us back a State Championship.