IN THE SUPREME COURT OF IOWA

Supreme Court No. 24-0289
Story County No. OWCR062790

THERON M CHRISTENSEN,
Plaintiff-Appellant,

Vs.

IOWA DISTRICT COURT FOR STORY COUNTY,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT FOR STORY COUNTY
THE HONORABLE STEPHEN A. OWEN

APPELLEE'S BRIEF

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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because the issue raised involves fundamental and urgent issues of broad public importance concerning the legal obligations of prosecutors and the court's discretion to impose sanctions against them when they engage in conduct contrary to those obligations. Iowa R. App. P. 6.903(2)(a)(4) and 6.1101(2)(d).

NATURE OF THE CASE

This case involves a writ of certiorari challenging the district court's exercise of discretion in imposing a $2072 monetary sanction against Assistant Story County Attorney Theron Christensen (hereinafter Christensen) pursuant to Iowa Rule of Civil Procedure 1.413 and Iowa Code Section 619.19. The sanctions were imposed by the district court for actions taken by Attorney Christensen during the pendency of an OWI criminal matter he was prosecuting where he sought to exclude exculpatory evidence by filing a motion in limine and dismissing the prosecution to hide an officer's investigative deficiencies from other defendants.

The District Court summarized the sanctionable conduct as follows:

> "To conclude and summarize, Assistant Story County Attorney Theron M. Christensen shall be sanctioned pursuant to Iowa Code Section 619.19 and Rule of [Civil] Procedure 1.413. On August 28, 2023, ACA Christensen filed a Motion in Limine that was contrary to facts that became known to him just hours before in the deposition of Dr. Lappe and Officer Shreffler. ACA Christensen used legal process in a spurious attempt to deprive defendant of exculpatory evidence, a .08 BAC test result, which would have been below the threshold of .08 with the margin of error. ACA Christensen's Motion in Limine misstated statutory law, misused case law and couched personal opinion as legal argument to deprive defendant of his right to present a legally sound defense. He later abandoned his spurious Motion in Limine but only after unreasonab[ly] causing unjustifiable and unnecessary expenditure of time and expense to the defendant. ACA Christensen abandoned his Motion in Limine long after he knew all the facts and knew or should have known his legal arguments were wrong. Finally, he abandoned the prosecution entirely to cover up Officer Shreffler's failure to check the calibration of his radar unit as he had been trained. He misrepresented the timing of the motion to dismiss to counsel and engaged in the unjustified smearing of defendant's character before the court. ACA Christensen's sanctionable conduct was not the result of inadvertence, innocent omission, mistake or accident. He has a history of attempting to use judicial process to deprive defendants of a fair trial only to abandon those arguments before being required to defend them on the record in open court. The court has considered ACA Christensen's resistance to sanctions and finds the resistance to be without merit. D0061, Order Sus. M. for Sanctions at 28-29 (11/29/23).

In imposing the monetary sanctions, the court summarized the reasons for the sanctions as follows:

> "Mr. Christensen has engaged in a pattern and practice of dubious conduct in OWI prosecutions in Story County that has continued to this case. He is without remorse and repeatedly attempts to shamelessly justify his sanctionable conduct. He is likely to repeat it unless an appropriate sanction impresses upon him the need to alter his thinking and behavior. In this case he has engaged in frivolous motion practice, he has lied and attempted a cover-up. His frivolous practice, lie, and cover-up are inexcusable, have discredited Iowa's justice system and have seriously jeopardized Mr. Clemons constitutional rights, liberty, and property interests. Even as a general proposition, false misrepresentation to opposing counsel and attempted cover-ups in any form even when isolated in nature, have no place in professional legal practice in Iowa nor in the administration of Iowa law that justice demands. Mr. Clemons, deserves a measure of compensation for the unjust and unwarranted treatment he has been forced to endure by Mr. Christensen's sanctionable behavior. Others are likely to suffer unless Mr. Christensen is deterred." D0083, Order for Specific Sanctions, at 16-17 (2/15/2024).

It is from these findings that Attorney Christensen alleges the court abused discretion in imposing the sanction against him.

STATEMENT OF THE FACTS AND PROCEEDINGS

The undersigned generally accepts the statements of facts put forth by the Appellant. Other relevant facts will be discussed when necessary as set out below.

ARGUMENT

Prosecutors have special role which requires them to carry both sword and shield when prosecting persons accused of criminal offenses. *Berger v. United States*, 295 U.S. 78, 88 (1935) ("the representative…of a sovereignty…whose interest…in a criminal prosecution is not that it shall win a case, but that justice shall be done"). When the shield is abandoned only for the sword, the essence of our judicial system and the constitution that supports it becomes unhinged. *Banks v. Dretke*, 540 U.S. 668, 696 (2004) ("a rule thus declaring 'prosecutor may hide, defendant must seek', is not tenable in a system constitutionally bound to accord defendants due process.'") The ability for judges overseeing these matters to impose sanctions against prosecutors who abandon the shield and only carry a sword into prosecutorial combat are necessary tools to prevent the unhinging of our justice system. *Id.* ("prosecutors' dishonest conduct

or unwarranted concealment should attract no judicial approbation") *citing Kyles v. Whitley*, 514 U.S 419, 440 (1995) ("the prudence of the careful prosecutor should not…be discouraged).

Christensen's actions threatened the very backbone of our justice system when he disregarded his obligation of the shield by attempting to exclude exculpatory evidence favorable to the accused in this OWI prosecution. His arguments were not grounded in fact or law and were an attempt to trample the accused's statutory and constitutional rights. Furthermore, he attempted to "coverup" evidence that would be exculpatory to other defendants by dismissing the prosecution to avoid further disclosure of that evidence. The district found the conduct sanctionable and imposed a reasonable sanction as the court was required by law to do.

This case presents a unique opportunity to reiterate the importance and requirements of the prosecutors' role. More importantly, it provides this court the opportunity to reiterate the role, power, and discretion our judges ought to have in order to ensure public confidence in our judicial system. When those

entrusted to uphold the special role of a prosecutor step out-of-bounds they must be held accountable because although they may uphold the law—they are not above the law.

Preservation of Error

The Appellant has preserved error on the issues he has raised in his appeal.

However, error has not been preserved on the issues raised in the "Brief of Amicus Curiae State of Iowa Supporting Plaintiff"-namely whether monetary sanctions can be imposed against prosecutors and whether imposing sanctions against a prosecutor is against public policy. *See* Brief of Amicus Curiae State of Iowa Supporting Plaintiff PP. 9-27. These legal issues were not pursued at the district court level and therefore should not be considered by this court. *See Rants v. Vilsack*, 684 N.W.2d 193, 199 (Iowa 2004) (refusing to consider legal issues raised in amicus briefing that were not presented to the district court) *citing Martin v. Peoples Mut. Sav. & Loan Ass'n*, 319 N.W.2d 220, 230 (Iowa 1982) ("reviewable issues must be presented in the parties briefs, not an amicus brief.")

Standards of Review

This court must review a district court's decision on whether to impose sanctions for an abuse of discretion. *Mathias v. Glandon*, 448 N.W.2d 443, 445 (Iowa 1989). "Relief through certiorari is strictly limited to questions of jurisdiction or illegality of the challenged acts." *French v. Iowa Dist. Ct.*, 546 N.W.2d 911, 913 (Iowa 1996). The district court's findings of fact are binding on this court if supported by substantial evidence. *Zimmerman v. Iowa Dist. Ct.*, 480 N.W.2d 70, 74 (Iowa 1992). The abuse-of-discretion standard means "we give a great deal of leeway to the trial judge who must make a judgment call." *State v. Newell*, 710 N.W.2d 6, 20-21 (Iowa 2006). If a violation of Iowa Code Section 619.19 or Iowa Rule of Civil Procedure 1.413 occurs, the court must impose sanctions and the only discretion to be reviewed is the scope of that sanction. *Mathias*, 484 N.W.2d at 445 ("we are mindful the rule and statute directs the court to impose a sanction when it finds a violation."). Additionally, this court can choose to review all or part of any sanctions issue. *Rowedder v. Anderson*, 814 N.W.2d 585, 589 (Iowa 2012)

Merits

The district court sanctioned Christensen after finding he violated Iowa Rule of Civil Procedure 1.413(1) and Iowa Code Section 619.19(2). This rule and statute are essentially, identical and each provides that when a party files a document they "certify" that they "read" the document, "it is grounded in fact" and "is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." *Id.* The duties contained in the rule are known as the "reading, inquiry, and purpose elements." *Weigel v. Weigel*, 467 N.W.2d 277, 280 (Iowa 1991). Each of these duties are distinct from each other and the court is required to impose a sanction if either is violated. *Barnhill v. Iowa Dist. Court*, 765 N.W.2d 267, 272 (Iowa 2009).

An objective standard of reasonableness under the circumstances is used to determine if the rule has been violated. *Id.* "The test is 'reasonableness under the circumstances,' and the standard to be used is that of a reasonably competent attorney admitted to practice before the district court." *Id.* (quoting *Golden*

Eagle Distrib. Corp. v. Burroughs Corp, 801 F.2d 1531, 1536 (9th Cir. 1986).

In order to determine the reasonableness of a signer's inquiry into the facts and law the court should look to the following non-exhaustive list of factors: (a) the amount of time available to the signer to investigate the facts and research an analyze the relevant legal issues; (b) the complexity of the factual and legal issues in question; (c) the extent to which pre-signing investigation was feasible; (d) the extent to which pertinent facts were in the possession of the opponent or third parties or otherwise not readily available to the signer; (e) the clarity or ambiguity of existing law; (f) the plausibility of the legal positions asserted; (g) the knowledge of the signer; (h) whether the signer was an attorney or pro se litigant; (i) the extent to which counsel relied upon his or her client for the facts underlying the pleading, motion, or other paper; (j) the extent to which counsel had to rely upon his or her client for facts underlying the pleading, motion, or paper; (j) the extent to which counsel had to rely upon his or her client for facts underlying the pleading, motion,

or other paper, and (k) the resources available to devote to the inquiries. *Barnhill* 765 N.W. 2d at 273 citing *Mathias*, 448 N.W.2d at 446-47.

"One of the primary goals of the rule is to maintain a high degree of professionalism in the practice of law" and to "discourage parties and counsel from filing frivolous suits and otherwise deter the misuse pleadings, motions, or other papers." *Id.* "The 'improper purpose' clause seeks to eliminate tactics that divert attention from the relevant issues, waste time, and serve to trivialize the adjudicatory process." *Id.* citing *Hearity v. Iowa Dist. Court*, 440 N.W.2d 860, 866 (Iowa 1989). Bad faith or malice is not required to trigger a violation. *Id.*

With these principles in mind, it is necessary to review the Motion in Limine as initially filed by Christensen. *Barnhill*, 765 N.W.2d at 272 (compliance with the rule is measured objectively at the time the motion was filed). If the district court's decision that this filing violated Iowa Code Section 619.19 and/or Iowa Rule of Civil Procedure 1.413 is supported by substantial evidence, then this

court must uphold the decision. *Zimmerman,* 480 N.W.2d at 74 (Iowa 1992); *Barnhill*, 765 N.W.2d at 272 (Iowa 2009).

I. SUBSTANTIAL EVIDENCE SUPPORTS THE DISTRICT COURT'S CONCLUSION THAT THE MOTION IN LIMINE WHICH SOUGHT TO EXCLUDE EXCULPATORY EVIDENCE FROM THE ACCUSED MISREPRESENTED THE LAW, WAS NOT BASED IN FACT, WAS AN ATTEMPT TO DEPRIVE THE ACCUSSED A FAIR TRIAL, AND WAS FILED FOR AN IMPROPER PURPOSE.

a. Procedural Lead Up to the Motion in Limine

Christensen abandoned his theory of prosecution that the accused was "under the influence of alcohol" on August 10, 2023, just thirteen days after filing the trial information. *See* D0009, Trial Information (7/19/2023); D0017, M. to Amend (8/10/2023). In doing so, he acknowledged to the court that there was "very little evidence of physical or mental impairment"; "the State expects that no reasonable jury would be able to find the defendant 'under the influence' beyond a reasonable doubt"; and that the amendment "will not prejudice the defendant in any way." D0017. The court approved the amendment the same day. *See* D0018, Order Amending (8/10/2024). Thus, the sole theory of prosecution at the time the

motion in limine was filed was that the accused operated a motion vehicle over the threshold level of .08.

Attempting to reduce litigation time and expenses, the undersigned reached out to Christensen suggesting that he may want to discuss this matter with his experts at the Iowa Division of Criminal Investigation which were listed in the minutes of testimony. *See* D0053, Exhibit B (10/18/23); D0008. Min. of Test. (7/19/2023). The reason for this was because the accused submitted two breath tests within minutes of each other with differing results (one was .091 and one was .08). The .08 test was exculpatory because it could not be used against the Defendant by the State. See Iowa Code Section 321J.2(14)(precluding use of a test that is under .08 when the margin of error is applied to provide a violation of section 321J.2). This suggestion did not have the desired effect and depositions of the arresting officer (Officer Hieu Shreffler) and the States DCI expert (Dr. Ryan Lappe) occurred on August 28, 2023. *See* D0052, Exhibit A-Lappe Depo at 1 (10/18/23); D0054, Exhibit C-Shreffler Depo at 1.

During those depositions, Officer Sheffler admitted he stopped the accused for speeding but did not know when the last time was the radar was checked for accuracy and he did not use tuning forks as instructed to check his radar for accuracy prior to stopping the accused. D0054 at 18:13- 19:12; 40:20- 42:4. He also admitted he had "probably" been trained to request a second breath sample from a suspected impaired driver when they test under .10. *Id.* at 37:20-25.

That same day, Dr. Lappe from the Iowa Division of Criminal Investigation testified that that they train officers to administer two breath tests when the first one is .10 or under. D0052 13:3-19. This method is more "scientifically sound" given that there can be significant variances between the two tests under the .10 threshold. *Id.* at 14:6-8; 16:6-12. He further opined that the .08 test result was a valid test; the established margin of error put the test under the legal threshold; and the accused should be given the benefit of the lower test. *Id.* 16: 13-17:19. Dr. Lappe shared these opinions with Christensen prior to the deposition. *Id.* 18:4-14. Finally, Dr. Lappe

testified that he could not render scientifically reliable extrapolation testimony in this matter. *Id.* 19:7-20:6. Christen chose not to ask any questions of Dr. Lappe at the deposition. *Id.* 26:10-11. The deposition concluded at 10:45 A.M. *Id.* 26:12.

Christensen filed his motion in limine less than four (4) hours after the completion of depositions and twenty-two (22) days prior to trial. D0021; D0014, Order Setting Trial (7/27/24); *See also* Iowa R. of Crim. P. 2.11(6) (establishing a deadline for motions in limine nine (9) days prior to trial). The accused filed a resistance to the motion in limine and request for sanctions, a motion to suppress, and a motion to dismiss on August 30, 2024. D0023, Resistance to M. in Limine and Req. for Sanctions (8/30/23); D0025, M. to Dismiss (8/30/23); D0024, M. to Supp. (8/30/23). Christensen's motion was subsequently withdrawn thirteen (13) days later in which he stated, "after further consideration of the evidence in the case, the State now moves to withdraw its motion in limine." D0029, M. to Withdraw Motion in Limine (9/12/2023).

b. The Motion in Limine

i. The Motion in Limine Generally.

Christensen's motion challenged (1) the admissibility of the .08 breath test result; (2) sought to prevent the admissibility of evidence or argument by the accused that there was no physical evidence of impairment; and (3) sough to exclude any evidence or argument from the DCI criminalist that two breath samples should be given when the result is less than .10 and the reasons for that opinion. *Id.* In total the motion incorrectly cited two statutes, two rules of evidence, and two Iowa cases in support of these positions. The motion did not suggest a "good faith argument for the extension, modification, or reversal of existing law." *See* Iowa Code Section 619.19(2)(b).

ii. Attempt to Exclude the .08 Test.

The motion in limine recklessly misstated the law in support of the contention that the .08 test result was not admissible. Christensen alleged that "Iowa Code Section 321J.14 flatly proscribes the use of *all* test results within the margin of error in the prosecution of a per se violation." D0021 at 2. *Emphasis Added.* This assertion is patently wrong.

Iowa Code Section 321J.14 has nothing to do with the admissibility of a chemical test—it is a statute addressing judicial review of administrative actions. However, giving Christensen the benefit of the doubt and assuming that that his intent was to cite to Iowa Code section 321J.2(14), the plain language of that code section is directly contrary to his assertion. That section provides "the results of a chemical test shall not be used *to prove a violation* of subsection 1 paragraph 'b' or 'c' if the alcohol …concentration indicated by the chemical test minus the established margin of error…does not equal or exceed the level prohibited." The imperative words are "shall not be used *to prove a violation…*" *Emphasis Added*.

The plain language of that statute does not "flatly proscribe the use of *all* tests" under .08 as Christensen suggested—only those used "to prove a violation" of the *per se* statute. Christensen's position did, and still does, fly in the face of basic tenants of statutory construction. *See Rock v. Warhank*, 757 N.W.2d 670, 673 (Iowa 2008) ("when the language of a statute is plain and its meaning clear, the rules of statutory construction do not permit us to search for

meaning beyond the statute's express terms"); *See also Marcus v. Young*, 538 N.W.2d 285, 289 (Iowa 1995) (recognizing the well establish rule of statutory construction that legislative intent is expressed by omission as well as by inclusion and the express mention of one thing implies the exclusion of others not so mentioned").

Interestingly, Christensen acknowledges the two competing breath tests created a situation where the accused "is presumed to be both guilty and innocent of operating while intoxicated" thereby acknowledging he exculpatory nature of the .08 test- yet claims he "attempted to resolve those competing presumptions via the doctrine of *in pari materia*." *See* Appellant's Brief PP.35-36. In doing so, he "attempted to craft a creative argument relying on statutory language to resolve a disputed point of law" and that this was simply "zealous advocacy." *Id.* at 37.

There are several problems with this position. First, this argument ignores the basic tenants of statutory construction as outlined above. Second, the motion never mentioned anything about

the doctrine of "*in pari materia*" nor can it be read to suggest that he was attempting to argue that doctrine. Third, assuming *arguendo* that he was arguing that doctrine, neither his motion nor his brief on appeal accurately do so because they both entirely ignore other relevant statutes. *See State v. Nail*, 743 N.W.2d 535, 540 (Iowa 2007)("a statute may be saved from constitutional deficiency…if its meaning is fairly ascertainable by reference to other similar statutes or other statutes related to the same subject matter"); *See also* Iowa Code Sections 321J.11 (allowing breath tests obtained by officers); 321J.15("upon the trial of…a criminal action alleged to have been committed by the person while operating a motor vehicle in violation of section 321J.2…evidence of the alcohol concentration…in the persons…breath…is admissible"); 321J.18 (allowing the introduction of any "competent evidence" including chemical tests). In fact, there is no statute in Chapter 321J or anywhere else that would suggest the test was not admissible. Thus, even applying the doctrine of *in pari materia*, these other statutes clearly indicate the .08 test result

was admissible and there was no statutory basis to exclude that evidence.

Mr. Christensen did not stop with his efforts to exclude the .08 test by misstating statutes and ignoring other relevant statutes. He doubled down by suggesting that the introduction of the test would require him to introduce retrograde extrapolation evidence--something not intended by the legislature. D0021 at 2. However, less than four (4) hours earlier he heard his own expert witness testify that he could not provide scientifically reliable retrograde extrapolation testimony at trial in this case. D0052 at 19:7-20:6. Dr. Lappe subsequently confirmed this position in an email to Christensen on September 11, 2024. D0053 at 5. ("I can't do retrograde extrapolation for this case"). The deposition and the email both confirm that Christen's own listed expert witness could not provide any testimony concerning retrograde extrapolation or any other estimation of the accused's breath alcohol content at the time he was driving. Thus, his argument was "not grounded in fact"

violating Iowa Code Section 619.19(2) and Iowa Rule of Civil Procedure 1.413.

Additionally, Christensen continued to incorrectly cite statutory authority in the motion (Iowa Code Section 321J.12(a) does not exist), but giving him the benefit of the doubt for the second time, and assuming that he intended to cite Iowa Code Section 321J.2(12)(a), that section does nothing to advance his argument. D0021 at 2. This section simply creates a presumption that the test taken within two hours of driving was the result at the time of driving. However, this presumption is rebuttable and must be to survive constitutional scrutiny. *LuGrain v. State*, 479 N.W.2d 312, 315 (Iowa 1991) ("the United States Supreme Court has 'uniformly condemned irrebuttable presumptions' as violations of federal due process") *citing Vlandis v. Kline*, 412 U.S. 441, 446 (1973); *See also State v. Lafontaine*, 839 N.W.2d 675 (Iowa App. Table 2013)(finding Iowa Code Section 321J.2(12)(a) (formerly 321J.2(8)(a) "allows a rebuttable presumption in any criminal prosecution under section 321J.2"). Yet, Christen did, and still is, contending that he was on sound legal footing by

arguing the .091 test result could be admitted and .080 excluded. This argument was clearly attempting to deprive the accused of his right to rebut the .091 test by presenting present exculpatory evidence—an interpretation that would render the statute unconstitutional. *LuGrain 479 N.W.2d* at 315 (Iowa 1991).

Nevertheless, Christensen decided to triple down his effort to exclude the exculpatory .08 test result by arguing it was precluded by Iowa Rule of Evidence 5.403. D0021 at. 2-3. This rule provides that a court may exclude "relevant evidence if its probative value is substantially outweighed by a danger of…unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Specifically, Christensen argued that introducing the .08 test would "confuse and mislead the jury" and that it would be "cumulative" and "less probative than the earlier test." D0021 at 2.

However, both tests were completely valid tests in which the legal presumption of 321J.2(12)(a) applied but with different legal effects—one over the presumptive limit and one under the legal limit

after applying the statutorily mandated margin of error. Thus, the .08 test is clearly not "cumulative" and even if it was it is not inadmissible. *See State v. Maxwell*, 222 N.W.2d 432, 435 (Iowa 1974) ("evidence is not inadmissible simply because it is cumulative"). Similarly, the admission of both tests would not have confused the jury because Dr. Lappe could have explained the variance. *See* D0052 at 13:14-19. However, even if confusing, why would the .091 test be less confusing than the .080 test? Finally, the argument that the .08 test "is less probative than the earlier test" was not factually or legally supported. *See* D0052 at 16: 19-23 (Dr. Lappe acknowledged "they are both valid tests"); *See also* Iowa Code Sections 321J.2(12)(a) (providing presumption of alcohol concentration at the time of driving for both tests); 321J.15 (allowing the introduction of the breath tests); 321J.18 (allowing the introduction of any "competent evidence" including breath tests).

Clearly the basis for attempting to exclude the .08 test in the motion in limine was not "grounded in fact" nor was it "warranted by existing law or a good faith argument for extension, modification, or

reversal of existing law" thereby violating Iowa Code Section 619.19 and Iowa Rule of Civil Procedure 1.413. No reasonably competent attorney would have sought to exclude this exculpatory evidence on the basis asserted. As such, the filing of this motion amounted to sanctionable conduct by Christensen. *Barnhill*, 765 N.W.2d 267 (sanctioning attorney for filing class action lawsuit not ground in fact or law)

iii. Attempt to Exclude Impairment Evidence.

The second component of Christensen's motion in limine sought to exclude any evidence the accused was "walking steadily, talking clearly, emotionally stable, exercising fine motor skills, or generally mentally alert" because the evidence was irrelevant to the *per se* theory of prosecution. D0021 at 2. In support of this argument only Iowa Rule of Evidence 5.401 was cited. *Id.* Pursuant to this rule, evidence is admissible if "it has any tendency to make a fact more or less probable than it would be without the evidence." *State v. Smith*, 876 N.W.2d 180,188 (Iowa 2016). It is important to remember that

Christensen admitted to the court that there was not enough evidence of impairment to prove the under the influence theory at the time the motion in limine was filed.

As discussed above there were two competing breath tests both of which were valid and admissible. The lack of any physical or mental impairment would "have a tendency to make [the .08 test] the more probable" alcohol concentration. Jurors are entitled to hear the evidence so they can accept or reject the evidence in an attempt to ferret out the truth. *See State v. Shanahan*, 712 N.W.2d 121, 135 (Iowa 2006) ("the function of the jury is to weigh the evidence and 'place credibility where it belongs'") c*iting State v. Blain*, 347 N.W.2d 416, 420 (Iowa 1984). A juror may be inclined to conclude that the .091 test did not accurately record the accused's alcohol concentration when confronted with physical and mental evidence of sobriety. Finally, as discuss *supra,* Iowa Code Section 321J.2(12)(a) creates a rebuttable presumption that the test was the person's alcohol concentration at the time the accused was driving. Physical and mental impression of sobriety at the time of driving would be one

effective way to rebut this presumption. Thus, this evidence was clearly relevant and unable to be excluded under Iowa Rule of Evidence 5.401.

Christensen puts significant stock in *State v. Warren*, 955 N.W.2d 848 (Iowa 2021) and *State v. Myers*, 924 N.W.2d 823 (Iowa 2019) for the proposition that demeanor evidence is not admissible in a *per se* OWI case. *See* Appellant's Brief PP. 27-28. However, neither of those cases stand for that proposition. *Warren* simply cites *Myers* for the basic proposition that there are different theories of prosecuting OWIs which generally use different evidence. 955 N.W.2d at 856. The case does not suggest that there is no place for demeanor evidence in a *per se* OWI case. In fact, the specific language used in *Myers* suggests that demeanor evidence does have a place in a *per se* OWI prosecution. 924 N.W.2d at 828 ("each prong uses a different theory and *primarily* relies on different evidence"). *Emphasis Added*. The word "primarily" suggests a place for evidence other than the primary evidence. In fact, this was the exact position taken in *State v. Price*, 692 N.W.2d 1 (Iowa 2005), where the court concluded that a

breath test was admissible in an "under the influence" OWI prosecution. If a breath test is relevant evidence in an "under the influence" prosecution then "under the influence" evidence, especially the lack thereof, must be relevant in a *per se* prosecution for the accused.

In short, no statute, rule, or case in Iowa allows for the exclusion of demeanor evidence in a *per se* OWI case especially evidence of sobriety. Existing case law suggests that the theory of prosecution does not limit the type of admissible evidence. No authority was cited in the motion to suggest that Christensen was attempting to "expand, modify, or reverse existing law" and as such no competent attorney would have made this argument and the district courts conclusion that this argument was grounded in existing law was sound.

iv. Attempt to Exclude Lappe's Testimony.

Christensen's third attempt to exclude exculpatory evidence from the Defendant included Dr. Lappe's "personal opinion that Iowa Law should require officers to request two breath samples if the first

result is less than .10 BrAC or the reasons for that opinion." D0023 at 2-3. Christensen contended that it would be jury nullification to allow this argument because Iowa law only requires one breath test. *Id.* Interestingly, he does so without consideration of the fact that exclusion of the other evidence mentioned above would also an attempt by him to nullify the jury.

Iowa Code Section 321J.6(1) provides a person "is deemed to have given consent to the withdrawal of specimens of a person's blood, breath, or urine and to a chemical test or tests of specimens for the purpose of determining the alcohol concentration…" It further provides that "the withdrawal of the body substances and test or tests shall be administered at the written request of the peace officer…" This language is replete with pluralities demonstrating the legislature's belief that multiple tests can be obtained from an impaired driver. *State v. McIver*, 858 N.W.2d 699, 707 (Iowa 2015) ("multiple testing may be needed so that the purpose of the law can be accomplished.")

More importantly, the taking and admissibility of breath tests is expressly established by statute. *See* Iowa Code Sections 321J.11 and 321J.15. Each of these code sections require the extraction and admissibility of the sample to be done in accordance with "methods approved by the commissioner of public safety." *See State v. Stohr*, 730 N.W.2d 674, 676 (Iowa 2007) ("The commissioner authorized the DCI to establish procedures for testing breath-alcohol concentration...")

Lappe testified that the DCI has trained officers to administer two breath tests when a subject blows under .10. D0052 at P.13: 3-13. Officer Sheffler testified that he "probably" had been trained to do two breath tests by the DCI when the subject blows under .10. D0054 at 37:20-25. Thus, offering two tests in this situation was exactly what the officer was trained by the DCI to do and what was necessary to comply with Iowa Code Section 321J.11 and 321J.15.

The reason for requesting two tests in this situation is because there can be great variance when the tests are under .10 and duplicate testing is more scientifically reliable. D0052 at P.13: 14-

14:14. Dr. Lappe also testified that because of that variance they instruct officers to go with the lower test. *Id.* at 16:6-12. Experts are allowed to express their opinions on the scientific validity of evidence and the reasons for that opinion. *See Leaf v. Goodyear Tire and Rubber Co.*, 590 N.W.2d 525, 532 (1999) (concluding that Iowa has a liberal view of expert testimony in Iowa); *See also Ranes v. Adams Labs., Inc*, 778 N.W.2d 677 (Iowa 2010) (providing an overview of expert witness testimony on scientific issues). Dr. Lappe's opinion on the need for two breath tests was based upon "national standards" and grounded in concerns over "scientific reliability." D0052 13:20-14:8.

Christensen's argument was an attempt to exclude his own expert's opinion because it was unfavorable to his case and beneficial to the accused. Although it is true Iowa law does not expressly *require* two breath tests by statute, the DCI has trained officers to do so in certain situations out of reliability concerns. To deprive Lappe of this testimony would be to deprive him of the role entrusted to him by the legislature—to establish "methods" for obtaining breath

samples. It would also deprive the accused his ability to question the scientific validity of Dr. Lappe's opinion and instruction to the officers. Thus, this argument was not "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law" and as such the district court's decision that Christensen committed sanctionable conduct was justified.

v. Constitutional Considerations.

In addition to the above, Christensen's motion disregarded the accused's constitutional right to a fair trial and to present a defense. The Sixth Amendment of the United States Constitution provides a right to present a defense to the accused. *Washington v. Texas*, 388 U.S. 14, 18-19 (1967). "This right is so fundamental and essential to a fair trial that it is accorded the status of an incorporated right through the Fourteenth Amendment's Due Process Clause." *State v. Clark*, 814 N.W.2d 551, 561 (Iowa 2012). This right has been explained as follows:

> "The right to offer testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecutions to the jury

> so it may decide where the truth lies. Just as an accused has the right to confront prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."

Osborn v. State, 573 N.W.2d 917, 921 (Iowa 1998) (quoting *Washington*, 388 U.S. at 19).

Prosecutors have "special duties" creating a special role in criminal prosecutions to ensure that an accused is not denied a fair trial. *State v. Plain*, 898 N.W.2d, 801, 818 (Iowa 2017) ("we impose special duties on prosecutors to ensure they act in accordance with the special role with which they are entrusted.") This role has been described as follows:

> "A prosecutor is not an advocate in the ordinary meaning of the term. That is because a prosecutor owes a duty to the defendant as well as to the public.
>
> The prosecutor's duty to the accused is to assure the defendant a fair trial by complying with the requirements of due process throughout the trial. Thus, while a prosecutor is properly an advocate for the State within the bounds of the law, the prosecutor's primary interest should be to see that justice is done, not to obtain a conviction. An observation we made many years ago is unfortunately still true today: even though prosecutors should keep in mind

> their obligation to the accused at every stage of the proceeding, too often, they do not."

State v. Graves, 668 N.W.2d 860, 870 (Iowa 2003) (internal citations omitted).

Christensen's motion attempted to deprive the accused of three key pieces of evidence relevant to his defense. All three of those pieces of evidence were at worst very helpful and at best outright exculpatory. They were necessary to "present the defendant's version of the facts" to help the jury "decide where the truth lies"—yet Christensen sought to deprive him and the jury of that evidence. He clearly did not fulfill his obligation to protect the accused's due process rights. Less egregious conduct by prosecutors have resulted in a violation of an accused's constitutional right to a fair trial. *Id.* (accused denied a fair trial when the prosecutor asked the accused if the police officer had "made up" his testimony and told the jury in closing arguments the accused was a liar); *Plain*, 898 N.W.2d at 820 ("the prosecutor erred during closing argument in persistently using the term "victim" to refer to the complaining witness" but finding that it was not intentional.)

Notably, Christen's brief fails to discuss the implication of his arguments on the accused's constitutional right to present a defense and right to a fair trial. This is likely because there is no reasonable way to do so given the exculpatory nature of the evidence he sought to exclude. Thus, not only did his arguments fail to reasonably be grounded in statutory or case law they were also infirm in the constitutional sense thereby justifying the court's decision that he committed sanctionable conduct for filing the motion in limine.

vi. Improper Purpose of the Filing.

Iowa Code Section 619.19(2) and Iowa Rule of Civil Procedure 1.413 both prohibit the filing of a document "for any improper purpose such as to harass or cause an unnecessary delay or needless increase in the cost of litigation." "The rule was designed to prevent abuse caused not only by bad faith but by negligence and, to some extent, professional incompetence." *Barnhill*, 765 N.W.2d at 273. The district court concluded Christensen "used the legal process in a spurious attempt to deprive defendant of exculpatory evidence." D0061 at 28.

There is substantial evidence to support the court's finding with the best examples being Christen's own words. For instance, Christensen's email on the eve of the dismissal provides insight on his perspective of the Defendant and/or those accused of OWI. *See* D0053 at 3. ("I've decided to let the bear go this time"). OWI prosecutions appear to be a game to him—one where he relishes in the power of who is set free and who is not, all while viewing the accused as caged animals.

In his response to request for sanctions he stated, "a .08 result has no relevance in a *per se* case" and "the .08 result is not 'exculpatory'…rather it has absolutely no evidentiary significance at all." D0033 Response to Request for Sanctions at 3-4 (9/13/23). Yet, his attorney acknowledges that "by statute" the .08 test "presumes" that the accused was "innocent." Appellant's Brief P. 35. The only explanation for these extreme opposite positions is either "bad faith, negligence, or professional incompetence" on the part of Christensen especially in light of the fact the .08 is exculpatory by law. *See* Iowa Code Sections 321J.2(14) (prohibit a test under .08 with the applied

margin of error to be used to prove a per se offense) and 321J.12(6) (precluding a test under .08 with the applied margin of error to be used to revoke driving privileges).

Even more telling is Christensen's attempt to place the blame on the undersigned. D0045 Resistance to Sanctions (10/18/24). Christensen outright acknowledges the frivolousness of his motion in limine by stating "counsel for defense could have called or emailed the undersigned and explained his concerns with the motion and its legal basis and likely persuaded the undersigned to withdraw the motion without any need for further pleadings." *Id.* at 6. Yet he waited fifteen days before withdrawing the motion in limine after the resistance and request for sanctions was filed and then attempted to place the blame on the undersigned for not reaching out to him prior to filing a resistance and request for sanctions. He further acknowledged that "the State's decision to withdraw the motion prior to any contested hearing demonstrates an effort to mitigate court costs and litigation expense" further admitting the motion should not have been filed. *Id.*

His legally and factually unjustified filings in other OWI cases also supports the court's finding that he has a pattern and practice of this type of behavior and that it was either reckless or intentional. *See* D0057 Exhibit F- Grabau M. in Limine (10/18/23) (attempt to exclude defendant's medical evidence in OWI case); D0080 Exhibit I-1- Rowen M. for Admissibility (1/29/24) (attempt to admit a preliminary breath test result). So does the abandonment of these arguments prior to reaching a judge but after counsel spent time and the client incurred costs to defend his filings.

The timing of the motion in limine also is suspect and seems to suggest that it was done for an improper purpose since it was filed less than four hours after the damaging depositions. The contents of the filing also suggest that it was hastily filed given the incorrect statutory citations, scant authority in support of the motion, and factual assertions that were contrary to the damaging depositions.

In sum, whether due to "bad faith, negligence, or professional incompetence", it is clear the motion in limine violated the "improper purpose" clauses of Iowa Code Section 619.19 and Iowa Rule of Crim.

P. 1.431. Christensen's own admissions paint this picture well. As such, the court did not error in finding sanctionable conduct. *Barnhill*, 765 N.W.2d at 273.

II. THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE DISTRICT COURT'S CONCLUSION THAT THE MOTION TO DISMISS WAS FILED WITH AN IMPROPER PURPOSE.

The district court concluded that Christensen's reason for filing the motion to dismiss was improper because it was done with the intent to cover up the fact that Officer Sheffler had not been using his tuning forks to calibrate his radar equipment as his training required to the detriment of other defendants. *See* D0061, p. 29. The court also found that Christensen "misrepresented" the filing status of the motion to counsel. *Id.* Christensen generally contends the reason he dismissed the case was because the prosecution was no longer viable and that the filing issues surrounding the motion were a "mistake." Appellant's Brief P. 42-47. Each of the court's findings are addressed in turn.

i. Improper Purpose for Filing the Motion to Dismiss.

"The reason [Christensen] was moving to dismiss this matter was to avoid the creation of any record which would highlight the fact that Officer Hieu of the Huxley Police Department was routinely failing to check the accuracy of his radar device by using his tuning forks." D0055, Ex. D, Ross Aff. P.1 (10/18/23). Christensen has never denied he made this statement. The question becomes whether the dismissal was used to further this purpose in an improper way.

To be clear, the dismissal was proper as it related to the accused as there was insufficient information to prosecute him for the *per se* violation which was one reason for the dismissal--Christensen acknowledges such. Appellant's Brief P. 44 ("the motion to dismiss was premised not on an attempted cover-up but on the practical difficulties of proving the case"). However, the other motive was to prevent Officer Sheffler's shortcomings from aiding other defendants. If not, what was the point of Christensen's statement? Certainly, the district court thought this to be the case by going lengths to identify thirty-four other defendants who could have been impacted by this

evidence and to call his actions a "cover up." D0083 at 17-18 and Appendix A.

Generally, when a charge is dismissed by a prosecutor to negatively impact a criminal defendant it is improper. *See State v. Taeger*, 781 N.W.2d 560 (Iowa 2010) (finding prosecutor improperly dismissed a criminal OWI in order to escape a likely successful motion to suppress that would have reinstated the client's driving privileges); *State v. Johnson*, 217 N.W.2d 609, 612 (Iowa 1974) (dismissals are improper if they are done to avoid violating a defendant's speedy trial rights). The only difference here is that Christensen's act of dismissal was not an attempt to negatively impact the accused, but other defendants who had been stopped by Officer Sheffler for speeding. However, he still owes a duty to those people just the same as the accused. *Graves*, 668 N.W.2d at 860 ("a prosecutor's primary interest should be to see that justice is done, not to obtain a conviction.")

There is no question the hearing on the motion to suppress would have exposed more ears to Officer Sheffler's shortcomings.

One of those sets of ears would have been the judge that likely was overseeing other cases involving Officer Sheffler. Should the motion have been sustained, there would be a judicial ruling on the issue. In turn, that ruling could have resulted in dismissal of other charges and/or provided arguments for other defendants to defend their charges. It also would have created a public record of the matter. Common sense tells us this is the only plausible explanation for Christensen's statement.

Christensen's arguments on this issue are without merit. First, he misses the point about who could be negatively affected by the dismissal and the significance of his uncontested statement. He argues that this information was inconsequential to the accused because he already had the information—but the "cover up" was to avoid the disclosure to others not the accused. Appellant's Brief P. 45-46. In fact, he has acknowledged the likely impact to others by stating that he "does not dispute that the failure to calibrate the radar could, in some circumstances, invalidate probable cause."

Appellant's Brief P. 46. This statement supports the conclusion the dismissal was an effort to negatively impact others.

Second, Christensen suggests that the motion to dismiss was a product of him abandoning the motion in limine "as well as [his] recent discovery on the evening of September 11 that Lappe could not perform retrograde extrapolation." Appellant's Brief P. 44. The veracity of this argument must be questioned because Christensen was aware of Lappe's inability to do extrapolation at his deposition on August 28, 2024. D0052 20:2-6. It also appears that there were other discussions with Lappe prior to his email that retrograde extrapolation could not be done. D0053 at 5 ("at the beginning of our conversation, I told you I could not do retrograde extrapolation in this case because both tests fall within the 2-hour presumptive period.").

Finally, Christensen suggests that the motion to dismiss was proper given the fact that Judge Van Marel granted the motion. Appellant's Brief P. 48. However, this ignores the fact that were was "a" proper purpose for the motion given the lack of evidence against

the accused. However, there also was an improper purpose--to avoid further disclosure and/or an adverse ruling on the motion to suppress benefitting other defendants. Furthermore, there is no evidence Judge Van Marel knew Christensen had made this statement as a basis for the dismissal.

His statements clearly highlight the fact that one of his goals of dismissing the charge was to hide Officer Shefflers shortcomings on using his radar from others. In doing so he ignored his "special duties" as a prosecutor to seek "justice" and not just "convictions." *Graves*, 668 N.W.2d at 870. As such, the court was correct in finding sanctionable conduct.

ii. Misrepresentations Concerning the Motion to Dismiss.

The district court characterized Christensen's representation surrounding the filing of the motion as "misrepresentations." The court reached this conclusion based upon the fact that Christensen had represented in his email the motion to dismiss had been filed on September 13, 2024, however that was not true.

D0052 at 1; D0036; D0061 at 25. The district court had the opportunity to view the parties and listen to their representations and assess the credibility of those representations. The court did not find Christensen's representations that he made a "mistake" credible. D0083 at 15 ("Mr. Christensen is not credible. The court has found he has lied.")

Just like Christensen has asked "to give significant consideration to Judge Van Marel's view because he had overseen the proceedings up through the motion to dismiss", this court should extend the same obligation to Judge Owens who oversaw the sanctions hearings. *See* Appellant's Brief P. 48; *See also State v. Tague*, 676 N.W.2d 197, 201 (Iowa 2004) (although not bound by them appellate courts "give considerable deference to the trial court's findings regarding credibility of witnesses").

III. THE DISTRICT COURT'S AWARD OF SANCTIONS WAS NOT AN ABUSE OF DISCTRECTION AND THERE IS JUSTIFICATION FOR MORE.

In light of Christensen's actions, the court imposed a monetary sanction of $2072. D0083 at 18. The court's reasons are set forth in

detail but generally are based upon pursuing a "frivolous motion"; dismissing the prosecution with "a lie and a cover up"; dismissing the prosecution "without regard to the ends of justice"; "his zeal for conviction was tempered not by justice but by his own bias toward protecting himself and a police officer"; in order "to deter a history of serious sanctionable conduct by an Iowa prosecutor"; "his lack of remorse and repeat[ed] attempts to shamelessly justify his sanctionable conduct"; "the discredit[ation] [of] Iowa's justice system; as a "measure of compensation to the accused for unjust and unwarranted treatment"; and Christensen's ability to pay the sanction. *Id.* at 14-17. In doing so, the court considered the relevant law supporting the imposition of sanctions thoroughly and appropriately and applied the law which does not need to be regurgitated here. *Id.* at 8-10.

Christensen takes issue with the imposition of the monetary sanctions because (1) "it is inconsistent with existing precedent, (2) "the court based its sanction on facts not in the record", and (3) "the court unilaterally ignored the only evidence before it in determining

the amount of attorney's fees Clemons incurred." Appellant's Brief P. 56.

Each of these will be addressed but before doing so, it is important to remember that sanctions must be imposed if there is sanctionable conduct and this court is only able to overturn the award if the district court abused discretion in awarding the sanction. *Mathias*, 484 N.W.2d at 445 ("we are mindful the rule and statute directs the court to impose a sanction when it finds a violation."); *Newell*, 710 N.W.2d at 20-21 ("we give a great deal of leeway to the trial judge who must make a judgment call.")

i. The court's ruling was consistent with existing precedent.

Christensen correctly notes that "deterrence—not compensation—is the primary goal of sanctions under rule 1.413." Appellant's Brief P. 57 citing *First Am. Bank & C.J. Land, LLC v. Fobian Farms, Inc.*, 906 N.W.2d 736, 747 (Iowa 2018). In doing so he advocates for a one-sixth ratio of sanctions to attorney fees. Appellant's Brief P. 57-58. In support of this one-sixth ratio he cites

cases involving sanctions imposed against counsel in civil cases. *Id.* But this is not a civil case and Christensen was not acting as a civil attorney but as the chief law enforcement officer in the State. *See State v. Whitehead*, 277 N.W.2d 887, 888 (Iowa 1979) (describing county attorney as "chief law enforcement officers"). That role carries special obligations distinct from civil attorneys. *Graves*, 668 N.W.2d at 870. This is something that Christensen fails to acknowledge but our courts have and must. *See Iowa Supreme Court Atty. Disciplinary Bd. V. Barry*, 762 N.W.2d 129 (Iowa 2009) (justifying a license suspension of a prosecuting attorney by concluding "in fashioning a sanction, we must protect the public, deter similar conduct by others, and uphold the integrity of the profession in the eyes of the public."). Moreover, criminal cases are not civil cases and carry different time frames and implications to the parties. These are things that Christensen fails to acknowledge but taken into account by the district court and it was not an abuse of discretion to do so.

No Iowa case has explicitly adopted a one-sixth ratio to make that a "binding" calculation. Instead, when judges go to "great

lengths to make a detailed finding that [an amount] is sufficient to deter any future conduct regardless of the opposing parties' attorney's fees" that is not an abuse of discretion. *Rowedder*, 814 N.W.2d at 591; *See also Chambers v. NASCO*, 501 U.S. 32 (1991) (upholding the entire amount of requested attorney fees of just under one million dollars as an appropriate sanction). That is exactly what the district court did in this matter and that decision should not be interfered with. D0083 at 14 ("the goal of deterring the magnitude of such conduct is within the reasonable range of attorney fees sought by Mr. Clemons. More would not be unjust; however, the court also considers the impact of a monetary sanction on the offender, including the offender's ability to pay a monetary sanction".); *See also* D0083 at 16 ("this amount is the minimum amount to deter a history of serious sanctionable conduct by an Iowa prosecutor.") *Rowedder*, 814 N.W.2d at 591.

ii. **The Court's Decision was Based on Facts in the Record and Did Not Ignore Christensen's Ability to Pay**.

In order to establish the monetary expenditures incurred an attorney fee affidavit and court reporter expenses were submitted to the court. *See* D0079 (attorney fees totaling $2027) and D0081 (court reporter fees of $610.27). The court did not award any amounts for the court reporter fees concluding that they "were incurred prior to the sanctionable conduct" despite the fact that Christensen generally knew that Lappe's testimony would be detrimental to his case prior to the depositions. D0083 at 15; D0052 at 18:4-14.

Although it is true the court suggested the attorney fee calculation might have been larger, the court did not award more than the attorney fees in the affidavit and clearly articulated sufficient reasons for imposing that sanction. Furthermore, Christensen's own admissions justify the amount awarded by the court irrespective of the court's considerations. *See* D0035 at 6 ("counsel for Defense could have called or emailed the undersigned and explained his concerns for his motion and its legal basis and likely persuaded the undersigned to withdraw the motion without

any need for further pleadings.") This admission alone provides factual support for those fees those fees because would not have been incurred if the frivolous motion was not filed.

Additionally, Christensen in his argument does not recognize the dual purpose of sanctions which is not only to deter but also to compensate. *Rowedder*, 814 N.W.2d 591-93. He fails to appreciate that some of the sanctions are necessary to deter future conduct and some were to compensate the accused as required by law. Furthermore, his lack of remorse can and should be considered when factoring in the appropriate award of sanctions. *Dupaco Cmty. Credit Union v. Iowa Dist. Ct. for Linn Cnty*, 5 N.W. 3s 657 (Table) at 18 ("if criminal offenders can be penalized at sentencing for not expressing remorse or taking responsibility, despite the protections of the Fifth Amendment, an attorney's failure to do the same can be considered an aggravating factor in assessing intent and determining sanctions.")

Christensen also takes issue with the court's unwillingness to consider his ability to pay the sanction. Christensen submitted a

screen shot showing a checking account balance of $5,036.53 and savings of $236.98 as an attachment to a brief in resistance to the sanctions. D0078, Brief and Attachment (1/26/24). No affidavit explaining or supporting this screen shot was admitted nor was any testimony taken concerning this screen shot. Additionally, no information was submitted as to how much Christensen makes or what assets are at his disposal. His brief contends that "Mr. Christensen is the sole provider for his family, earns a government salary as an Assistant County attorney, and has minimal savings." D0078 at 4. However, that is not evidence this court can consider. *Rasmussen v. Yentes*, 522 N.W.2d 844, 846 (Iowa Ct. App. 1994) (facts that are not part of the record should not be considered). Thus, the fact the court considered this evidence and the weight given to it was beneficial to Christensen. Stated another way, even assuming consideration of the attachment, it tells us little about Christensen's ability to pay the sanction other than he had sufficient money in his accounts to pay the imposed sanction.

iii. A Greater Amount of Monetary Fees is Now Warranted.

The undersigned is required by law to defend this certiorari action and has done so at considerable time and neglect to other clients and his own family. Iowa R. App. P. 6.107(5). It is not just to charge the accused for the time to further defend the courts decision. The pursuit of sanctions against prosecutors and the need to defend any sanctions imposed is a necessary component to uphold the integrity of our justice system. Requiring attorneys to defend these matters on appeal without compensation will have a chilling effect on the pursuit of sanctions against prosecutors in the future.

This court has discretion to change the sanction amount or award attorney fees pursuant to the court's inherent powers. *Link v. Wabash R. Co.*, 370 U.S. 626, 630-631 (1962) (inherent powers of the court are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.") Although this power "ought to be exercised with create caution," it is

nevertheless "incidental to all Courts." *Chambers*, 501 U.S. at 43. "A primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process." *Id.* at 44. To this end "an assessment of attorney's fees is undoubtedly within a court's inherent power as well." *Id.*

The undersigned recognizes that there is a disconnect between the above authorities and the suggested inherent authority of the courts in Iowa in this regard. *See Hearity*, 440 N.W.2d at 863 ("The court's inherent power alone, however does not authorize the court to assess attorney fees or other costs as a sanction against a litigant or counsel); *See also, State Pub. Def. v. Iowa Dist. Ct.*, 886 N.W.2d 595, 598 (Iowa 2016) ("As a general rule, court costs 'are taxable only to the extent provided by statute [and] absent statutory authority, a court lacks authority to tax costs against a party.") This rule should be revisited to be in line with the United States Supreme Court in order to help ensure sufficient incentive and means to deal with sanctionable conduct from prosecutors.

Nevertheless, even if this court concludes that the inherent powers of the court do not allow taxing fees for defending this matter on appeal there is statutory authority to do so and that authority should be exercised. *See* Iowa Code Section 619.19(4) (allowing the court to require the payment of "the amount of reasonable expenses incurred because of the filing of the motion, pleading, or other paper, including a reasonable attorney fee.")

In consideration of this request, the undersigned has attached an affidavit to this brief outlining the hours expended at the hourly rate of $400/hour. For a total attorney fee expenditure of $10,640. The undersigned asks that this amount be awarded either under the inherent powers of the court or pursuant to Iowa Code Section 619.19(4). The assessment of these fees is necessary to avoid a chilling effect on others from pursuing sanctions against prosecutors for similar conduct and to express the true gravity of how Christen's actions have impacted others.

CONCLUSION

The United States Supreme Court has summarized the importance of this case and the need to uphold the district court's ruling in all respects best by stating:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes or procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Boyd v. United States, 116 U.S. 616, 635 (1886).

Christensen's approach was not a "mild" or "stealthy", but was an intentional, calculated, reckless, arrogant, overt, and unremorseful attempt to deprive the accused and others of exculpatory evidence. Any lesser conclusion by this court would give the green light to prosecutors that these actions are acceptable; create a chilling effect on efforts by others to correct prosecutors who

attempt to sidestep their special role by seeking a conviction at all costs; and undermine the public's confidence in our judicial system.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument given the importance of this issue to uphold the integrity of our judicial system.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(g)(1) and 6.903(1)(i)(1) because:

[X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 9965 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(i)(1).

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_____ Dated: 8/12/24

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