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IN THE SUPREME COURT OF IOWA
Supreme Court No. 18-1534

IN RE 2018 GRAND JURY OF
DALLAS COUNTY,

JOHN DOE,
Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR DALLAS COUNTY
THE HONORABLE DUSTRIA RELPH, JUDGE

APPELLEE'S BRIEF

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III. The district court had no authority to quash the "grand jury proceedings." Even if it did, Doe failed to prove it should.

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ROUTING STATEMENT

This interlocutory appeal presents four questions related to grand juries: (1) can the State subpoena a target's expert to testify before a grand jury after the target has told the State the expert has an exculpatory opinion, (2) must a district court disqualify a prosecutor who calls a target's expert ex parte to facilitate presenting that expert's exculpatory opinion to the grand jury, (3) can a district court quash a grand jury proceeding, and (4) when must a district court decide a challenge to a grand jury array under *State v. Plain*.[1] The Supreme Court could retain this case due to the relative lack of Iowa precedent dealing with grand jury procedure. *See* Iowa R. App. P. 6.1101(2)(c).

STATEMENT OF THE CASE

Nature of the Case

The Supreme Court granted John Doe's application for interlocutory appeal. He asks this Court to reverse district court rulings refusing to quash a grand jury subpoena served on his expert, declining to disqualify a prosecutor, refusing to quash the grand jury,

[1] 898 N.W.2d 801 (Iowa 2017).

and denying him a continuance to make a *Plain* challenge to the grand jury array. This Court should affirm.

Course of Proceedings and Facts

The State filed a criminal complaint alleging that Doe committed child endangerment resulting in bodily injury in violation of Iowa Code section 726.6(6). Compl. (11/17/2017); App.5. Detective Stephen Becker investigated a report that SC "had possibly been abused." *Id.*; App.5. Becker photographed "multiple bruises" on SC's back. *Id.*; App.5. Doe admitted "to striking [SC] with an open hand on the back, as punishment for [SC] going poop in [SC's] diaper." *Id.*; App.5. Doe pleaded not guilty. Not Guilty Plea (11/20/2017); App.7.

The State's attorneys, Matthew Schultz and Denise Timmins, and Doe's attorney, Alfredo Parrish, attempted to resolve the matter. Mots. Hr'g Tr., 9:23 to 10:2; 18:7–10. Parrish told Schultz and Timmins that Doe retained Doctor Linda Railsback as an expert. *Id.* Parrish told them multiple times that Railsback opined that the discoloration on SC's back was not from bruising but a skin condition. *E.g.*, *id.* at 18:7–10; 30:10–17.

After learning Railsback's opinion from Parrish, the State subpoenaed SC's medical records and scoured SC's DHS records to

determine whether SC had a skin condition. *Id.* at 30:18–23; 34:1–6; Appl. Subpoena (2/7/2018); App.23. This review slowed the investigation by months and produced nothing to support Railsback's opinion. Mots. Hr'g Tr., 30:18–23; 34:1–6.

The State convened a grand jury to consider the Doe matter. *Id.* at 16:5–9; 59:3–4. It did so for two reasons: to let the community decide if Doe's spanking SC was criminal, and to ensure confidence in the justice system because Doe repeatedly accused the State of bias and discriminatory intent in prosecuting him. *Id.* at 18:11–24; 26:17–24; 32:2–15; 34:1–6; 37:15–24.

A week before the grand jury convened, Timmins informed Parrish that the State would use a grand jury. *Id.* at 16:5–16. Parrish thought that was a good idea. *Id.* He asked Timmins to present pictures to the grand jury on Doe's behalf; Timmins agreed. *Id.* at 16:17–22.

The same day, Timmins called Railsback to inform her, "as a professional courtesy," that she would be subpoenaed to appear before a grand jury. *Id.* at 17:11–16. Timmins told Railsback that "Parrish told [me that you] said [SC] had a skin condition." Railsback Aff. (9/4/2018), Att. to Mot. Quash Subpoena (9/4/2018); App.28.

Timmins asked Railsback if “that [was] correct.” Mot. Hr’g Tr., 17:11–19. An awkward silence followed, and Railsback declined to answer. *Id.* at 17:20–22. Timmins informed Railsback that she respected her decision not to say, but she would still receive a subpoena, which she did. *Id.* at 17:23–25; Railsback Aff. (9/4/2018); App.28.

Doe moved to quash the Railsback subpoena. Mot. Quash Subpoena (9/4/2018); App.30. He also moved to quash the grand jury proceeding, to disqualify Timmins, and to continue the grand jury proceeding so he could make a *Plain* challenge. Mot. Quash Grand Jury (9/5/2018); App.37.

The district court heard Doe’s motions the morning the grand jury was to be drawn. Mots. Hr’g Tr., 2:5 to 3:23. At the hearing, the district court denied the motion to quash the grand jury; to disqualify Timmins; and for a continuance, though it preserved Doe’s right to raise a *Plain* challenge via a motion to dismiss and authorized him to access the data he needed. *Id.* at 42:3–14; 51:25 to 52:10.

Later that day the court denied Doe’s motion to quash the Railsback subpoena. Order on Mots. (9/5/2018) at 1–2; App.43–44. It concluded that “the exculpatory evidence [Doe’s] counsel told the State Dr. Railsback would testify regarding is not privileged and the

State should be allowed to inquire about it." *Id.* at 2; App.44. It also ordered that "[t]o the extent Dr. Railsback is aware of [Doe's] 'trial strategy' … that information [is] privileged and should not be sought." *Id.*; App.44.

Doe filed an application for interlocutory appeal. Appl. Interl. Appeal (9/5/2018); App.47. The Supreme Court granted his application. Order Grant Interl. (9/11/2018); App.63.

ARGUMENT

I. The district court did not err by refusing to quash the grand jury subpoena compelling Dr. Linda Railsback to testify because the State subpoenaed Railsback to offer exculpatory evidence and Doe waived privilege.

Preservation of Error

Doe moved the district court to quash the Railsback subpoena because that subpoena violated work-product privilege and circumvented discovery; the district court denied the motion. Mot. Quash Subpoena (9/4/2018) at 2–3; App.31–32; Order on Mots. (9/5/2018) at 1–2; App.43–44. This claim is preserved. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

Doe failed to preserve a constitutional claim. He suggests that "this Court's review involves constitutional claims." Doe Br. at 31. But he makes no constitutional argument to quash the Railsback

subpoena here, waiving such claim. *Id.* at 31–39; Iowa R. App. P. 6.903(2)(g)(3). Similarly, Doe's motion to quash asserted that allowing the State to subpoena Railsback would "violate [his] constitutional rights," but he did not explain how. Mot. to Quash Subpoena (9/4/2018) at 3; App.32; *cf.* Mots. Hr'g Tr., 4:12 to 16:15. The district court did not rule on a constitutional argument. Order on Mots. (9/5/2018) at 1–2; App.43–44. Such a claim is unpreserved. *Meier*, 641 N.W.2d at 537.

Standard of Review

This Court reviews a district court decision on whether to quash a subpoena for "an abuse of discretion." *State v. Cole*, No. 07–0832, 2008 WL 4876993, at *2 (Iowa Ct. App. Nov. 13, 2008) (citing *Morris v. Morris*, 383 N.W.2d 527, 529 (Iowa 1986)); *see also State v. Cashen*, 789 N.W.2d 400, 405 (Iowa 2010) *superseded by statute on other grounds by* Iowa Code § 622.10. A district court abuses its discretion by relying on an unsupported fact finding or erroneously applying the law. *See State v. Parker*, 747 N.W.2d 196, 203 (Iowa 2008) (quoting *State v. Rodriquez*, 636 N.W.2d 234, 239 (Iowa 2001)). To the extent this claim presents a question of statutory interpretation, review is "for correction of errors at law." *State v.*

Russell, 897 N.W.2d 717, 724 (Iowa 2017) (quoting *State v. Dahl*, 874 N.W.2d 348, 351 (Iowa 2016)).

Merits

In denying Doe's motion to quash the Railsback subpoena the district court observed: "It makes no sense to this court why Defendant's counsel would repeatedly inform prosecutors that Dr. Railsback would provide evidence favorable to and tending to exonerate the Defendant if this matter were to proceed to trial, but then resist her providing that same exculpatory testimony to a grand jury." Order on Mots. (9/5/2018) at 2; App.44; *see also* Mots. Hr'g Tr., 33:4–6 ("So you're asking me to keep out exculpatory evidence from … the grand jury? … That's what it feels like to me."). Indeed, by moving to quash the Railsback subpoena, Doe tried to prevent the State from presenting her exculpatory opinion to the grand jury. The district court did not abuse its discretion by refusing that request.

Doe disagrees for two reasons. He says: (1) "[e]nforcing the subpoena … circumvents the specific rules of discovery for disclosure of Dr. Railsback's opinion," and (2) the subpoena seeks only privileged information. Doe's Br. at 33, 32. Both arguments fail.

A. The State was not conducting discovery by subpoenaing Railsback, it was presenting exculpatory evidence.

1. The State could subpoena Railsback to present exculpatory evidence to the grand jury.

Doe argues that the State subpoenaed Railsback to end run discovery rules. Doe Br. at 32–34. But he offered no proof. *See generally id.* That is because none exists.

The State subpoenaed Railsback to present her exculpatory opinion to the grand jury. As Timmins explained: "Parrish has stated on numerous occasions throughout this case that Dr. Railsback is going to say that [SC] has a skin condition, is going to have exculpatory information. That is why we are calling her." Mots. Hr'g Tr., 18:7–10; 27:17–22. Schultz explained that Parrish told him "Railsback … reviewed the pictures" of SC, and she opined that they showed that SC did not have "bruises … [but] Mongolian spots or several other different skin conditions [including] eczema." *Id.* at 30:10–17; 30:24 to 31:15. Given what Parrish told them, Timmins and Schultz "underst[oo]d[] [that Railsback] ha[d] exculpatory evidence, and so we felt it proper to put that in front of the [grand] jury … so they can make a decision about it." *Id.* at 27:17–22; *see also id.* at 26:7–9; 27:7–8; 30:10–23; 32:2–4.

The district court found that Doe told the State about Railsback's exculpatory opinion and that the State could present that exculpatory evidence to the grand jury. Order on Mots. (9/5/2018) at 2; App.44. In addition to Timmins's and Schultz's statements, other evidence supported those findings. For example, the State did not seek any documents from Railsback. Railsback Subpoena (8/30/2018); App.26; Order on Mots. (9/5/2018) at 2; App.44. The State also represented it would use a beyond-a-reasonable-doubt, not probable-cause, instruction when submitting the case to the grand jury for deliberation, demonstrating its intent to treat Doe more than fair. Mots. Hr'g Tr., 26:7–15; 27:11–13. The record supports the district court's findings; this Court should not disturb them.

The State's decision to present exculpatory evidence to the grand jury was prudent. True, the State had no duty to do so. *United States v. Williams*, 504 U.S. 36, 47, 55 (1992). But considerable authority dictated that it should. The Iowa Supreme Court has observed that a prosecutor's duty "in grand jury proceed[ings] is to fairly and dispassionately present not only that evidence which tends to prove guilt but also that which is exculpatory." *State v. Hall*, 235 N.W.2d 702, 712 (Iowa 1975). American Bar Association ("ABA")

Standards provide that a prosecutor "with personal knowledge of evidence that directly negates the guilt of a subject of the investigation should present or otherwise disclose that evidence to the grand jury." ABA Crim. Justice Standards for the Prosecution Function, 3-4.6(e) (4th ed. 2015). The United States Department of Justice's ("DOJ") manual requires its prosecutors with personal knowledge of exculpatory evidence to present it to the grand jury. DOJ, Justice Manual, 9-11.233 (2018). And the Iowa Rules of Criminal Procedure allow the grand jury to hear "evidence for the defendant." Iowa R. Crim. P. 2.3(4)(g). By subpoenaing Railsback to present exculpatory evidence, the State acted appropriately and justly.

2. *Civil discovery rules do not apply in criminal cases much less to grand juries.*

Doe hinges his argument that the State could not subpoena Railsback on Iowa's civil procedure rules, particularly Rule 1.508(2) governing consulting experts. Doe's Br. at 33. But the "rules of civil procedure do not apply to criminal matters." *State v. Russell*, 897 N.W.2d 717, 725 (Iowa 2017) (citing *State v. Halstead*, 791 N.W.2d 805, 813 (Iowa 2010)). In fact, the discovery provisions in Iowa's criminal rules do not apply to limit the State's investigative powers

until the State has filed charges. *State v. Sanders*, 623 N.W.2d 858, 861–62 (Iowa 2001); *see also id.* at 863–64 (Snell, J., concurring) ("Once charges have been filed against a defendant … the State becomes bound by the rules of discovery."); Iowa R. Crim. P. 2.5(6) (authorizing prosecuting attorneys to seek and district courts to issue pre-charge investigatory subpoenas). The district court acted properly by refusing to quash the Railsback subpoena based on inapplicable rules.

While the civil rules can be instructive in criminal cases, *id.*, Iowa's rules of criminal procedure govern here. The Rules of Criminal Procedure provide for the grand jury, prosecuting attorney, or both to issue subpoenas to secure witnesses and records for the grand jury. Iowa R. Crim. P. 2.3(4)(e). The grand jury can order that evidence favorable to a target be produced. *Id.* at 2.3(4)(g). They also have expert discovery provisions, though they do not apply until charges are filed. Iowa R. Crim. P. 2.14(2)(b)(1), (2); 2.14(3)(b); *see also Sanders*, 623 N.W.2d at 861–62. Iowa Rule of Civil Procedure 1.508(2) does not apply. *See Russell*, 897 N.W.2d at 725; Iowa R. Civ. P. 1.101.

The grand jury's investigative function buttresses that conclusion. Grand juries investigate conduct to decide if it is criminal. *See State v. Paulsen*, 286 N.W.2d 157, 160 (Iowa 1979) (citing *United States v. Calandra*, 414 U.S. 338, 342–44 (1974)); Iowa R. Crim. P. 2.3(4)(j). Imposing civil discovery rules on the grand jury would stymie that purpose. The district court would have erred by imposing them here.

B. Doe waived work-product privilege by telling the State Railsback's opinion.

For Doe's claim to prevail, work-product privilege must shield all the "testimony Dr. Railsback could provide to the grand jury." Doe Br. at 32, 36–37. Doe waived any such privilege.

Doe waived work-product privilege when Parrish told Timmins and Schultz Railsback's opinion. Communicating privileged work-product to an adversary waives privilege. *See, e.g.*, *Doe No. 1 v. United States*, 749 F.3d 999, 1008 (11th Cir. 2014) ("Disclosure of work-product materials to an adversary waives the work-product privilege." (citing *In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 860 F.3d 844, 846 (8th Cir. 1988))); *Pittman v. Frazer*, 129 F.3d 983, 988 (8th Cir. 1997) (citation omitted); *Exotica Botanicals, Inc. v. Terra Int'l, Inc.*, 612 N.W.2d 801, 804–09 (Iowa

2000) (rejecting subject-matter waiver for work product protection but assuming that the specific information disclosed lost work product protection). As the district court found, Parrish communicated Railsback's opinion to the State. Order on Mots. (9/5/2018) at 1–2; App.43–44 ("[T]he exculpatory evidence Defendant's counsel told the State Dr. Railsback would testify regarding is not privileged."). Thus, Doe waived privilege as to Railsback's opinion.

Doe resists that conclusion, arguing that by subpoenaing Railsback the State violated ABA standards, rules on plea discussions, and the rules of evidence. All three arguments fail.

First, because Doe waived privilege, his claim that the State violated ABA standards for prosecutors by subpoenaing Railsback misses the mark. According to those standards, a "prosecutor should not issue a grand jury subpoena to a criminal … defense team member, or other witness whose testimony reasonably might be protected by a recognized privilege, without considering the applicable law and rules of professional responsibility." ABA Crim. Justice Standards for the Prosecution Function, 3-4.6(i) (4th ed. 2015). The State considered the applicable law and concluded Doe

waived privilege by telling the State Railsback's opinion. *See id.* Plus, ABA standards tell the State it should present exculpatory evidence it knows about, which was the purpose of subpoenaing Railsback. *See id.* at 3-4.6(e).

Second, it does not matter that Parrish conveyed Railsback's opinion in plea discussions. Disclosing confidential information during plea discussions waives work-product privilege. *Doe No. 1*, 749 F.3d at 1008–10; *see also* Iowa R. Crim. P. 2.10(5) (making plea discussions "[in]admissible in any criminal" proceeding, not absolutely privileged). Doe's position that the State cannot investigate or otherwise use information learned during plea discussions would allow defendants to inoculate themselves from harmful evidence by disclosing it during plea negotiations. Doe. Br. at 38. Doe's concern that allowing the State to pursue evidence it learns of in plea discussions will discourage pleas is misplaced. Defendants disclose favorable information during pleas in hopes of persuading the State to offer better deals. It is to be expected, and to defendants' benefit, that the State will confirm such information. Plus, plea discussions have protection: they cannot be admitted as evidence. Iowa R. Evid. 5.410(a)(4).

Third, Doe's claim that Iowa Rule of Evidence 5.104(a) required the State to notify him it had subpoenaed Railsback misapplies that rule. Doe Br. at 35. Rule 5.104(a) requires a court do decide preliminary questions regarding privilege. It says nothing about notifying the target of a grand jury investigation about who is subpoenaed. Doe's reading of Rule 5.104(a) undermines the secrecy enveloping grand jury proceedings. *See* Iowa R. Crim. P. 2.3(4)(d). Notifying a target of who the grand jury or State subpoenaed to appear before the grand jury could allow the target to tamper with evidence or witnesses, or even flee. Those concerns animate the rule that the State need not tell a target of a grand jury proceeding at all. *See State v. Wellington*, 264 N.W.2d 739, 740–41 (Iowa 1978) (affirming the denial of a defendant's challenge that because she did not know a grand jury was convened to consider her case she could not challenge individual jurors as allowed by statute); *State v. Gartin*, 271 N.W.2d 902, 908 (Iowa 1978) (same). *A fortiori*, the State need not tell a target who it has subpoenaed. In any event, the district court decided Doe's privilege claim when it denied his motion to quash. Order on Mots. (9/5/2018) at 1–2; App.43–44.

While Doe is wrong that Railsback's opinion is privileged, the State and district court recognized Doe's concern. The district court ordered the State not to seek Doe's trial strategy when examining Railsback. Order on Mots. (9/5/2018) at 2; App.44. The State will abide by that order. Railsback can claim privilege when testifying if she believes a question seeks such information, and the district court will decide the claim. Iowa R. Crim. P. 2.3(4)(h); *see also Gartin*, 271 N.W.2d at 908 (holding witness should have claimed attorney-client privilege to refuse answering a question before grand jury). These safeguards ensure the State will not obtain privileged information.

* * *

Doe waived privilege when Parrish told the State Railsback's exculpatory opinion that SC suffered from a skin condition, not bruises from abuse. Once the State learned that exculpatory information it could, and should, have presented it to the grand jury. The district court did not abuse its discretion by finding that the State could present Railsback's exculpatory opinion to the grand jury.

II. **The district court did not abuse its discretion by refusing to disqualify Denise Timmins for subpoenaing Railsback to present her exculpatory opinion to the grand jury.**

Preservation of Error

Doe argued that the court should disqualify Timmins because she "directly contacted defense counsel's expert and demanded information about this matter." Mot. Quash Grand Jury (9/5/2018) at 5, ¶ 9; App.41; Mots. Hr'g Tr., 15:9–14. The district court overruled the motion, preserving error. Mots. Hr'g Tr., 52:5–10; Order on Mots. (9/5/2018) at 3; App.45; *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

To the extend Doe makes a constitutional argument, such claim is unpreserved. He did not argue that the Iowa Constitution or United States Constitution demanded disqualification; the district court did not decide that issue. Mot. Quash Grand Jury (9/5/2018) at 4–5; App.40–41; Mots. Hr'g Tr., 15:9–14; 52:5–10. No constitutional claim is preserved. *Meier*, 641 N.W.2d at 537.

Standard of Review

This Court reviews a district court's decision not to disqualify a prosecutor for abuse of discretion. *State v. Iowa Dist. Court*, 870 N.W.2d 849, 850, 853 (Iowa 2015).

Merits

Doe argues that the district court abused its discretion by declining to disqualify Timmins for contacting Railsback ex parte. Doe Br. at 22. He failed to prove an abuse of discretion.

A. Doe failed to prove Timmins had a conflict of interest demanding disqualification.

The only legal authority Doe identifies as a basis to disqualify Timmins is a prohibited conflict of interest. *Id.* (citing *Iowa Dist. Court*, 870 N.W.2d at 853). Doe did not argue or prove that Timmins had a conflict of interest. That alone justifies affirming.

B. The district court lacked authority to disqualify Timmins for engaging in "unjust" conduct.

Doe takes a sentence from an Iowa Supreme Court opinion out of context to justify crafting a new basis to disqualify a prosecutor. He says that a district court can disqualify a prosecutor "based on a determination that [she] ha[s] a conflict of interest which might prejudice [her] against the accused *or otherwise cause [her] to seek results that are unjust or adverse to the public interest*." Doe Br. at 22 (quoting *Iowa Dist. Court*, 870 N.W.2d at 853). Doe relies on the italicized language to suggest a freestanding basis for disqualifying prosecutors who seek "results that are unjust or adverse to the public interest." *Id.* at 22, 22–31. But *Iowa District Court* created no such

freestanding basis; instead, it offered “unjust” results or results “adverse to the public interest” as reasons to avoid conflicts of interest. 870 N.W.2d at 853. Doe identifies no case disqualifying a prosecutor solely for seeking unjust results or results adverse to the public interest. *See generally* Doe Br.

Indeed, district courts lack that power. Whether results are “unjust” or “adverse” to the public is subjective. That is why the public elects prosecutors to represent them. The people, therefore, determine whether a prosecutor is unjust in charging decisions via the ballot box. District courts cannot substitute their judgment for voters’ judgment via disqualification.

Relatedly, disqualifying prosecutors for charging decisions, including whether to file an information or seek an indictment, would encroach on the prosecutorial function. Courts lack the authority to make charging decisions. *State v. Iowa Dist. Court*, 568 N.W.2d 505, 508 (Iowa 1997) (citations omitted). That should include overseeing such decisions via disqualification. If courts could disqualify prosecutors for “unjust” results, it is not hard to imagine defendants flooding the courts with such requests.

Yet defendants and grand jury targets have other remedies to protect against "unjust" prosecutors. They can dismiss indictments, suppress evidence, file ethical complaints, move to disqualify for a conflict, seek a new trial, or campaign against elected prosecutors.

The district court rightly found that Doe failed to show it had authority to disqualify Timmins. Order on Mots. (9/5/2018) at 3; App.45. This Court should affirm.

C. Even if the district court could disqualify Timmins for contacting Railsback ex parte, it properly exercised its discretion not to.

Even if the court could disqualify Timmins for seeking "unjust" results, Timmins sought to further justice by presenting Railsback's exculpatory opinion to the grand jury. Disagreeing, Doe relies on three overlapping reasons the district court should have disqualified Timmins: (1) she violated civil discovery rules, (2) she violated an ABA ethical opinion, and (3) she violated Doe's "no-contact" rule. Doe Br. at 22–31. None of these reasons justify disqualification.

One, as already explained, the civil discovery rules do not apply in criminal cases. *State v. Russell*, 897 N.W.2d 717, 725 (Iowa 2017). Doe's complaint that Timmins violated civil discovery rules does not support disqualification. Doe does not argue Timmins violated any

criminal rule. Doe Br. at 22–31. He therefore showed no discovery violation.

Two, Doe's ethics-opinion argument dissolves without a discovery violation. Doe cites an ethics opinion that says ex parte contact between a lawyer and an opposing party's expert "probably violat[es Model Rule] 3.4(c)" in a jurisdiction with an expert discovery rule similar to Federal Rule of Civil Procedure 26(b)(4)(A). ABA Comm. on Ethics & Prof'l Resp., Formal Op. 93–378 (1993). "[I]f the matter is not pending in such a jurisdiction, there would be no violation." *Id.* Neither federal nor Iowa civil discovery rules apply to Iowa grand jury proceedings. According to the ABA ethics opinion, then, Timmins committed "no violation" because no rule prohibited her contact with Railsback. *Id.*

Had Timmins violated an ethical rule, the ABA opinion does not warrant disqualification. That opinion is equivocal. It informs that contacting an opponent's expert ex parte "probably constitute[s]" an ethical violation if doing so violates discovery rules. *Id.* Disqualifying a prosecutor for violating a non-binding ethics opinion that equivocates about whether conduct violates a non-binding standard goes too far.

Three, Doe asks this Court to adopt a "no-contact" rule prohibiting a prosecutor from contacting an opponent's expert ex parte. Doe Br. at 22, 25–29. Doe cites no Iowa authority imposing his rule. Instead, he relies on a law review article and a few federal cases purporting to adopt his "no-contact" rule. But every federal case he cites is civil. Doe Br. at 25, 27 (citing *Carlson v. Monaco Coach Corp.*, No. CIV S–05–181 LLKK/GGH, 2006 WL 1716400 (E.D. Cal. 2006); *Erickson v. Newmar Corp.*, 87 F.3d 298 (9th Cir. 1996)). Civil discovery rules do not apply to Iowa grand juries. And the law review article cites a single criminal case, otherwise relying on civil or attorney discipline cases. *See generally* George M. Cohen, *Beyond the No-contact Rule: Ex Parte Contact by Lawyers with Nonclients*, 87 Tul. L. Rev. 1197 (2013) (citing *United States v. Talao*, 222 F.3d 1133 (9th Cir. 2000)). The only criminal case it cites held that a prosecutor did not commit an ethical violation by making ex parte contact with a grand-jury target's employee accountant. *Talao*, 222 F.3d 1133. Doe cites no Iowa law or criminal case adopting his Rule. This Court should not adopt it.

Underlying Doe's request for this Court to craft a new rule and apply it to disqualify Timmins is his concern that Timmins could have

gotten privilege information from Railsback by telephoning her. Doe Br. at 28–29. But as he acknowledges, Timmins did not get such information. *Id.* That is because Timmins was careful when she called Railsback: Timmins asked Railsback a yes or no question about whether Parrish correctly informed Timmins of Railsback's skin-condition opinion. Railsback Aff. (9/4/2018); App.28; Mots. Hr'g Tr., 17:11–22. Timmins did not ask a broad question trying to catch Railsback unaware to get privileged information through guile.

The record, therefore, supports the district court's decision not to disqualify Timmins. Timmins acted cautiously and properly to ensure she received no privileged information while trying to facilitate presenting exculpatory evidence to the grand jury. This Court should affirm the district court's decision declining to disqualify her.

D. Even if Doe proved Timmins committed misconduct, he failed to prove prejudice.

Before a court disqualifies a prosecutor for seeking "unjust" results, it should require a prejudice showing. It requires such a showing in other, similar, contexts. For example, the law demands showing prejudice before dismissing an indictment due to prosecutorial misconduct. *See State v. Williams*, 360 N.W.2d 782,

785 (Iowa 1985); *State v. Paulsen*, 286 N.W.2d 157, 160 (Iowa 1979). So too with prosecutor error or misconduct at trial. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003) (citing *State v. Piper*, 663 N.W.2d 894, 913 (Iowa 2003) *overruled on other grounds by State v. Hanes*, 790 N.W.2d 545, 551 (Iowa 2010)). A prejudice requirement would provide a recognized legal standard to what would otherwise be unfettered district court discretion. Requiring prejudice would also prevent an unjust-conduct standard from becoming a tool to attack any prosecutor a defendant does not like.

Doe cannot prove prejudice. Timmins's "unjust conduct" was attempting to present exculpatory evidence to the grand jury. That helped, not hurt, Doe. Also, Timmins gained no privileged information because Parrish had already told her what she asked Railsback. Mots. Hr'g Tr., 18:7–10. And if the grand jury indicts Doe and Doe intends to present a skin-condition expert, the State will get discovery from that expert. Reciprocal Disc. Order (12/5/2017); App.16; Iowa R. Crim. P. 2.14(3)(b). If he doesn't, Railsback's opinion is irrelevant. For these reasons, Doe suffered no harm from Timmins trying to present exculpatory evidence.

III. The district court had no authority to quash the "grand jury proceedings." Even if it did, Doe failed to prove it should.

Preservation of Error

Doe asked the district court to quash the "grand jury proceeding as fundamentally and procedurally flawed to its core," mainly because he believes that the State was using the grand jury to conduct discovery. Mot. Quash Grand Jury (9/5/2018) at 2–3; App.38–39; Mots. Hr'g Tr., 5:10–17; 14:19 to 15:8. The district court rejected his argument, concluding it lacked authority to quash the grand jury. *Id.* at 42:3–14; Order on Mots. (9/5/2018) at 2; App.44. This claim is preserved. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

Standard of Review

"Questions of … authority … of the district court are … reviewed for correction of errors at law." *State v. Clark*, 608 N.W.2d 5, 7 (Iowa 2000) (citing *Holding v. Franklin Cnty. Zoning Bd.*, 565 N.W.2d 318, 320 (Iowa 1997)).

Merits

Doe argues that the district court erred in concluding that it lacked the authority to quash the "grand jury proceeding." Doe Br. at 39 (bolding removed). He asserts that the district court had "inherent

authority" to "do whatever" it needed to rule on Doe's claim that this grand jury proceeding violated the constitution. *Id.* at 45.

A. The district court correctly held it lacked authority to quash a "grand jury proceeding."

Doe identified no rule or case authorizing an Iowa district court to quash a grand jury. The closest he came was identifying Iowa Rule of Criminal Procedure 2.3(2)(c). Mot. Quash Grand Jury (9/5/2018) at 3; App.39. That rule provides that "[c]hallenges to the panel or to an individual grand juror shall be decided by the court." Iowa R. Crim. P. 2.3(2)(c). The Rule's plain language allows district courts to decide challenges to panels or jurors, not quash a grand jury proceeding. *Id.* Its placement within Rule 2.3(2) confirms the plain meaning: Rule 2.3(2)(c) immediately follows the rules allowing challenges to the array and to grand jurors. Iowa R. Crim. P. 2.3(a), (b), (c).

Doe's citation to caselaw fares no better. He cited no case quashing a grand jury. The State could find none. Instead, Doe found cases in which district courts *dismissed indictments* following State misconduct in securing them. Doe Br. at 43–52 (citing *e.g.*, *State v. Wong*, 40 P.3d 914 (Haw. 2002) (per curiam)). Dismissing an indictment is a different remedy than quashing a grand jury. The

State acknowledges Doe can move to dismiss an indictment for certain reasons. Iowa R. Crim. P. 2.3(2)(d); *id.* 2.11(6)(b).

The lack of authority to quash a grand jury proceeding is not surprising because such a remedy would violate separation of powers. It would allow district courts to improperly intrude on the grand jury, prosecutorial function, and legislature.

Allowing district courts to quash a grand jury proceeding for prosecutorial misconduct would improperly infringe on the grand jury. The grand jury is not part of the judicial branch; rather, "it belongs to no branch of the institutional government, serving as a kind of buffer or referee between the government and the people." *State v. Iowa Dist. Court*, 568 N.W.2d 505, 508 (Iowa 1997) (quoting *United States v. Williams*, 504 U.S. 36, 47 (1992)). The court's role *vis-à-vis* the grand jury is "constitutive." *Id.* It cannot quash a grand jury absent authority, which is not provided. *See* Iowa R. Crim. P. 2.3.

Moreover, quashing a grand jury for prosecutorial misconduct targets the wrong entity. Grand juries have their own investigative authority absent prosecutors. Iowa R. Crim. P. 2.3(4)(e), (j); *see also Iowa Dist. Court*, 568 N.W.2d at 508 ("The grand jury is not an adjunct of either the court or the prosecutor.") (quoting *Williams*,

504 U.S. at 47). They can investigate multiple cases at once. *See* Iowa R. Crim. P. 2.3(4)(j). Quashing a grand jury for a prosecutor's error, therefore, deprives the grand jury of its authority because of another office's misconduct.

Quashing a grand jury due to the prosecutor's choices in convening a grand jury and presenting evidence to that jury also invades the prosecutorial function. The prosecutor decides whether and what to charge, not the court. *Iowa Dist. Court*, 568 N.W.2d at 508. That principle extends to the decision whether to seek a grand jury indictment or file a trial information. *See id.* (holding district court lacked authority to direct a grand jury to consider charges). Such limits on district court power are particularly important because the prosecutorial function is exercised by elected officials. *See id.* at 508–09; Iowa Code § 331.751. District courts should not usurp a core function of elected prosecutors.

Finally, allowing district courts to quash grand juries would improperly seize legislative power because it would give district courts power the legislature withheld. District courts exercise only that authority that the legislature provides. *See* Iowa Const., art. V, sec. 6. The Iowa legislature has authorized district courts to rule on

challenges to a grand jury array, individual grand jurors, and to dismiss indictments for certain grand jury violations, but not quash grand juries. Iowa R. Crim. P. 2.3(2)(a)–(d); 2.11(6)(a), (b). This Court should not seize for district courts that which the legislature has not provided.

Relatedly, to the extent Doe asks for "dismissal of the proceeding with prejudice," that remedy does not fit. *See* Doe Br. at 51. Presumably he means dismiss an indictment with prejudice, but there is no indictment to dismiss. To the extent he means that this Court should preclude the State from convening a grand jury, it lacks that authority for the reasons just discussed. *See Iowa Dist. Court*, 568 N.W.2d at 508. And to the extent he seeks a bar from prosecution, he sited no authority authorizing that remedy. *See* Doe Br. at 39–52.

The core of Doe's complaint seems to be the broad scope of the grand jury's investigative powers coupled with prosecutors' ability to participate while he is excluded. *See* Doe Br. at 45–47, 49–50. The State understands Doe's concerns. But they are appropriately addressed to the legislature, not this Court. He should direct his complaints there.

B. Even if the district court had authority to quash a grand jury proceeding, it acted within its discretion by declining to.

1. Prosecutors can present exculpatory evidence or other target favorable evidence to the grand jury.

Doe suggests that a prosecutor may only present evidence to the grand jury that favors indicting. Doe Br. at 45–46. He is wrong for five reasons.

First, the grand jury rules explicitly provide that "[t]he grand jury is not bound to hear evidence for the defendant, but *may do so*." Iowa R. Crim. P. 2.3(4)(g) (emphasis added). The State, therefore, can present evidence favorable to targets.

Second, some authorities provide that prosecutors have an ethical duty to present exculpatory evidence they know of to the grand jury. *See* ABA Crim. Justice Standards for the Prosecution Function, 3-4.6(e) (4th ed. 2015). Under Doe's no-exculpatory-evidence-before-the-grand-jury regime, prosecutors would be obliged to commit ethical violations if they learned exculpatory evidence when using a grand jury.

Third, evidence is not binary, neatly favoring the prosecution or defense. Some evidence is foundational. Some cuts both ways. Some

evidence's value hinges on each side's theory. Some witnesses have information harmful to both sides. Limiting prosecutors to presenting evidence favoring indictment creates a thorny classification problem. A problem made worse by Doe's proposed remedy: quashing the grand jury.

Fourth, the State will not always know the full import of evidence it presents to the grand jury. At times a grand jury investigation will reveal evidence that the State did not know about, much less which "side" the new evidence benefits. And grand juries can investigate on their own initiative. Iowa R. Crim. P. 2.3(4)(e) ("The clerk of the court must, when required by the foreman or forewoman of the grand jury … issue subpoenas …."); (j) (grand jury can convene "upon the request of a majority of the grand jurors"). In such situations Doe's proposed rule creates an unworkable standard.

Fifth, limiting the grand jury to hearing inculpatory evidence undermines the grand jury's investigative purpose. *Id.* 2.3(4)(j); *State v. Paulsen*, 286 N.W.2d 157, 160 (Iowa 1979). This Court should not adopt a rule contradicting that purpose.

Instead of imposing an unworkable rule that is antithetical to the grand jury's investigative purpose, this Court should hold that the

State can present target-favorable evidence to the grand jury. Doe's proposed rule would prevent the State from doing justice; this Court should reject it.

2. The State did not use the grand jury to improperly obtain discovery from Doe.

The State was not conducting discovery. It was providing the grand jury evidence related to Doe spanking SC. Mots. Hr'g Tr., 18:11–15; 32:2–15. That was proper. Iowa R. Crim. P. 2.3(4)(g).

The State convened a grand jury for two reasons: (1) to allow the community to make a judgment about the conduct in this case because it involved spanking, and (2) to undercut Doe's claims of improper bias leveled at the State. To further those purposes, the State needed to present a full picture of the evidence to the grand jury. That included subpoenaing witnesses like Doe's wife, sister, and co-worker, all of whom Doe tabs defense witnesses. Doe Br. at 45–46; 50–51. But those people are not his witnesses: they are individuals with information about how Doe treated SC and spanked her. Doe complains that these people are witnesses he listed in the child-in-need-of-assistance case. *Id.* at 50–51; Mots. Hr'g Tr., 8:11–17. It is little wonder that the witnesses overlap as they are the people with relevant information. And while Doe's claim that Railsback is "his

witness" has more heft, the State has already explained why it could subpoena her. The State acted properly by providing as complete a picture as possible to the grand jury.

Doe cites a Hawaii Supreme Court case to support his argument that subpoenaing witnesses who might have privileged material warrants quashing a grand jury. Doe Br. at 48–49 (citing *Wong*, 40 P.3d 914). That case is legally and factually distinguishable. Legally, the case did not grant the relief he seeks: it dismissed an indictment based on prosecutorial misconduct, not quashed a grand jury. *Wong*, 40 P.3d at 916, 930. Also, Hawaii grand juries are "a constituent part of the court" giving courts supervisory powers over Hawaii grand juries that Iowa courts lack. *Id.* at 924–25; *Iowa Dist. Court*, 568 N.W.2d at 508 (citation omitted). Factual differences also render *Wong* inapplicable. In *Wong*, the State presented testimony from lawyers currently or previously representing grand jury targets without obtaining a court ruling on attorney-client privilege. 40 P.3d at 917, 918–19, 924–25. But here the district court rejected Doe's privilege claim before Railsback was scheduled to testified. Order on Mots. (9/5/2018) at 1–2; App.43–44. Also, in *Wong* the district court had ordered the State to seek permission before presenting attorney

testimony to the grand jury, but the State failed to do so. 40 P.3d at 925. No such order bound the State here.

The State could present information to the grand jury—both damning and redeeming—about Doe's interactions with SC generally and the specific spanking incident prompting the investigation. Even if the district court could quash the grand jury proceeding, it did not abuse its discretion by declining to.

3. *Doe failed to prove prejudice to justify quashing the grand jury.*

When a defendant moves to quash or dismiss a grand jury indictment, Iowa courts typically require the defendant to prove prejudice. *E.g.*, *State v. Williams*, 360 N.W.2d 782, 785 (Iowa 1985); *Paulsen*, 286 N.W.2d at 160–61. Prejudice occurs when a prosecutor's misconduct creates "a reasonable likelihood" that it "induce[d] action other than that which the grand jurors in their uninfluenced judgment would take." *Paulsen*, 286 N.W.2d at 160 (citing *State v. Joao*, 491 P.2d 1089, 1091 (Haw. 1971)). Doe cannot prove prejudice.

To prove prejudice here Doe would have to show that presenting Railsback's exculpatory opinion to the grand jury induced it not to indict him when he otherwise would have been indicted. The

absurdity of that showing underscores how any "misconduct" by the State accrued to Doe's benefit.

Alternatively, this Court could require Doe to show prejudice in the form of a likelihood Timmins's conduct in contacting Railsback will prejudice him in a future trial. *See State v. Hall*, 235 N.W.2d 702, 713 (Iowa 1975). But if Doe faces a trial, he will have jurors who do not know any evidence the grand jury heard. *See id.*; *State v. Tyler*, 512 N.W.2d 552, 554 (Iowa 1994). And Doe has not shown that the State received evidence through the grand jury that it otherwise would not have gotten through discovery, much less that such evidence would hurt Doe. He could not have done so as the court had entered a reciprocal discovery order. Reciprocal Disc. Order (12/5/2017); App.16.

Doe has not shown harm from the State's purported misconduct. Absent harm, this Court should reject Doe's request to quash the grand jury much less dismiss the case with prejudice.

IV. The district court did not err by denying Doe a continuance that would allow him to challenge the grand jury array under *State v. Plain* when it preserved such a challenge for him to raise later.

Preservation of Error

Doe moved to continue the grand jury proceeding to allow him to challenge the composition of the grand jury array under *State v. Plain*, 898 N.W.2d 801 (Iowa 2017). The district court denied him a continuance but preserved his right to challenge the grand jury array via a motion to dismiss. Mots. Hr'g Tr., 51:25 to 52:4; Order on Mots. (9/5/2018) at 2; App.44. Error is preserved. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

Standard of Review

This Court reviews rulings denying a motion for continuance for abuse of discretion. *State v. LaGrange*, 541 N.W.2d 562, 564 (Iowa Ct. App. 1995) (citing *State v. Teeters*, 487 N.W.2d 346, 348 (Iowa 1992)). It reviews the interpretation of rules for errors at law. *Estate of Cox v. Dunakey & Klatt, P.C.*, 893 N.W.2d 295, 302 (Iowa 2017) (citing *State v. Kukowski*, 704 N.W.2d 687, 690–91 (Iowa 2005)). It reviews constitutional claims de novo. *State v. Harrison*, 914 N.W.2d 178, 187 (Iowa 2018) (citing *State v. Coleman*, 907 N.W.2d 124, 134 (Iowa 2018)).

Merits

In *Plain*, the Iowa Supreme Court authorized defendants to attack jury venires because the venire was not composed of a fair cross-section of the community. 898 N.W.2d at 821–22. To prove such a claim, a defendant must show (1) a distinctive group, (2) whose representation in the venire is not fair and reasonable compared to the group's size in the population, and (3) the underrepresentation is due to "systematic exclusion of the group in the jury-selection process." *Id.* (quoting *Duren v. Missouri*, 439 U.S. 357, 364 (1979)).

The district court denied Doe's request for a continuance so that he could make a *Plain* challenge to the grand jury array but preserved his ability to make that claim via a motion to dismiss. Order on Mots. (9/5/2018) at 2; App.44; Mots. Hr'g Tr., 51:25 to 52:4. Doe argues that the district court erred because "any challenge to the grand jury panel [must] be raised and ruled upon 'before the grand jury is sworn.'" Doe Br. at 53 (bolding removed). For Doe to prevail, he must show that he asserted a *Plain* challenge and that the district court was required to rule on that challenge before swearing the grand jury. He can prove neither.

A. Doe never raised a *Plain* challenge, so the district court had no obligation to decide such a challenge.

Doe's claim fails because he never challenged the grand jury array. Even under his interpretation of Rule 2.3(2), a district court need only decide "[c]hallenges" "before the grand jury is sworn." Iowa R. Crim. P. 2.3(2)(c), (a); Doe Br. at 53. But Doe merely sought a continuance so that he could assert his right to a "fair and impartial grand jury drawn from a fair cross-section of the community." Mot. Quash Grand Jury (9/5/2018) at 3–4; App.39–40; Mots. Hr'g Tr., 15:17–19; 46:1–5. He never actually made a *Plain* challenge. Mot. Quash Grand Jury (9/5/2018) at 3–4; App.39–40; Mots. Hr'g Tr., 15:17–19; 46:1–5; *see also generally*, Mots. Hr'g Tr. Because Doe never made a *Plain* challenge, the district court had no obligation to decide that issue. The district court did not err.

B. Rule 2.3(2) allows grand jury targets to challenge the array "before the grand jury is sworn," but does not require district courts to decide such challenges in that period.

Doe says that Iowa Rule of Criminal Procedure 2.3(2)(a) required the district court to decide a *Plain* challenge "before the grand jury is sworn." Doe. Br. at 53 (bolding removed). He reasons that the district court erred by denying him a continuance so that he

could make that challenge. *Id.* at 53–59. But Rule 2.3(2) does not require a district court to rule on a *Plain* challenge before the grand jury is sworn.

Rule 2.3(2)(a) provides: "A defendant … may, before the grand jury is sworn, challenge the panel … only for the reason that it was not composed or drawn as prescribed by law. If the challenge be sustained, the court shall thereupon proceed to take remedial action to compose a proper grand jury panel or grand jury." That rule allows, but does not require, grand jury targets to attack the array "before the grand jury is sworn." *Id.* Indeed, "may" is permissive, not mandatory. Iowa Code § 4.1(30)(c); *John Deere Waterloo Tractor Works of Deere & Co. v. Derifield*, 110 N.W.2d 560, 562 (Iowa 1961). Absent Rule 2.3(2)(a), a grand jury target could not "challenge the panel" "before the grand jury is sworn." Instead, such person would have to wait to do so via a motion to dismiss, which he or she can still do. *Id.* 2.3(3)(d).

Nothing in Rule 2.3(2)(a) requires a district court to rule on the challenge before the grand jury is sworn. As just explained, the "before" clause adds an additional time for making a *Plain* challenge. But it has no language mandating the court decide the challenge in

that same timeframe. The second sentence in Rule 2.3(2)(a) also does not require action before the grand jury is sworn. Instead, it requires district courts "to take remedial action" if an attack on the array or a juror "be sustained." In other words, if the target's challenge has merit, the district court lacks discretion to do nothing. That the court must correct an illegal array when one is found does not imply that it must decide the challenge before the grand jury is sworn.

That "[c]hallenges to the panel or to an individual grand juror shall be decided by the court" also imposes no time limit. Iowa R. Crim. P. 2.3(2)(c). Had the legislature intended to create a time in which the district court must decide such challenges it would have said so explicitly. Instead, Rule 2.3(2)(c) identifies the district court as the authority to decide these challenges. Explicitly providing that authority to the court is necessary because grand juries are outside the judicial branch. *State v. Iowa Dist. Court*, 568 N.W.2d 505, 508 (Iowa 1997). The court needs explicit authority to act to oversee the grand jury.

Rule 2.3(2)(d) buttresses the conclusion that a district court need not rule on a *Plain* challenge to the array before swearing the grand jury. That Rule provides: "A motion to dismiss [an] indictment

may be based on challenges to the array …, if the grounds for challenge which are alleged in the motion of the defendant have not previously been determined pursuant to a challenge asserted by the defendant pursuant to rule 2.3(2)(a) or 2.3(2)(b).” Because this Rule provides another avenue for a grand jury target to attack the array under *Plain*, a district court has discretion to defer deciding a *Plain* challenge until an indictment is returned. Iowa R. Crim. P. 2.3(2)(d); *see also* 2.3(2)(a). By extension, a district court can refuse a continuance that would enable a target to assess whether to make a *Plain* challenge. The district court did not misinterpret Rule 2.3(2).

C. Denying Doe’s request for a continuance furthered efficiency at no cost to Doe.

Denying Doe’s request for a continuance was efficient. It allowed grand jury proceedings to begin that day. The Dallas County citizens comprising the array were at the courthouse. Witnesses were subpoenaed and scheduled to testify. Delay would have wasted the time of all those people.

That waste would have likely been in vain. Doe asked for a continuance to get data to assess whether the array violated *Plain*. But grand juries are presumed regular, so Doe’s array likely had no constitutional defect. *State v. Paulsen*, 286 N.W.2d 157, 158–59 (Iowa

1979) (citing *Cole v. State*, 22 S.E.2d 529, 531 (Ga. App. 1942)). Reviewing the facts would likely have revealed no basis to raise a *Plain* challenge, and Doe surely would not have asserted a baseless claim. Delay in the face of an unlikely violation was unwarranted.

Also, denying a continuance but preserving Doe's right to make a *Plain* challenge allowed him to get the grand jury data needed to assess systemic exclusion without wasting time. Doe needed Dallas County's grand jury data, and the district court allowed him to get it. Mots. Hr'g Tr., 51:25 to 53:22. He could get and review that data to assess whether a *Plain* challenge had merit while the grand jury considered whether to indict.

That efficiency could be bought at no cost to Doe. If reviewing the data reveals that a *Plain* challenge has merit, Doe can move to dismiss any indictment returned. Such a challenge will allow him to vindicate his constitutional rights. Plus, the grand jury may not indict him, in which case any time spent on the *Plain* challenge is wasted.

His complaint that he must "endure the grand jury process and bear the possible embarrassment and risk of a grand jury indictment" by waiting is misguided. The remedy for a meritorious *Plain* challenge to a grand jury array is calling a new array. It is not a

dismissal with prejudice. *See Plain*, 898 N.W.2d at 829 (stating remedy for violation of right to representative jury is a new trial). Doe must "endure" a grand jury and "bear the possible embarrassment and risk" of indictment whether this grand jury violated *Plain* or not.

* * *

Doe can still challenge the grand jury array under *Plain*. The district court preserved Doe's right to make such a challenge in a motion to dismiss. Mots. Hr'g Tr., 15:17–19; 46:1–5; 51:25 to 52:4 Order on Mots. (9/5/2018) at 2; App.44. The State will not resist an otherwise timely motion to dismiss on *Plain* grounds by arguing Doe had to raise the challenge before the grand jury was sworn. Instead of delaying proceedings so Doe could decide whether the facts warranted a *Plain* challenge, the district court could authorize Doe to get the necessary information while allowing the grand jury to proceed. The district court did not abuse its discretion.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court in all respects.

REQUEST FOR ORAL SUBMISSION

The State requests to be heard in oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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