IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff–Appellee, v. DERRICK EARL JOHNSON, Defendant–Appellant.	)))))))))	S. CT. NO. 19–0892

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
THE HONORABLE JOEL A. DALRYMPLE, JUDGE

APPELLANT'S BRIEF AND ARGUMENT
AND
REQUEST FOR ORAL ARGUMENT

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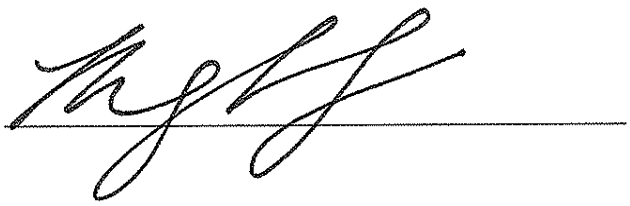
CERTIFICATE OF SERVICE

On 25th day of February, 2020, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant–Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Derrick Earl Johnson, No. 6582594, Mount Pleasant Correctional Facility, 1200 East Washington Street, Mt. Pleasant, IA 52641.

APPELLATE DEFENDER'S OFFICE



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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because it involves a substantial issue of first impression in Iowa. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c). Specifically, in Division I, Johnson asks this Court to find that homicide by vehicle by reckless driving is a lesser-included offense of homicide by vehicle by operating while intoxicated. In unpublished opinions, the Court of Appeals has found that it is not. See, e.g., State v. Halterman, No. 12–1072, 2013 WL 1457148 (Iowa Ct. App. 2013) (unpublished table decision); State v. Ware, No. 13–1072, 2014 WL 3931451, at *4 (Iowa Ct. App. Aug. 13, 2014) (unpublished table decision). However, Judge Tabor dissented in State v. Ware, noting the majority's misplaced reliance on State v. Massick, 511 N.W.2d 384, 387 (Iowa 1994), which held that reckless driving is not a lesser-included offense of operating while intoxicated. In this case, the trial judge agreed Judge Tabor's opinion was persuasive, but stated "it is the dissent of an unpublished opinion, so

there's . . . not a lot of weight the court can give that." (Trial Tr. vol.3 p.147 L.10–13). Johnson asks this Court rule State v. Massik is not controlling and find the reckless alternative is a lesser-included offense of the operating-while-intoxicated alternative of homicide by vehicle.

In addition, retention is appropriate because Johnson asks this Court reverse State v. Hubka, 480 N.W.2d 867 (Iowa 1992) in Division II. State v. Hubka found that evidence that the victims were not wearing seatbelts and would have survived if they had been restrained was not relevant in a vehicular homicide case. Johnson requests this Court adopt Michigan's approach, which allows the jury to consider this type of evidence in determining whether the defendant caused the victim's death. See People v. Moore, 631 N.W.2d 779, 781–84 (Mich. Ct. App. 2001).

STATEMENT OF THE CASE

Nature of the Case: Defendant–Appellant Derrick Earl Johnson appeals his conviction, sentence, and judgment following a jury trial and verdict finding him guilty of homicide by vehicle while operating under the influence, in Black Hawk County District Court Case No. FECR221581.

Course of Proceedings: On September 28, 2017, the State charged Johnson with interference with homicide by vehicle by operating under the influence, a class "B" felony, in violation of Iowa Code section 707.6A(1) (2017). (Trial Information) (App. pp. 5–6). On October 9, 2017, Johnson filed a written arraignment and plea of not guilty. (Written Arraignment) (App. pp. 7–8). He also waived his right to trial within ninety days at the same time. (Written Arraignment) (App. p. 8). Johnson subsequently waived his right to be tried within one year. (Waiver) (App. p. 10).

On March 29, 2018, the State filed a motion in limine asking the district court to prevent the defense from entering

evidence that L.M. was not in a child restraint system at the time of the car crash and that there were more occupants in the vehicle than seatbelts. (Mot. Limine) (App. p. 9). In its motion, the State also noted the defense intended to present expert testimony that L.M. would have survived or had a higher chance of surviving if restrained in a car seat and asked the court to prevent the admission of such evidence. (Mot. Limine) (App. p. 9). The defense resisted the motion. (Resistance) (App. pp. 11–12). After hearing on the motion, the district court granted the State's motion. (Mot. Limine Tr. p.2 L.10–p.18 L.7) (Ruling) (App. pp. 13–16).

The State moved to amend the trial information on March 13, 2019. (Mot. Amend.; Amend. Trial Information) (App. pp. 17–19). The amendment added an alternative theory by which the State sought to prove operating while intoxicated. (Amend. Trial Information) (App. p. 18). The district court granted the amendment. (Order Amend.) (App. pp. 20–21).

On April 2, 2019, the jury returned a verdict finding Johnson guilty of homicide by vehicle by operating while under the influence. (Trial Tr. vol.3 p.246 L.15–p.247 L.19) (Verdict) (App. p. 25). By way of a special interrogatory, the jury unanimously found that Johnson was under both the influence of alcohol and a drug individually, as well as under a combination of both alcohol and a drug, beyond a reasonable doubt. (Trial Tr. p.246 L.15–p.247 L.19) (Interrogatory) (App. p. 26). It also unanimously found Johnson had an alcohol concentration of 0.08 or more and that he had any amount of controlled substance present, as measured by his blood, beyond a reasonable doubt. (Trial Tr. p.246 L.15–p.247 L.19) (Interrogatory) (App. p. 26).

Following the jury's return of the guilty verdict, Johnson filed a motion for new trial and motion in arrest of judgment on several grounds, including that there was insufficient evidence supporting a finding that the accident was caused by Johnson's intoxication, that the statute was not applicable to

Johnson's case considering the entire record, and that the court erroneously granted the State's motion in limine. (Sentencing Tr. p.2 L.21–p.4 L.13) (Mot. New Trial & Mot. Arrest of J.) (App. pp. 27–29). The court denied the motions. (Sentencing Tr. p.5 L.11–p.8 L.12).

The matter came before the district court for sentencing on May 13, 2019. (Sentencing Order) (App. p. 30). The district court sentenced Johnson to an indeterminate sentence not to exceed twenty-five years in prison. (Sentencing Tr. p.20 L.6–8) (Sentencing Order ¶¶ 2, 3) (App. p. 30). The court imposed a $10 drug abuse resistance education surcharge. (Sentencing Tr. p.20 L.9) (Sentencing Order ¶ 8) (App. p. 31). The court ordered Johnson to pay $150,000 in restitution to the victim's heirs at law, pursuant to Iowa Code section 910.3B, as well as any other victim restitution. (Sentencing Tr. p.20 L.14–16) (Sentencing Order ¶¶ 9, 10) (App. p. 31). The court found Johnson could not reasonably repay the costs of his court-appointed attorney and entered a temporary

restitution order regarding the remaining restitution. (Sentencing Tr. p.21 L.2–p.24 L.17) (Sentencing Order) (App. p. 31). The court revoked Johnson's driver's license for six years, ordered him to obtain a substance abuse evaluation and comply with the recommended treatment, and ordered him to complete a drinking and driving course. (Sentencing Tr. p.20 L.10–15) (Sentencing Order ¶ 15) (App. p. 32). Lastly, the court ordered Johnson to submit a DNA sample. (Sentencing Tr. p.24 L.20–22) (Sentencing Order ¶ 14) (App. p. 32).

Johnson timely filed a notice of appeal on May 27, 2019. (Notice) (App. pp. 35–36).

Facts: At approximately 6:30 p.m., on August 2nd, 2017, there was a car crash at the intersection of First Street and Sycamore Street in Waterloo. (Trial Tr. vol.1 p.194 L.15–22; vol.2 p.31 L.13–18). First Street was usually a one-way street headed north; however, it was a two-lane street with a middle turning lane at the time of the accident because it was being used as a detour while a nearby street was under

construction. (Trial Tr. vol.1 p.202 L.6–19). At the intersection, there were temporary stop signs with two orange flags attached to poles displayed on the side of road on Sycamore Street only; vehicles traveling on First Street did not have to yield. (Trial Tr. vol.1 p.203 L.1–18, p.224 L.3–21, p.247 L.13–20). Witnesses testified the view of the intersection was blind; it was blocked extensively by surrounding buildings and hard to see the oncoming traffic until very close to the intersection. (Trial Tr. vol.2 p.9 L.1–20, p.13 L.10–15; vol.3 p.94 L.17–p.95 L.15, p.105 L.32–p.106 L.15).

The evidence showed Johnson, who was headed west in a pickup truck, ran the stop sign on Sycamore Street. (Trial Tr. vol.2 p.33 L.2–25, p.175 L.10–18; vol.3 p.72 L.1–23). His vehicle t-boned a minivan, being driven by Danny Lewis, Jr., that was headed northbound on First Street. (Trial Tr. vol.1 p.198 L.16–p.199 L.25) (Ex. O3) (Ex. App. p. 20). L.M., an almost seven-month-old infant and passenger of Lewis's van, died from blunt force injuries to his head consistent with a car

crash. (Trial Tr. vol.1 p.61 L.12–20, p.62 L.5; vol.2 p.152 L.19–24). The jury did not hear evidence of it, but L.M. was not restrained in a child car seat at the time of the crash; an eight-year-old passenger was holding him on her lap. (Mot. Limine Tr. p.3 L.3–15) (Mins. Test. p. 13) (Confidential App. p. 4).

Lewis testified that he was driving his family and L.M., for whom his wife provided childcare, home from his son's soccer practice. (Trial Tr. vol.1 p.61 L.1–6, p.62 L.24–p.63 L.14, p.67 L.4–11; vol.2 p.7 L.18–23). Lewis's van was headed north on First Street, going approximately thirty to thirty-five miles per hour;[1] L.M. was in the middle of the van. (Trial Tr. vol.2 p.8 L.6–15, p.22 L.15–16). Lewis testified as he entered the intersection he saw a pickup truck quickly approaching. (Trial Tr. vol.2 p.9 L.1–20, p.13 L.10–15). He attempted to swerve to try to avoid the truck but was unsuccessful; the truck collided with the van, causing the van to roll over before

[1] The speed limit on First Street was thirty-five miles per hour. (Trial Tr. vol.2 p.179 L.11–13).

landing right side up. (Trial Tr. vol.2 p.9 L.21–10 L.5, p.33 L.2–25). Lewis immediately exited the vehicle and started helping the other occupants, including L.M., out of the van. (Trial Tr. vol.2 p.10 L.6–14).

L.M. was not moving or breathing when he was removed from the van. (Trial Tr. vol.2 p.10 L.15–p.11 L.45, p.36 L.6–15). A nurse that witnessed the crash stopped her car and began to triage the van's occupants. (Trial Tr. vol.2 p.33 L.20–22, p.35 L.11–p.36 L.5). She testified L.M. did not have a pulse; she and another bystander performed CPR on L.M. until the paramedics arrived minutes later. (Trial Tr. vol.1 p.196 L.11–21; vol.2 p.10 L.15–p.11 L.45, p.36 L.6–p.37 L.7). The paramedics then transported the infant to Allen Hospital. (Trial Tr. vol.1 p.196 L.11–23, p.161 L.7–21). After doctors identified that L.M. had a brain injury, they had a helicopter life-flight L.M. to the University of Iowa hospital where he died shortly after arriving. (Trial Tr. vol.1 p.65 L.22–p.66 L.7).

Waterloo Police Officer Enes Mrzljak responded to the scene shortly after the crash. (Trial Tr. vol.1 p.209 L.8–10, p.210 L.8–19). Almost immediately after arriving, he was flagged down by a woman, later identified as Mekaila Shane and Johnson's significant other; she was standing with Johnson. (Trial Tr. vol.1 p.213 L.9–15, p.220 L.3–4, p.222 L.3–9, p.226 L.10–13) (Ex. E 0:00–0:37). Mrzljak spoke with Johnson, who identified himself as the driver of the truck; Mrzljak observed Johnson had a small gash on his forehead that was bleeding. (Trial Tr. vol.1 p.216 L.1–p.217 L.1, p.222 L.15–p.223 L.7) (Ex. E 0:00–0:37). Mrzljak initially did not smell anything when speaking to Johnson, but later smelled alcohol coming from Johnson once he started interacting with Waterloo Police Officer Jessica Brownell. (Trial Tr. vol.1 p.217 L.2–p.218 L.14).

Brownell also responded to the scene; shortly after she arrived, she approached Johnson, who was still speaking with Mrzljak. (Trial Tr. vol.3 p.25 L.3–6) (Ex. F. 0:00–0:13).

Brownell asked Johnson how the accident happened, and Johnson told her that he was not paying attention; however, Johnson denied being on his phone. (Trial Tr. vol.3 p.25 L.7–18) (Ex. F. 0:39–1:15, 1:59–2:15). Law enforcement later examined Johnson's phone and were unable to determine if he was on the phone at the time of the crash. (Trial Tr. vol.2 p.169 L.6–p.170 L.4). However, separate information from Facebook indicated that around the time of the crash Johnson was getting a series of calls through Facebook's Messenger app. (Trial Tr. vol.2 p.170 L.8–p.171 L.17, p.190 L.2–9). Shane called him several times in a very short period of time using the app, but it did not appear that Johnson had answered any of her calls. (Trial Tr. vol.2 p.171 L.8–172 L.12)

Brownell testified that when she was talking with Johnson she smelled an odor consistent with alcohol coming from him. (Trial Tr. vol.3 p.25 L.19–p.26 L.4). Accordingly, Brownell questioned Johnson on whether he had been drinking, which he denied. (Trial Tr. vol.3 p.25 L.19–p.26 L.4)

(Ex. F. 2:05–2:25). Brownell requested Johnson consent to field sobriety testing, and he did. (Trial Tr. vol.1 p.218 L.12–14; vol.3 p.7–8) (Ex. F. 2:30–2:35).

Brownell testified Johnson failed the horizontal-gaze-nystagmus test, one-leg-stand test, and the walk-and-turn test; she believed he was under the influence because of the results of the testing, the odor of alcohol, and he had bloodshot and watery eyes; however, Brownell admitted she had not properly instructed Johnson on one of the tests, he properly followed some of the instructions that others do not, and she did not observe him swaying or having trouble with his balance. (Trial Tr. vol.3 p.26 L.10–p.31 L.11, p.38 L.10–p.48 L.15) (Ex. F. 3:00–7:15). Brownell also testified that while Johnson seemed nervous, he was not fidgety, aggressive, agitated, or paranoid; nor was his speech abnormal. (Trial Tr. vol.3 p.47 L.5–24). Mrzljak described Johnson as calm. (Trial Tr. vol.1 p.223 L.8–10).

After the field sobriety testing, Johnson admitted to Brownell that he had drank alcohol earlier in the day. (Trial Tr. vol.3 p.32 L.22–25) (Ex. F. 7:15–7:30). Brownell then detained Johnson and transported him to the police station for further testing. (Trial Tr. vol.3 p.33 L.2–5). While at the police station, Johnson requested medical attention. (Trial Tr. vol.3 p.33 L.15–17). Paramedics came and took Johnson to Covenant Hospital for treatment. (Trial Tr. vol.3 p.33 L.18–p.34 L.7).

Johnson was getting medical treatment in the emergency room, lying on a hospital bed with a neck brace, when Waterloo Police Officer Michael Rasmussen went to interview him. (Trial Tr. vol.2 p.63 L.11–p.65 L.1, p.72 L.11–12) (Ex. I 0:00–0:10). Rasmussen Mirandized Johnson, and Johnson agreed to an interview. (Trial Tr. vol.2 p.65 L.1–15) (Ex. I 0:35–1:00). Johnson told Rasmussen he had two twelve ounce Bud Light cans at his home earlier between 1:00 and 2:00 p.m. but stated he was not sure on the exact timeframe;

he denied being under the influence of drugs. (Trial Tr. vol.2 p.69 L.3–21) (Ex. I 5:35–6:30, 13:15–15:50). Johnson denied being on his phone at the time of the crash and told the officer he was unsure but thought he had been driving about forty miles per hour; he also told the officer he had not seen a traffic control device. (Trial Tr. vol.2 p.68 L.19–p.70 L.20) (Ex. I 6:30–8:00). Rasmussen did not observe any signs that Johnson was intoxicated. (Trial Tr. vol.2 p.70 L.21–24).

While Johnson was at the hospital, law enforcement obtained a search warrant for a sample of his blood. (Trial Tr. vol.1 p.84 L.6–9; vol.2 p.49 L.2–20, p.62 L.13–19). A lab technician drew Johnson's blood at 8:44 p.m. pursuant to the search warrant. (Trial Tr. vol.1 p.69 L.10–11, p.75 L.9–18). The nurse sealed the box the blood sample went in before Brownell was able to put the paperwork in it. (Trial Tr. vol.1 p.88 L.1–12). Brownell testified because of this she got a new blood kit once she took the sample to the police station, threw away that kit's contents, and put Johnson's sample in the new

kit with his paperwork; she denied tampering with the blood. (Trial Tr. vol.1 p.88 L.1–p.90 L.12, p.91 L.22–p.92 L.13). Brownell placed the sample in the locked refrigerator at the jail; the sample was sent to AXIS Forensic Toxicology in Indianapolis for testing. (Trial Tr. vol.1 p.90 L.21–91 L.12, p.100 L.2–7, p.172 L.2–p.174 L.16, p.181 L.17, p.182 L.16–p.183 L.1).

Employees from AXIS testified they tested the sample; it tested positive for alcohol with an alcohol concentration of 0.069. (Trial Tr. vol.1 p.116 L.4–12, p.121 L.8–12, p.129 L.14–23) (Ex. C1) (Ex. App. p. 4). The sample also tested positive for cocaine. (Trial Tr. vol.1 p.153 L.15–p.154 L.10, p.161 L.7–9) (Ex. C1) (Ex. App. p. 4).

A criminalist in the toxicology section of the Iowa Division of Criminal Investigation Crime Laboratory also testified regarding the sample. (Trial Tr. vol.2 p.97 L.5–13). He conducted a retrograde extrapolation of the alcohol content in Johnson's blood sample and posited that Johnson's blood

alcohol level at the time of the crash was between 0.090 and 0.122; given the level of the sample when it was taken, the criminalist testified that ninety-five percent of the population would be within this range. (Trial Tr. vol.2 p.101 L.9–p.102 L.6). He also testified that alcohol over the concentration of 0.05 starts affecting an individual, including one's balance, coordination, reaction time, and perception. (Trial Tr. vol.2 p.104 L.16–p.105 L.24). In addition, the criminalist testified he believed Johnson had ingested cocaine sometime in the three hours before the crash for it to still be in his bloodstream when the sample was taken. (Trial Tr. vol.2 p.111 L.1–15). He testified he would expect to see increased risk-taking behaviors in driving when an individual has cocaine in his bloodstream; he identified rapid speech, agitation, aggression, paranoia, and motor restlessness as signs of cocaine use. (Trial Tr. vol.2 p.115 L.7–p.116 L.1–8).

During their investigation, law enforcement collected video from a post office that was approximately one and a half

city blocks from the intersection and from Waterloo Water Works Department, which was across the street from the post office and about two to three city blocks from the intersection. (Trial Tr. vol.2 p.87 L.17–23, p.94 L.5–p.95 L.24, p.163 L.7–p.164 L.5). The video showed Johnson was exceeding the speed limit of twenty-five miles per hour. (Trial Tr. vol.2 p.61 L.3–11, p.164 L.15–23).

The State also presented the testimony of State Troopers that were trained in technical accident investigations and collusion reconstruction. (Trial Tr. vol.2 p.195 L.4–15, p.216 L.11–25, p.58 L.7–p.59 L.3). Typically a vehicle using evasive actions would leave a curved tire mark on the roadway or braking marks; however, it is possible for a vehicle to slow down rapidly and not leave tire marks. (Trial Tr. vol.2 p.209 L.11–23; p.213 L.23–p.214 L.25; vol.3 p.73 L.18–p.74 L.14). The troopers did not observe any markings that were consistent with Johnson's truck taking evasive actions in an attempt to avoid the crash. (Trial Tr. vol.2 p.210 L.2–12; vol.3

p.73 L.1–17). However, the tread of the tires can be relevant to whether they leave markings; two of the tires on Johnson's truck were bald and two only had a very minimal tread. (Trial Tr. vol.2 p.219 L.3–p.220 L.20).

At trial, one of the troopers also testified the video evidence showed the truck travelling at approximately fifty-five miles per hour in the blocks just before the intersection. (Trial Tr. vol.3 p.74 L.18–p.78 L.16, p.83 L.17–18). The Water Works video showed Johnson's break lights did illuminate briefly prior to the stop sign, and the trooper testified that while Johnson was speeding, he could have stopped at the stop sign. (Trial Tr. vol.3 p.79 L.8–p.82 L.1).

After law enforcement received the results from the blood sample, they went to Johnson's home to arrest him. (Trial Tr. vol.2 p.173 L.4–7). Johnson told the officers he knew there was alcohol in his system; he also later said he knew there was stuff in his system. (Trial Tr. vol.2 p.174 L.15–p.175 L.9)

(Ex. N. 3:20–3:40). Johnson also told officers that he had ran the stop sign. (Trial Tr. vol.2 p.175 L.10–18).

Outside the presence of the jury, the medical examiner testified that a child or adult in a restraint would not move around in a vehicle if in a collusion. (Trial Tr. vol.2 p.156 L.13–22). He also testified that restraint devices were effective in reducing the opportunity for impact between the wearer's body and the inner surfaces of the vehicle; therefore they reduced the likelihood of injuries, including fatalities. (Trial Tr. vol.2 p.156 L.18–p.157 L.6). One of the State troopers also testified that an individual's chance of survival would increase if restrained and that the middle of the van was the safest spot. (Trial Tr. vol.3 p.109 L.1–p.110 L.11).

Any additional relevant facts will be discussed below.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING THE DEFENDANT'S REQUEST THAT IT INSTRUCT THE JURY ON THE LESSER-INCLUDED OFFENSE OF HOMICIDE BY VEHILCE BY RECKLESS DRIVING.

A. Preservation of Error: Johnson preserved error by requesting the proposed instruction and the district court's denial to give the instruction. (Trial Tr. vol.3 p.143 L.16–p.145 L.10–p.149 L.16). See State v. Jeffries, 430 N.W.2d 728, 737 (Iowa 1988) (citations omitted) ("[T]o preserve error, a defendant must request a lesser-included offense instruction or object to the court's failure to give it.").

B. Scope of Review: Generally, the Court reviews a "district court's refusal to give a requested jury instruction for errors at law; however, if the jury instruction is not required but discretionary, [the Court] review[s] for abuse of discretion." State v. Plain, 898 N.W.2d 801, 811 (Iowa 2017) (citations omitted). Because the requested instruction concerns a material issue and is outcome determinative, it was required; therefore, review is for errors at law. See id. at 811, 816.

C. Discussion: The district court erred in declining Johnson's request to instruct the jury on the offense of homicide by vehicle by reckless driving, a violation of Iowa

Code section 707.6A(2)(a), as a lesser-included of the offense homicide by vehicle by operating while under the influence, a violation of section 707.6A(1). While it is true that the Iowa Supreme Court, in State v. Massick, 511 N.W.2d 384, 387 (Iowa 1994), held that reckless driving is not a lesser-included offense of operating while intoxicated, Johnson respectfully urges that holding is not controlling with regard to the consideration of whether homicide by vehicle by reckless driving is a lesser-included offense of homicide by vehicle by operating while intoxicated. See State v. Ware, No. 13–1072, 2014 WL 3931451, at *4 (Iowa Ct. App. Aug. 13, 2014) (unpublished table decision) (Tabor, J., dissenting). Because it is impossible to commit the offense of homicide by vehicle by operating while under the influence, a violation of section 707.6A(1), without also committing the offense of homicide by vehicle by reckless driving, a violation of Iowa Code section 707.6A(2)(a), the latter is a lesser-included offense of the

former and the district court should have submitted it to the jury in the present case.

The "automatic instruction rule" entitles a defendant to demand submission of offenses that are lesser-included offenses of the crime charged by the State to the jury at trial. State v. Coffin, 504 N.W.2d 893, 896 (Iowa 1993) (citation omitted). "The impossibility test is the paramount consideration in determining the submissibility of lesser included offenses." Id. at 894. The impossibility test examines "whether the greater offense cannot be committed without also committing all elements of the lesser offense." Id.

"The legal or elements test" or "strict statutory-elements approach" is only "an aid in applying the impossibility test and is fully subsumed in it." Id. at 894–95 (citations omitted); State v. Miller, 841 N.W.2d 583, 588 (Iowa 2014) (citations omitted). The question under the elements test is "whether if the elements of the greater offense are established, in the manner in which the State has sought to prove those

elements, then the elements of any lesser offense have also necessarily been established." Coffin, 504 N.W.2d at 895. Upon applying the elements test, "if the lesser offense contains an element not required for the greater offense, the lesser cannot be included in the greater." Id. at 895 (quoting Jeffries, 430 N.W.2d at 740). However, to satisfy the legal elements test, "it is not necessary that the elements of the lesser offense be described in the statutes in the same way as the elements of the greater offense." Id. Rather, if there is no "significant difference" in the terms as used in the context of the pertinent statutory provisions, the legal test is satisfied even if the terms are not strictly synonymous when considered in the abstract. See, e.g., State v. Royer, 436 N.W.2d 637 (Iowa 1989) (concluding there is no significant difference between "causing" a fire within meaning of arson statute, and "use" of fire within meaning of reckless use of fire statute).

"When a case is tried to a jury, the determination of whether a particular lesser crime must be submitted as a

lesser-included offense of the crime charged may logically begin with the court's marshaling instruction on the greater offense." State v. Turecek, 456 N.W.2d 219, 223 (Iowa 1990). In the present case, the charged offense of homicide by vehilce by operating while intoxicated in violation of Iowa Code section 707.6A(1) was marshaled to the jury in Instruction 17, which set forth the following elements:

> 1. On or about the 2nd day of August, 2017, the defendant:
>
> > a. Operated a motor vehicle while under the influence of alcohol or a drug or a combination of such substances, or
> >
> > b. Operated a motor vehicle while having an alcohol concentration of .08 or more, or
> >
> > c. Operated a motor vehicle while any amount of a controlled substance was present, as measured in the defendant's blood.
>
> 2. The defendant's acts set out in Element 1 unintentionally caused the death of [L.M.].

(Instruction 17) (App. p. 22); see also Iowa Code § 707.6A(1) (2017) (making it a class "B" felony when a "person unintentionally causes the death of another by operating while

intoxicated, as prohibited by section 321J.2"). Jury Instruction 17 was modeled after Iowa Criminal Jury Instruction 710.1 "Homicide by Vehicle (Intoxication) – Elements." See Iowa State Bar Ass'n, Iowa Criminal Jury Instruction No. 710.1 (2018).

Iowa Criminal Jury Instruction 710.2 "Homicide By Vehicle (Recklessness) – Elements", if submitted in the present case, would have set forth the following elements:

> 1. On or about the 2nd day of August, 2017, the defendant drove a motor vehicle in a reckless manner.
>
> 2. The defendant's recklessness unintentionally caused the death of L.M.

See Iowa State Bar Ass'n, Iowa Criminal Jury Instruction No. 710.2 (2018); see also Iowa Code § 707.6A(2)(a) (2017) (making it a class "C" felony when a person unintentionally causes the death of another by "[d]riving a motor vehicle in a reckless manner with willful or wanton disregard for the safety of persons or property, in violation of section 321.277").

Johnson argued that homicide by vehicle by reckless driving is a lesser-included offense of homicide by vehicle by operating while intoxicated because it is impossible to commit homicide by vehicle without driving recklessly. (Trial Tr. vol.3 p.144 L.5–18). The State resisted, arguing that State v. Massik, which held reckless driving is not a lesser-included offense of operating while intoxicated controlled the decision. (Trial Tr. vol.3 p.145 L.12–21). The district court agreed with the State and refused to submit the requested instruction, stating that "the current status of the law is such that it is not a lesser included." (Trial Tr. vol.3 p.147 L.2–13).

Johnson adopted and argued Judge Tabor's dissent in State v. Ware, No. 13–1072, 2014 WL 3931451, at *4 (Iowa Ct. App. Aug. 13, 2014) (unpublished table decision) (Tabor, J., dissenting), in which she outlined why the Supreme Court's decision in Massick does not control the decision of whether homicide by vehicle by reckless driving is a lesser-included

offense of homicide by vehicle by operating while intoxicated. (Trial Tr. vol.3 p.144 L.5–18). Judge Tabor explained:

> Massick held reckless driving under Iowa Code section 321.277 is not a lesser included offense of operating while intoxicated (OWI) under section 321J.2 because a defendant cannot be convicted of reckless driving without proof he or she actually drove a vehicle, but a defendant can be convicted of OWI without moving his or her vehicle. The court also concluded OWI lacked an element of recklessness because "some movement must occur before recklessness can be shown." In other words, it is possible to commit OWI without committing reckless driving.
>
> By contrast, it is impossible to commit homicide by vehicle under section 707.6A(1) (unintentionally causing a death by OWI) without also violating section 707.6A(2)(a) (unintentionally causing death by reckless driving). A person cannot unintentionally cause the death of another by operating a motor vehicle while intoxicated without moving the vehicle.

Ware, 2014 WL 3931451, at *4 (internal citations omitted).

Furthermore, it is clear that in the context of section 707.6A(1), the Iowa Supreme Court considers "operating to be synonymous with driving". Id. In State v. Adams, the Supreme Court concluded:

> [I]t is the State's burden under section 707.6A(1) to prove a causal connection between the *defendant's intoxicated*

> *driving* and the victim's death. Although the statute does not impose a burden on the State to prove a specific causal connection between the defendant's intoxication and the victim's death, it does require proof of a factual causal connection between a specific criminal act—"*intoxicated driving*"—and the victim's death. Put another way, the statute demands more than mere proof that *the defendant's driving* caused the death of another person. A defendant may be found guilty of homicide by vehicle only if the jury finds beyond a reasonable doubt that *his criminal act of driving* under the influence . . . caused the victim's death.

State v. Adams, 810 N.W.2d 365, 371 (Iowa 2012) (emphasis added). Because it is clear that driving, and therefore movement of the vehicle, is necessary for the offense of homicide by vehicle by operating while intoxicated, the holding of State v. Massick does not apply to the offense at hand.

Thus, the question becomes whether an individual can commit the crime of homicide by vehicle by operating while intoxicated without also fulfilling the element of recklessness. Iowa courts have continually held that driving while intoxicated *is* driving in a reckless manner with willful and wonton disregard for the safety of persons or property. Massick, 511 N.W.2d at 387–88 ("[D]riving under the influence

is certainly reckless behavior . . . ."); State v. Wullner, 401 N.W.2d 214 (Iowa Ct. App. 1986) (concluding the State did not have to establish "recklessness independent of the drunk driving" in a prosecution for involuntary manslaughter); State v. McQuillen, 420 N.W.2d 488, 489 (Iowa Ct. App. 1988) (citation omitted) ("Because drunk driving is itself a reckless act, it would be 'patently absurd and generally redundant' to require the State to prove recklessness . . . ."); State v. Rohm, 609 N.W.2d 504, 513 (Iowa 2000) ("The very nature of some activities are considered reckless due to the known, dangerous risks involved."). Thus, under Iowa law, driving while intoxicated "is a per se act of recklessness." Ware, 2014 WL 3931451, at *4; see also Rohm, 609 N.W.2d at 513 ("Thus, when the activity or conduct itself constitutes recklessness, the necessity of proof of recklessness is eliminated.").

As such, one cannot commit the offense of homicide by vehicle by operating while intoxicated without also driving with willful or wanton disregard for the safety of persons or

property—reckless driving. The *only* difference between the two crimes is that homicide by vehicle by operating while intoxicated requires an additional element—that the driver was under the influence of drugs or alcohol or some combination, had a blood alcohol content of 0.08 or greater, or had a controlled substance present in his person. Compare Iowa Code 707.6A(1), with Iowa Code 707.6A(2)(a). Therefore, the district court erred in not granting Johnson's request that the jury be instructed on homicide by vehicle by reckless driving as a lesser-included offense to homicide by vehicle by operating while intoxicated.

It is reversible error when the district court fails to instruct on a lesser-included offense when such an instruction is requested, unless the error is harmless. Royer, 436 N.W.2d at 642. However, the Iowa Supreme Court has found that the when the lesser-included offense is a primary part of the defendant's defense, the harmless error analysis does not apply, the defendant was prejudiced, and reversal is required.

See Miller, 841 N.W.2d at 596 (citation omitted) (reversing when the jury was not instructed on absence from custody as a lesser-included offense of escape); State v. Mikesell, 479 N.W.2d 591, 592 (Iowa 1991) (per curiam) (reversing and remanding for a new trial when the defendant was convicted of willful injury after the trial court did not instruct on assault without intent to inflict a serious injury despite the defendant's admitted he committed an assault and that a serious injury resulted, but argued he lacked the intent to inflict the serious injury).

A primary theory of Johnson's defense was that his reckless driving, not any intoxication, caused the accident. See, e.g., (Trial Tr. vol.1 p.59 L.12–16) ("[T]he evidence is not proof beyond a reasonable doubt that any kind of impairment is what caused the accident . . . ."); (Trial Tr. vol.3 p.211 L.17–p.220 L.12) (highlighting in closing the evidence that suggested Johnson was not impaired in the moments after the accident); (Trial Tr. vol.3 p.221 L.2–p.226 L.13) (noting the

traffic patterns of the streets were changed, the intersection was blind, there was not usually a stop sign on Sycamore, there was not a posted speed limit sign, but Johnson was speeding). In addition, the district court's refusal to properly instruct the jury regarding the lesser-included offense likely altered defense counsel's closing arguments.

The district court's refusal to give the reckless driving alternative instruction as a lesser-included offense to vehicular homicide by operating while intoxicated denied Johnson the opportunity to instruct the jury on his theory of defense and to possibly be found guilty of homicide by vehicle by reckless driving instead of homicide by vehicle by operating while intoxicated. Therefore, Johnson was prejudiced. See Miller, 841 N.W.2d 596 (citation omitted). Because the district court erred by failing to give the requested jury instruction, Johnson's conviction must be vacated and his case remanded for a new trial. See id.

II. THE DISTRICT COURT ERRED IN GRANTING THE STATE'S MOTION IN LIMINE AND PROHIBITING THE DEFENDANT FROM PRESENTING EVIDENCE THAT L.M. WAS NOT IN A CAR SEAT AT THE TIME OF THE CRASH AND WOULD HAVE SURVIVED THE CRASH IF PROPERLY RESTRAINED.

A. Preservation of Error: The State filed a motion in limine asking the court prohibit Johnson from entering evidence that L.M. was not secured in a child restraint system at the time of the crash and that L.M. would have survived the crash if restrained. (Mot. Limine) (App. p. 9). Johnson filed a written resistance and resisted at the hearing. (Mot. Limine Tr. p.13 L.22–p.17 L.23); (Resistance) (App. pp. 11–12). The district court made a final ruling granting the motion. (Ruling) (App. pp. 13–16). As such, Johnson preserved error. See State v. Garrett, 183 N.W.2d 652, 653 (Iowa 1971) (citation omitted); see also Iowa R. Evid. 5.103(a)(2) (2017) (stating error is preserved if the court excludes evidence when the substance is apparent). In addition, Johnson made offers of proof related to the prohibited evidence. (Trial Tr. vol.2 p.155 L.1–p.157 L.11; vol.3 p.108 L.15–p.110 L.24). See State v. Hubka, 480

N.W.2d 867, 869 (Iowa 1992) (noting the offer of proof preserved error).

To the extent this Court concludes error was not properly preserved for any reason, Johnson respectfully requests that this issue be considered under the Court's familiar ineffective-assistance-of-counsel framework.[2] See State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983). The traditional rules of preservation of error do not apply to claims of ineffective assistance of counsel. State v. Ondayog, 722 N.W.2d 778, 784 (Iowa 2006) (citation omitted).

B. Standard of Review: The Court reviews "the district court's determination of relevancy and admission of relevant

[2] Johnson acknowledges that the legislature recently amended Iowa Code section 814.7 to require ineffective-assistance-of-counsel claims to be brought in postconviction relief proceedings rather than by direct appeal. Compare Iowa Code § 814.7 (2019), with Iowa Code § 814.7 (2017). However, the amended statute has no application in this appeal because Johnson is appealing from a final judgment and sentence that was entered on May 13, 2019, before the effective date of the statute. (Sentencing Order) (App. pp. 30–34); see State v. Macke, 933 N.W.2d 226 (Iowa 2019).

evidence for an abuse of discretion." Mohammed v. Otoadese, 738 N.W.2d 628, 631 (Iowa 2007).

However, as far as those claims involve violations of constitutional rights, such as ineffective assistance of counsel or the rights to a fair trial and to present a defense, review is de novo. State v. Cashen, 789 N.W.2d 400, 405 (Iowa 2010).

C. Discussion: The Sixth and Fourteenth Amendments to the U.S. Constitution and Article I, section 10 of the Iowa Constitution provide the defendant with a right to a fair trial and a right to present a defense. U.S. Const. amends. VI, XIV; Iowa Const. art. I, § 10; see also State v. Clark, 814 N.W.2d 551, 560 (Iowa 2012); State v. Simpson, 587 N.W.2d 770, 771 (Iowa 1998). "'[A] criminal defendant has a due process right to present evidence to a jury that might influence the jury's determination of guilt.'" State v. Thompson, 836 N.W.2d 470, 480 (Iowa 2013) (quoting Cashen, 789 N.W.2d at 407). The Iowa Supreme Court has explained:

> The right to offer the testimony of witnesses . . . 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 prosecution's to the jury so it may decide where the truth lies.

Simpson, 587 N.W.2d 770, 771 (Iowa 1998) (quoting Washington v. Texas, 388 U.S. 14, 19 (1967)). The Court has emphasized the importance of due process, finding that "[t]he right to present a defense is essential to a fair trial." Id.

The district court's ruling improperly interfered with Johnson's defense, preventing him from the fair chance of presenting his defense and violating his constitutional rights to do so. In the motion hearing, defense counsel stated that he believed the prohibited evidence implicated whether Johnson caused L.M.'s death. (Mot. Limine Tr. p.15 L.1–p.17 L.24). Counsel noted that the Iowa Supreme Court's ruling in State v. Adams concluded the State must prove the defendant's intoxicated driving caused not just the crash but the victim's death. (Mot. Limine Tr. p.15 L.1–p.17 L.8). Counsel argued the restricting the defense from presenting the

challenged evidence "really doesn't allow for us to mount a defense . . . ." (Mot. Limine Tr. p.1–4).

In State v. Adams, the Iowa Supreme Court concluded that it was "the State's burden under under section 707.6A(1) to prove a causal connection between the defendant's intoxicated driving *and the victim's death*." State v. Adams, 810 N.W.2d 365, 371 (Iowa 2012) (emphasis added). The Court found "[a] defendant may be found guilty of homicide by vehicle only if the jury finds beyond a reasonable doubt that his criminal act of driving under the influence of alcohol *caused the victim's death*." Id. Because the State must prove Johnson caused L.M.'s death, as stated in Adams, the district court erred in finding evidence that L.M. was unsecured in the vehicle and could have survived if restrained was not relevant and that even if minimally relevant would be substantially outweighed by the danger of unfair prejudice and confusion of the issues. (Ruling) (App. p. 15).

Johnson acknowledges that State v. Hubka, 480 N.W.2d 867 (Iowa 1992), found that evidence that the victims were not wearing seatbelts was not relevant. However, the Court found that the defendant was not prejudiced because the jury actually heard evidence that the children were not properly restrained. See id. at 869. This Court should overrule Hubka to the extent it finds that the evidence of the use of the child restraint system and whether the victims would have survived if restrained was not admissible. See id. at 869–870. It should instead follow the lead of Michigan's courts, which have found that victim's use of a seat restraint is relevant and the jury should consider that evidence when determining whether the defendant caused the victim's death. People v. Moore, 631 N.W.2d 779, 781–84 (Mich. Ct. App. 2001). That Court noted that "the case is not about whether the decedent's failure to use the seat belt caused the accident, but is about whether the decedent's alleged negligence caused the decedent's death." Id. at 783. The Court found:

> [A]though a victim's contributory negligence is a factor to consider in determining whether the defendant's negligence caused the victim's death, it is not a defense. Further, the negligent act of a third party is not a defense, but is only one factor to be considered in ascertaining whether the defendant's negligence caused the victim's death. . . . [T]he evidence of the decedent's failure to wear his seat belt is directly relevant to whether the defendant's conduct . . . was a substantial cause of the . . . death.

Id. (citations and internal quotation marks omitted). It noted that the defendant had secured experts to opine that the decedent would not have died if he was wearing a restraint and testify that the "decedent's loss of control of his vehicle after it struck the defendant's truck was caused by the failure to wear a seat belt." Id. Other courts have also found that a decedent's negligence is not a complete defense but should be considered by the jury in order to determine whether the defendant's conduct is a proximate cause of death. See, e.g., State v. Farner, 66 S.W.3d 188, 201 (Tenn. 2001).

This Court should also find that, while the fact that L.M. was not in a child restraint system at the time of the crash is not a defense to the offense at hand, it is a factor in

determining whether Johnson caused L.M.'s death. See Moore, 631 N.W.2d at 781–84 (citation omitted); State v. Dock, 167 So.3d 1097, 1100 (La. Ct. App. 2015) (noting the jury heard testimony that a two-year old victim was not in a child restraint at the time of the crash). Whether L.M. would have survived if in a car seat is directly relevant to whether Johnson's conduct was a substantial cause of his death. Id.; see also Bowman v. State, 618 So.2d 763, 764 (Fla. Dist. Ct. App. 1993) (Anstead, J., dissenting) ("I would also hold that the trial court erred in excluding evidence that the death of the minor victim may have been caused by the failure to secure him in a child restraint seat. A jury charged with determining the criminal responsibility for a death should not be deprived as to the cause of death. This is especially important where there is a substantial dispute as to appellant's role in causing the death of the victim."); see also Iowa R. Evid. 5.402 (2017) (defining evidence as relevant if it has "any tendency to make a fact more or less probable than it would be without the

evidence" and "the fact is of consequence in determining the action").

This Court should find the district court abused its in excluding the evidence because the evidence is relevant and because it should be considered by the jury in determining causation; because it should be a pertinent factor for the jury, the probative value is not substantially outweighed by any unfair prejudice or confusion. See Moore, 631 N.W.2d at 784 ("Consequently, the trial court abused its discretion in granting the prosecutor's motion in limine to exclude evidence that the decedent was not wearing his seat belt at the time of the accident."); see also Iowa R. Evid. 5.403 (2017) (allowing the district court to "exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury . . . ."). Thus, because the district court exercised its discretion "on grounds or for reasons clearly untenable" and "clearly unreasonable," it abused its discretion in limiting the defense.

See State v. Rodriguez, 636 N.W.2d 234, 239 (Iowa 2001) (citation and internal quotation marks omitted). Moreover, because the district court improperly prohibited him from presenting this evidence for the jury's consideration, Johnson is entitled to retrial of the offenses because his rights to a fair trial and to present a defense were violated. See State v. Begey, 672 N.W.2d 747, 751–53 (Iowa 2003) (reversing and remanding for retrial when the trial court excluded testimony regarding the defendant's justification defense). Cf. State v. Frazier, 559 N.W.2d 34, 38–39 (Iowa Ct. App. 1996) (finding due process was satisfied when the defendant was allowed to present witnesses to support his theory of the case).

Johnson asserts the previous arguments are preserved. See Lamasters v. State, 821 N.W.2d 856, 864 (Iowa 2012) (citations omitted) ("If the court's ruling indicates the court *considered* the issue and necessarily ruled on it, even if the court's reasoning is 'incomplete or sparse,' the issue has been preserved."); see also State v. Paredes, 775 N.W.2d 554, 561

(Iowa 2009) (citing State v. Williams, 695 N.W.2d 23, 27–28 (Iowa 2005)) ("We have previously held that where a question is obvious and ruled upon by the district court, the issue is adequately preserved."). However, to the extent the Court concludes error was not preserved for any reason, counsel was ineffective.

"The right to assistance of counsel under the Sixth Amendment to the United States Constitution and article I, section 10 of the Iowa Constitution is the right to 'effective' assistance of counsel." State v. Ambrose, 861 N.W.2d 550, 556 (Iowa 2015) (citations omitted); see also U.S. Const. amends. VI, XIV; Iowa Const. art. I, § 10. To prevail on an ineffective-assistance-of-counsel claim, a defendant must establish (1) counsel failed to perform an essential duty and (2) the defense was prejudiced as a result. State v. Brothern, 832 N.W.2d 187, 192 (Iowa 2013) (quoting Lamasters, 821 N.W.2d at 866). Johnson hereby incorporates by reference the argument outlined above. Defense counsel clearly attempted

to make these arguments; as they are legally meritorious, counsel breached an essential duty by failing to adequately preserve error. (Mot. Limine Tr. p.13 L.22–p.17 L.23). See State v. Clay, 824 N.W.2d 488, 496 (Iowa 2012) (stating counsel has a duty to know the law). Cf. State v. Greene, 592 N.W.2d 24, 29 (Iowa 1999) (stating counsel is not incompetent for failing to pursue a meritless issue.).

If error was not preserved, Johnson was prejudiced by counsel's breach. As argued above, the evidence that L.M. was not in a child restraint system at the time of the crash and evidence that he would have survived the crash if restrained was the primary defense that Johnson could have presented to the jury; the jury should have been able to consider such evidence in determining whether Johnson was guilty of homicide by vehicle. See State v. Leckington, 713 N.W.2d 208, 218 (Iowa 2006) (citing Strickland v. Washington, 466 U.S. 668, 694 (1984)) (finding prejudice if "'there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'").

III. THE DISTRICT COURT IMPOSED AN ILLEGAL SENTENCE WHEN IT ORDERED THE DEFENDANT TO PAY THE DRUG ABUSE RESISTANCE EDUCATION SURCHARGE.

A. Preservation of Error: An illegal sentence is not subject to the usual requirements of error preservation. State v. Dann, 591 N.W.2d 635, 637 (Iowa 1999) (citation omitted).

B. Scope of Review: The Court typically reviews challenges to the legality of a sentence for errors at law. State v. Sisk, 577 N.W.2d 414, 416 (Iowa 1998). To the extent the issue involves statutory construction, review is also for correction of errors at law. American Asbestos v. Eastern Iowa Comm. College, 463 N.W.2d 56, 58 (Iowa 1990).

C. Discussion: When the district court sentenced Johnson, it imposed a $10 drug abuse resistance education (DARE) surcharge. (Sentencing Tr. p.20 L.9) (Sentencing Order ¶ 8) (App. p. 31). The imposition of this surcharge is illegal because it is not authorized by law.

Under Iowa Rule of Criminal Procedure 2.24(5)(a), the Court may correct an illegal sentence at any time. Iowa R. Crim. P. 2.24(5)(a) (2017). Under the Rule, an illegal sentence is one that is "not authorized by statute." Tindell v. State, 629 N.W.2d 357, 359 (Iowa 2001). "In other words, the sentence is illegal because it is beyond the power of the court to impose." Id. (citation omitted). The Iowa Supreme Court has stated that the "legislature possesses the inherent power to prescribe punishment for crime, and the sentencing authority of the courts is subject to that power. A sentence not permitted by statute is void." State v. Ohnmacht, 342 N.W.2d 838, 842 (Iowa 1983) (citations omitted).

Iowa Code section 911.2 provides the authority for when the district court shall impose the DARE surcharge. Iowa Code § 911.2 (2017). It states "the court or clerk of the district court shall assess a drug abuse resistance education surcharge of ten dollars if a violation arises out of a violation of an offense provided for in chapter 321J or chapter 124,

subchapter IV." Id. § 911.2(1). The provision does not refer to a violation of Chapter 707, under which the offense of homicide by vehicle by operating while intoxicated appears. Because the Iowa Code does not authorize the district court to impose the DARE surcharges for violations of Iowa Code Chapter 707, the district court's imposition of the surcharges in this case is illegal. This Court must vacate the surcharge and remand for the entry of a corrected sentence.

CONCLUSION

For the reasons stated above, Defendant–Appellant Derrick Earl Johnson respectfully requests the Court reverse and remand for a new trial. In the alternative, he asks the Court vacate the portion of the sentence that imposes the DARE surcharge and remand to the district court for entry of a corrected sentence.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $3.36, and that amount has been paid in full by the Office of the Appellate Defender.

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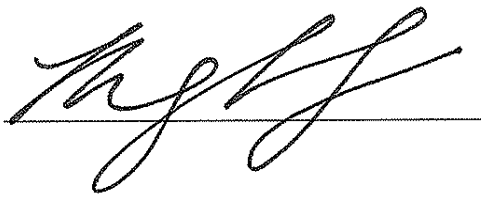

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