

IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 19-0551

Black Hawk County No. AGCR 225149, FECR 225935, FECR 227264

STATE OF IOWA
Plaintiff-Appellee

vs.

CHRISTOPHER LEE ROBY, JR
Defendant-Appellant

APPEAL FROM THE DISTRICT COURT
IN AND FOR BLACK HAWK COUNTY
Honorable ALAN HEAVENS, District Court Judge
Honorable KELLYANN M LEKAR, Chief District Court Judge
First Judicial District

APPELLANT'S FINAL BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.	4
I. <u>STATEMENT OF THE ISSUES PRESENTED FOR REVIEW.</u>	7
II. <u>ROUTING STATEMENT.</u>	10
III. <u>STATEMENT OF THE CASE.</u>	11
IV. <u>STATEMENT OF THE FACTS.</u>	16
V. <u>ARGUMENT.</u>	19
A. THE ELUDING WARRANT AND SUBSEQUENT CHARGE CONSTITUTE UNCONSTITUTIONAL DOUBLE JEOPARDY RENDERING EVERYTHING THAT FLOW FROM THEM UNCONSTITUTIONAL.	22
B. THE ARREST OF CHRISTOPHER ROBY ON MAY 31, 2018 WAS BASED ON AN UNCONSTITUTIONAL WARRANT, RENDERING ANY SEARCH WARRANT OR CHARGE SUBSEQUENT TO THAT ARREST INVALID.	25
C. A FACTUAL BASIS DOES NOT EXIST FOR CHRISTOPHER ROBY TO PLEAD TO POSSESSION WITH INTENT TO DELIVER.	28
D. NONE OF CHRISTOPHER ROBY’S PLEAS WERE KNOWING OR VOLUNTARY.	33
1. <u>The plea to the eluding charge was facially and factually inaccurate.</u>	35
2. <u>Christopher Roby was not provided with adequate information regarding the sentencing consequences of pleading to a sexual offense.</u>	37
3. <u>Christopher Roby was not provided with adequate information regarding potential ramifications of his guilty pleas to his pending federal indictment.</u>	40
D. WHETHER DEFENSE COUNSEL PERFORMANCE WAS SO DEFICIENT AS TO CAUSE STRUCTURAL ERROR.	41
E. EVEN IF DEFENSE COUNSEL PERFORMANCE WAS NOT SO DEFICIENT AS TO CAUSE STRUCTURAL ERROR, IT WAS SO DEFICIENT TO CONSIST OF INEFFECTIVE ASSISTANCE OF COUNSEL.	43

VI. CONCLUSION. 46

VII. REQUEST FOR ORAL ARGUMENT.. . . . 46

CERTIFICATE OF COMPLIANCE.. . . . 46

ATTORNEY'S CERTIFICATION REGARDING UNPUBLISHED OPINION. . . . 47

CERTIFICATE OF COST.. . . . 47

PROOF OF SERVICE AND CERTIFICATE OF FILING. 47

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Constitutional Authority</u>	
Fourth Amendment of the US Constitution	7, 8, 11, 19, 21, 26, 27, 29
Fifth Amendment of the US Constitution	7, 8, 9, 10, 11, 19, 20, 21, 23, 25, 26, 28, 29, 34, 35, 37, 40, 42, 44
Sixth Amendment of the US Constitution	7, 8, 9, 10, 11, 20, 21, 22, 23, 25, 26, 29, 34, 35, 37, 40, 42, 44
Eighth Amendment of the US Constitution.. . . .	7, 11, 19, 23, 28
Fourteenth Amendment of the US Constitution	7, 8, 9, 10, 11, 19, 20, 21, 23, 25, 26, 28, 29, 31, 34, 35, 37, 40, 42, 44
Article I, Section 8 of the Iowa Constitution	7, 8, 11, 19, 21, 27, 29, 31
Article I, Section 9 of the Iowa Constitution	7, 8, 9, 10, 11, 20, 21, 23, 25, 26, 29, 34, 35, 37, 40, 42, 44
Article I, section 10 of the Iowa Constitution	7, 8, 9, 10, 11, 20, 21, 23, 25, 26, 29, 34, 35, 37, 40, 42, 44
Article I, section 12 of the Iowa Constitution	7, 11, 19, 20, 21, 23, 25, 26
Article I, section 17 of the Iowa Constitution. . . .	7, 11, 19, 28
<u>Cases</u>	
<u>Arizona v Fulminante</u> , 499 US 279, 310 (1991).	10, 42
<u>Everett v State</u> , 789 NW2d 151 (Iowa 2010)	7, 8, 9, 10, 22, 24, 27, 30, 34, 35, 36, 37, 40, 42, 44
<u>Lado v State</u> , 804 NW2d 248 (Iowa 2011).	10, 42, 43, 45
<u>Nguyen v. State</u> , 707 NW2d 317 (Iowa 2005)..	10, 45
<u>State v Atkinson</u> , 620 NW2d 1(Iowa 2000)..	8, 32
<u>State v Bash</u> , 670 NW2d 135(Iowa 2003)..	8, 32
<u>State v Brooks</u> , 555 NW2d 446 (Iowa 1996).	8, 33

<u>State v Doggett</u> , 687 NW2d 97 (Iowa 2004)	8,33
<u>State v Feregrino</u> , 756 NW2d 700 (Iowa 2008)	10,42
<u>State v Fox</u> , 858 NW2d 36 (Table) 2014 WL 5243365 (Iowa Ct App 2014)	7,25
<u>State v Gines</u> , 844 NW2d 437 (Iowa 2014)	7,8,10,22,23,26,29,34,44
<u>State v Henderson</u> , 696 NW2d 5 (Iowa 2005)	8,9,32,36
<u>State v Jorgensen</u> , 758 NW2d 830 (Iowa 2008)	8,9,32,36
<u>State v Kress</u> , 636 NW2d 12 (Iowa 2001)	10,43
<u>State v McDowell</u> , 622 NW2d 305 (Iowa 2001)	8,32
<u>State v Meyer</u> , 705 NW2d 676 (Iowa Ct. App. 2005)	7,8,9,10,22,24,27,30,34,35,37,40,42,44
<u>State v Powell</u> , 684 NW2d 235 (Iowa 2004)	7,8,9,10,21,22,24,27,30,34,35,37,40,42,44
<u>State v Reeves</u> , 209 NW2d 18 (Iowa 1973)	8,31
<u>State v Trainer</u> , 762 NW2d 155 (Iowa 2008)	7,25
<u>State v Webb</u> , 648 NW2d 72 (Iowa 2002)	8,9,32,36
<u>Strickland v Washington</u> , 466 US 668 (1984)	7,8,10,22,23,26,29,34,44,45
<u>United States v Chronic</u> , 466 US 648 (1984)	10,42
<u>US v Funchess</u> , 422 F3d 698 (8 th Cir 2005)	9,41
<u>US v Golden</u> , 669 F3d 901 (8 th Cir 2012)	9,41
<u>US v Young</u> , 960 F Supp 881 (ND Iowa 2013)	9,41
<u>Statutes</u>	
21 USC §851	9
Iowa Code §124.401(1)	8,30

Iowa Code §124.401(1)(d)	14,18
Iowa Code §321.277.	7,25
Iowa Code §321.279.	7,25
Iowa Code §321.279(2)	12,17
Iowa Code §321.285.	7,25
Iowa Code §709.	39
Iowa Code §709.4(b)(2)	15,18,38
Iowa Code §813.2.	9,38
Iowa Code §816.	11,19
Iowa Code §816.1.	7,19,23,25,26
Iowa Code §903B.	20,39
Iowa Code §903B.1.	9,20,38,39

Court Rules

Iowa R. App. P. 6.903(1)(e)	46
Iowa R. App. P. 6.903(1)(g)(2)	46,47
Iowa R. App. P. 6.904(2)	47
Iowa R. App. P. 6.1101(2)	10
Iowa R. Crim P. 2.8(2)(b)	10,37,43
Iowa R. Crim P. 2.8(2)(b)(2)	9,38,39

Other Authorities

B. John Burns, <i>Iowa Practice: Criminal Procedure</i> (2019)	7,27
Blacks Law Dictionary (West 5 th ed)	7
Uniform Bond Schedule	8,12,28
USSG §4A1.2	9

I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- A. WHETHER THE ELUDING WARRANT AND SUBSEQUENT CHARGE CONSTITUTE UNCONSTITUTIONAL DOUBLE JEOPARDY RENDERING EVERYTHING THAT FLOW FROM THEM UNCONSTITUTIONAL

Fifth Amendment to the US Constitution
Sixth Amendment to the US Constitution
Fourteenth Amendment to the US Constitution
Article I, Section 9 of the Iowa Constitution
Article I, Section 10 of the Iowa Constitution
Article 1, Section 12 of the Iowa Constitution
Everett v State, 789 NW2d 151, 155 (Iowa 2010)
State v Fox, 858 NW2d 36 (Table) 2014 WL 5243365 (Iowa Ct App 2014)
State v Gines, 844 NW2d 437 (Iowa 2014)
State v Meyer, 705 NW2d 676 (Iowa Ct. App. 2005)
State v Powell, 684 NW2d 235 (Iowa 2004)
State v Trainer, 762 NW2d 155 (Iowa 2008)
Strickland v Washington, 466 US 668 (1984)
Iowa Code §321.277
Iowa Code §321.279
Iowa Code §321.285
Iowa Code §816.1

- B. WHETHER THE ARREST OF CHRISTOPHER ROBY ON MAY 31, 2018 WAS BASED ON AN UNCONSTITUTIONAL WARRANT, RENDERING ANY SEARCH WARRANT OR CHARGE SUBSEQUENT TO THAT ARREST INVALID

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Uniform Bond Schedule

C. WHETHER A FACTUAL BASIS DOES NOT EXIST FOR CHRISTOPHER ROBY TO PLEAD TO POSSESSION WITH INTENT TO DELIVER

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State v Powell, 684 NW2d 235 (Iowa 2004)
State v Reeves, 209 NW2d 18 (Iowa 1973)
State v Webb, 648 NW2d 72 (Iowa 2002)
Strickland v Washington, 466 US 668 (1984)
Iowa Code §124.401(1)

D. WHETHER NONE OF CHRISTOPHER ROBY'S PLEAS WERE KNOWING OR VOLUNTARY

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Sixth Amendment to the US Constitution
Fourteenth Amendment to the US Constitution
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1. Whether the plea to the eluding charge was facially and factually inaccurate

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State v Jorgensen, 758 NW2d 830 (Iowa 2008)
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2. Whether Christopher Roby was not provided with adequate information regarding the sentencing consequences of pleading to a sexual offense

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State v Meyer, 705 NW2d 676 (Iowa Ct. App. 2005)
State v Powell, 684 NW2d 235 (Iowa 2004)
Iowa Code §813.2
Iowa Code §903B.1
Iowa R Crim P 2.8(2)(b)(2)

3. Whether Christopher Roby was not provided with adequate information regarding potential ramifications of his guilty pleas to his pending federal indictment

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State v Meyer, 705 NW2d 676 (Iowa Ct. App. 2005)
State v Powell, 684 NW2d 235 (Iowa 2004)
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State v Meyer, 705 NW2d 676 (Iowa Ct. App. 2005)
State v Powell, 684 NW2d 235 (Iowa 2004)
United States v Chronic, 466 US 648 (1984)
Iowa R. Crim P. 2.8(2)(b)

E. WHETHER EVEN IF DEFENSE COUNSEL PERFORMANCE WAS NOT SO DEFICIENT AS TO CAUSE STRUCTURAL ERROR, IT WAS SO DEFICIENT TO CONSIST OF INEFFECTIVE ASSISTANCE OF COUNSEL

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Lado v State, 804 NW2d 248 (Iowa 2011)
Nguyen v. State, 707 NW2d 317 (Iowa 2005)
State v Gines, 844 NW2d 437 (Iowa 2014)
State v Meyer, 705 NW2d 676 (Iowa Ct. App. 2005)
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II. ROUTING STATEMENT

Appellant believes that, in accordance with Iowa R. App. P. 6.1101(2), this case should be retained by the supreme court. This case presents constitutional and statutory issues which appear to be of first impression, presents fundamental issues of broad public importance requiring ultimate determination by the

supreme court, and presents substantial questions of enunciating legal principles.

III. STATEMENT OF THE CASE

This is an appeal of the sentences issued against Christopher Roby, on March 28, 2019. (App. 55-58, 119-122, 181-184, 186-212). A *pro se* notice to rescind plea was filed on April 2, 2019. (App. 185). Notice of Appeal was timely filed on April 4, 2019. (App. 13-14, 67-68, 131-132).

This case involves the failure to provide redress to Christopher Roby contrary to his rights under the Fourth, Fifth, Sixth and Eighth Amendments, and the Due Process Clause of the Fourteenth Amendment of the United States Constitution, Article I, Sections 8, 9, 10, 12 and 17 of the Iowa Constitution, applicable case law and statutory provisions, especially including the double jeopardy provisions of Iowa Code Chapter 816.

On October 23, 2017, Christopher Roby was stopped, arrested and ultimately released from custody. He was charged with eluding, interference with official acts, no driver's license, reckless driving and speeding. (App. 28-33). In November 2017, he pled to the charges of no driver's license (State v Roby, Black Hawk County No. STA 0163248), speeding (State v Roby, Black Hawk County No. STA 0163250), and reckless driving (State v Roby, Black Hawk County No. NTA 0163249). The remaining charges were

apparently not pursued.

Over six months later, based on the same speeding event/ticket, to which he had already been convicted, a Trial Information was filed on June 5, 2018, (App. 34-35), charging Christopher Roby with eluding-speed over 25 over limit, in violation of Iowa Code §321.279(2), an aggravated misdemeanor. That case is entitled State v Christopher Roby, Black Hawk County AGCR 225149. A criminal complaint, consisting of the October 2017 police report, had been filed on May 23, 2018 (App. 16-18). Pursuant to that complaint, an arrest warrant was issued for Christopher Roby. (App. 16-18).

Minutes of testimony were also filed on June 5, 2018, containing the old police reports. (App. 26-37). A discovery request was filed on June 6, 2018 (App. 38-39), and a discovery order was filed the same day. (App. 40-41). It does not appear from the court file that any discovery was actually conducted.

The charge is an aggravated misdemeanor, for which the uniform bond schedule sets bail at \$2,000. (App.42). In this case, for some unknown reason, bail was set in the amount of \$50,000, cash only, which is twenty-five (25) times the scheduled amount. (App. 16-18). Only after Mr Roby filed a *pro se* motion for a bond reduction (App. 43), was a five-minute hearing set, (App. 44-46), and the bond was reduced to \$5,000, cash or surety, still 2 ½ times the scheduled amount. (App. 47-48).

Waiver of speedy trial was filed July 27, 2018. (App. 49). A written guilty plea was ultimately signed on March 28, 2019 and filed the next day. (App. 50-54). It recites a completely incorrect offense date. (App. 50). It pleads to the full charge, and agrees to two years in prison, to run concurrent with sentences in two felony cases, FECR 227264 and FECR 225935. (App. 51).

Because of the questionable eluding warrant, surveillance was conducted on the apartment of Christopher Roby's alleged girlfriend. (App. 71,88,95,97). On May 31, 2018, Mr Roby was apprehended. (App. 88,95,97).

A search warrant was requested the day Mr Roby was arrested, based on officer's assertion that "a fresh green odor of marijuana" could be smelled on Roby's person. (App. 71). Despite the fact that Mr Roby was pulled out of his friend's vehicle, the search warrant was requested, and granted, for his friend's vehicle, the vehicle's garage and his friend's apartment. (App. 69-73). Substances were seized, which weighed less than 33 grams combined. (App. 102). Local law enforcement identified the substances as marijuana. (App. 97, 102). There is no clear documentation that any of the substances seized actually tested positive for marijuana. Despite the lack of evidence of an actual illegal drug, as well as the minimal amount of substance, and despite the fact that all of the substances

seized were found in his friend's apartment, a criminal complaint was filed on July 11, 2018, naming Christopher Roby as the offender for a controlled substance violation. (App. 78-79).

On August 16, 2018, a trial information was filed (App.83-84), charging Christopher Roby with possession of a controlled substance with intent to deliver, to-wit: marijuana, in violation of Iowa Code §124.401(1)(d), a "D" felony. That case is entitled State v Christopher Roby, Black Hawk County FECR 225935. Minutes of testimony were also filed on August 16, 2018 (App. 85-109). Within those minutes are multiple police incident reports, including one which only indicates a charge of possession of marijuana. (App. 90). A discovery request was filed August 22, (App. 110-111), and a discovery order was filed the same day. (App. 112-113). It does not appear from the court file that any discovery was actually conducted. Waiver of speedy trial was filed October 22, 2018. (App. 114). Additional minutes were filed on October 23, 2018. (App. 115-118).

On August 30, 2018, Allen Memorial Hospital in Waterloo notified Iowa DHS and ultimately law enforcement, that they had a 13 year old patient who was 8 weeks pregnant. (App. 154-155, 168-170). The juvenile reported that she began having sexual encounters when she was twelve. (App. 172). She reported liking "older men" (App. 172), although claimed that she had recently had consensual sex with a 14 year old. (App. 170). She also

claimed that she had consensual sex with Christopher Roby, and she believed that he impregnated her. (App. 133-134,174). A criminal complaint was filed on September 26, 2018. (App. 133-134).

By Trial Information filed on October 5, 2018 (App. 143-144), Christopher Roby was charged with sexual abuse in the third degree, in violation of Iowa Code §709.4(b)(2), a "C" felony. (App. 143-144). That case is entitled State v Christopher Roby, Black Hawk County FECR 227264. A criminal complaint had been filed on September 26, 2018. (App. 133-134). A discovery request was filed September 28, (App. 138-139), and a discovery order was filed the same day. (App. 140-141). It does not appear from the court file that any discovery was actually conducted. A pre-trial release report was filed on October 3, 2018 (App. 142) and an order was filed the next day, re-iterating the denial of bond previously set on September 27, 2018. (App. 135-137). Minutes of testimony were filed on October 5, 2018. (App. 145-179). Waiver of speedy trial was filed December 7, 2018. (App. 180).

On March 28, 2019, Christopher pled guilty to the charge of possession with intent to deliver as alleged in FECR 225935, and to the charge of sexual abuse in the third degree, as alleged in FECR 227264. (App. 188-189, 199-200). There was no recitation of the factual basis in either case, but merely a reference to

the trial information and minutes of testimony in each case. (App. 193-194).

Christopher Roby was found guilty of both offenses and sentenced to five and ten years, respectively, to run concurrently with each other, and with the misdemeanor eluding case. (App. 119-122, 181-184, 207-208).

It is clear that Mr Roby's defense attorney knew that he had a pending federal indictment, but no attempt was made to explain the potential ramifications his plea might have on those charges. (App. 195-196). Furthermore, although there as a passing reference to having to be on parole for the rest of his life, there was no explanation of what that means, or the possible consequences of revocation of that parole. (App. 183, 206).

A *pro se* notice to rescind plea was filed on April 2, 2019. (App. 185). Notice of Appeal was timely filed on April 4, 2019. (App. 131-132).

IV. STATEMENT OF THE FACTS

On October 23, 2017, Christopher Roby was stopped, arrested and ultimately released from custody. He was charged with eluding, interference with official acts, no driver's license, reckless driving and speeding. (App. 28-33). In November 2017, he pled to the charges of no driver's license (State v Roby, Black Hawk County No. STA 0163248), speeding (State v Roby, Black Hawk County No. STA 0163250), and reckless driving (State v Roby,

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substance, and despite the fact that all of the substances seized were found in his friend's apartment, a criminal complaint was filed on July 11, 2018, naming Christopher Roby as the offender for a controlled substance violation. (App. 78-79).

On August 16, 2018, a trial information was filed (App. 83-84), charging Christopher Roby with possession of a controlled substance with intent to deliver, to-wit: marijuana, in violation of Iowa Code §124.401(1)(d), a "D" felony. That case is entitled State v Christopher Roby, Black Hawk County FECR 225935.

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Black Hawk County FECR 227264.

V. ARGUMENT

There are multiple errors in this case, implicating errors at law, abuse of discretion, and constitutional issues. As a result of these errors, prejudice to Christopher Roby has resulted.

The actions by the state in obtaining a warrant to pursue an eluding charge more than six months after Christopher Roby pled to a lesser included offense, constituted double jeopardy in violation of Iowa Code §816.1, as well as in violation of the Fifth Amendment to the US Constitution, the Due Process Clause of the Fourteenth Amendment to the US Constitution, and Article I, section 12 of the Iowa Constitution. It also constituted a violation of probable cause required under the Fourth Amendment to the US Constitution and Article I, Section 8 of the Iowa constitution.

The bail imposed on Mr Roby for the eluding charge was unconstitutionally excessive, contrary to the Eighth Amendment to the US Constitution and Article I, Section 17 of the Iowa Constitution.

The actions by the trial court in taking the eluding plea and imposing a sentence should be considered as a retrial and constitutes double jeopardy, in violation of Iowa Code §816.1, as well as in violation of the Fifth Amendment to the US

Constitution, the Due Process Clause of the Fourteenth Amendment to the US Constitution, and Article I, section 12 of the Iowa Constitution.

Constitutional issues also arise in the wake of the failure of the trial court, when it allowed pleas to offenses for which factual basis do not exist. These failures of the trial court implicate due process rights under the Fifth and Fourteenth Amendments to the US Constitution, and Article I, Section 9 of the Iowa Constitution.

The failure of the trial court to engage in a proper colloquy, and fully explain the ramifications of special sentence parole under Iowa Code Chapter 903B, and especially, the mandatory terms of revocation for parole violation set out in Iowa Code §903B.1, is also a violation of Christopher Roby's due process rights in violation of the Fifth and Sixth Amendments to the US Constitution, the Due Process Clause of the Fourteenth Amendment to the US Constitution, and Article I, sections 9 and 10 of the Iowa Constitution.

The failure of the trial court in not advising Christopher Roby of the adverse ramifications of his state pleas in relationship to his federal charges is also a violation of Christopher Roby's due process rights in violation of the Fifth and Sixth Amendments to the US Constitution, the Due Process Clause of the Fourteenth Amendment to the US Constitution, and

Article I, sections 9 and 10 of the Iowa Constitution.

Constitutional issues also arise in the prosecutorial misconduct and ineffective assistance of counsel, in charging, and allowing the defendant to plead to, charges which constitute double jeopardy, as well as charges which have no basis in fact, in violation of the Fourth and Fifth Amendments and the Due Process Clause of the Fourteenth Amendment to the US Constitution, as well as to Article I, Sections 8, 9, 10 and 12 of the Iowa Constitution.

Constitutional issues also arise surrounding defense counsel's errors in not objecting to the double jeopardy implicit in the eluding charge, the lack of basis in fact to the drug charge, the failure to ensure the complete explanation of the ramifications of special sentence parole as part of the sex offense plea, and the failure to fully investigate and explain the ramifications of the state pleas and sentencings on pending federal charges. The ineffective assistance of defense counsel, implicates due process rights under the Fifth and Fourteenth Amendments to the US Constitution, and Article I, Section 9 of the Iowa Constitution, as well as the right to competent counsel under the Sixth Amendment of the US Constitution and Article I, section 10 of the Iowa Constitution.

The actions by the trial court are reviewable as an abuse of discretion. State v Powell, 684 NW2d 235 (Iowa 2004). The

failure of the court to recognize the failures of defense counsel is reviewable as an error of law, State v Meyer, 705 NW2d 676, 677 (Iowa Ct. App. 2005) and an abuse of discretion. State v Powell, 684 NW2d 235 (Iowa 2004). It also implicates constitutional rights. The scope and standard of review regarding any constitutional issues, are reviewed *de novo*. Everett v State, 789 NW2d 151, 155 (Iowa 2010).

Ineffective assistance of counsel claims are analyzed under the two-prong test set forth in Strickland v Washington, 466 US 668, 687 (1984). The first prong requires a showing of deficiency in trial counsel's performance. State v Gines, 844 NW2d 437, 440 (Iowa 2014) (citations omitted). When counsel makes fundamental errors, then counsel has breached an essential duty under the Sixth Amendment. *Id.* The second prong requires a showing that the deficient performance prejudiced the defendant. *Id.* at 441. (citations omitted).

All of these issues have been preserved for appellate review by the appeal filed April 4, 2019. (App. 13-14, 67-68, 131-132).

A. THE ELUDING WARRANT AND SUBSEQUENT CHARGE CONSTITUTE UNCONSTITUTIONAL DOUBLE JEOPARDY RENDERING EVERYTHING THAT FLOW FROM THEM UNCONSTITUTIONAL

This issue has been preserved for appellate review by the appeal filed April 4, 2019. (App. 13-14).

The actions by the trial court in taking the eluding plea and imposing a sentence should be considered as a retrial and

constitutes double jeopardy, in violation of Iowa Code §816.1, as well as in violation of the Fifth Amendment to the US Constitution, the Due Process Clause of the Fourteenth Amendment to the US Constitution, and Article I, section 12 of the Iowa Constitution.

Constitutional issues also arise in the prosecutorial misconduct in charging Mr Roby, and ineffective assistance of counsel, in allowing Mr Roby to plead to, charges which constitute double jeopardy,

Constitutional issues also arise surrounding defense counsel's errors in not objecting to the double jeopardy implicit in the eluding charge, in violation of Christopher Roby's due process rights under the Fifth and Fourteenth Amendments to the US Constitution, and Article I, Section 9 of the Iowa Constitution, as well as the right to competent counsel under the Sixth Amendment of the US Constitution and Article I, section 10 of the Iowa Constitution.

Ineffective assistance of counsel claims are analyzed under the two-prong test set forth in Strickland v Washington, 466 US 668, 687 (1984). The first prong requires a showing of deficiency in trial counsel's performance. State v Gines, 844 NW2d 437, 440 (Iowa 2014) (citations omitted). When counsel makes fundamental errors, then counsel has breached an essential duty under the Sixth Amendment. *Id.* The second prong requires a

showing that the deficient performance prejudiced the defendant. *Id.* at 441. (citations omitted).

The actions by the trial court are reviewable as an abuse of discretion. State v Powell, 684 NW2d 235 (Iowa 2004). The failure of the court to recognize the failures of defense counsel is reviewable as an error of law, State v Meyer, 705 NW2d 676, 677 (Iowa Ct. App. 2005) and an abuse of discretion. State v Powell, 684 NW2d 235 (Iowa 2004). It also implicates constitutional rights. The scope and standard of review regarding any constitutional issues, are reviewed *de novo*. Everett v State, 789 NW2d 151, 155 (Iowa 2010).

On October 23, 2017, Christopher Roby was stopped, arrested and ultimately released from custody. He was charged with eluding, interference with official acts, no driver's license, reckless driving and speeding. (App. 28-33). In November 2017, he pled to the charges of no driver's license (State v Roby, Black Hawk County No. STA 0163248), speeding (State v Roby, Black Hawk County No. STA 0163250), and reckless driving (State v Roby, Black Hawk County No. NTA 0163249). The remaining charges were apparently not pursued.

Over six months later, based on the same speeding event/ticket, to which he had already been convicted, a Trial Information was filed on June 5, 2018, (App. 24-25), again charging Christopher Roby with eluding-speed over 25 over limit.

Speeding is clearly part of an eluding charge. *Compare* Iowa Code §321.285 *with* Iowa Code §321.279. In addition, arguably, reckless driving is part of an eluding charge. *Compare* Iowa Code §321.277 *with* Iowa Code §321.279. “The Double Jeopardy Clause prohibits prosecution of a defendant for a greater offense when he has already been tried and acquitted or convicted on a lesser included offense.” State v Trainer, 762 NW2d 155, 157-158 (Iowa 2008) (citation omitted); State v Fox, 858 NW2d 36 (Table) 2014 WL 5243365 (Iowa Ct App 2014). Christopher Roby had already pled to the lesser-included offenses of eluding, based on the events of October 23, 2017, with the apparent consent of the state. Thus, jeopardy attached, barring any further prosecution based on that incident. The actions by the prosecution, the court and defense counsel combined to create a gross violation of Christopher Roby’s constitutional rights pursuant to Iowa Code §816.1, as well as the Fifth, Sixth and Fourteenth Amendments to the US Constitution, and Article I, Sections 9, 10 and 12 of the Iowa Constitution.

B. THE ARREST OF CHRISTOPHER ROBY ON MAY 31, 2018 WAS BASED ON AN UNCONSTITUTIONAL WARRANT, RENDERING ANY SEARCH WARRANT OR CHARGE SUBSEQUENT TO THAT ARREST INVALID

This issue has been preserved for appellate review by the appeal filed April 4, 2019. (App. 13-14,67-68,131-132).

The actions by the state in obtaining a warrant to pursue an eluding charge more than six months after Christopher Roby pled

to a lesser included offense, constituted a violation of probable cause required under the Fourth Amendment to the US Constitution. It also constituted double jeopardy in violation of Iowa Code §816.1, as well as in violation of the Fifth Amendment to the US Constitution, the Due Process Clause of the Fourteenth Amendment to the US Constitution, and Article I, section 12 of the Iowa Constitution.

The ineffective assistance of defense counsel in not objecting to the basis of the warrant, implicates due process rights under the Fourth, Fifth and Fourteenth Amendments to the US Constitution, and Article I, Section 9 of the Iowa Constitution, as well as the right to competent counsel under the Sixth Amendment of the US Constitution and Article I, section 10 of the Iowa Constitution.

Ineffective assistance of counsel claims are analyzed under the two-prong test set forth in Strickland v Washington, 466 US 668, 687 (1984). The first prong requires a showing of deficiency in trial counsel's performance. State v Gines, 844 NW2d 437, 440 (Iowa 2014) (citations omitted). When counsel makes fundamental errors, then counsel has breached an essential duty under the Sixth Amendment. *Id.* The second prong requires a showing that the deficient performance prejudiced the defendant. *Id.* at 441. (citations omitted).

The actions by the trial court are reviewable as an abuse of

discretion. State v Powell, 684 NW2d 235 (Iowa 2004). The failure of the court to recognize the failures of defense counsel is reviewable as an error of law, State v Meyer, 705 NW2d 676, 677 (Iowa Ct. App. 2005) and an abuse of discretion. State v Powell, 684 NW2d 235 (Iowa 2004). It also implicates constitutional rights. The scope and standard of review regarding any constitutional issues, are reviewed *de novo*. Everett v State, 789 NW2d 151, 155 (Iowa 2010).

Arrest warrants must only issue upon probable cause. Fourth Amendment to the US Constitution; Article I, Section 8 of the Iowa Constitution. "Probable cause" is defined as "reasonable grounds for belief that a person should be arrested or searched." B. John Burns, *Iowa Practice: Criminal Procedure* (2019), pages 18-19, *citing* Blacks Law Dictionary (West 5th ed). As has already been set out above in this Brief, the eluding charge in the criminal complaint filed on May 23, 2018, stemmed from an October 23, 2017 encounter and charges. At that time, Mr Roby had been taken into custody, and had already pled six months previously. (App. 28-33). State v Roby, Black Hawk County No. STA 0163248; State v Roby, Black Hawk County No. STA 0163250; State v Roby, Black Hawk County No. NTA 0163249. It is clear that the person filing the May 2018 complaint and requesting the warrant had the October 2017 information in front of him. Compare October 23, 2017 citation with May 23, 2018 complaint.

There was no probable cause for a request for a subsequent warrant based on a seven month old stop, when there had already been an arrest and court appearance.

It must also be noted that the charge is an aggravated misdemeanor, for which the uniform bond schedule sets bail at \$2,000. (App. 42). In this case, for some unknown reason, bail was set in the amount of \$50,000, cash only, which is twenty-five (25) times the scheduled amount. (App. 16-18). Only after Mr Roby filed a *pro se* motion for a bond reduction (App. 43) after he had been in jail for a month, was a five-minute hearing set, (App. 44), and the bond was reduced to \$5,000, cash or surety, still 2 ½ times the scheduled amount. (App. 47-48). The bail imposed was unconstitutionally excessive, pursuant to both the federal and state constitutions. Eighth Amendment to the US Constitution; Article I, Section 17 of the Iowa Constitution. The state, the court and defense attorney all failed Christopher Roby by violating these provisions.

C. A FACTUAL BASIS DOES NOT EXIST FOR CHRISTOPHER ROBY TO PLEAD TO POSSESSION WITH INTENT TO DELIVER

This issue has been preserved for appellate review by the appeal filed April 4, 2019. (App. 67-68).

Constitutional issues arise in the wake of the failure of the trial court, when it allowed pleas to offenses for which factual basis do not exist. These failures of the trial court implicate due process rights under the Fifth and Fourteenth

Amendments to the US Constitution, and Article I, Section 9 of the Iowa Constitution.

Constitutional issues also arise in the prosecutorial misconduct in charging the defendant with charges which have no basis in fact, in violation of the Fifth and Sixth Amendments and the Due Process Clause of the Fourteenth Amendment to the US Constitution, and Article I, Sections 8, 9 and 10 of the Iowa Constitution.

Constitutional issues also arise surrounding defense counsel's errors in not objecting to the lack of basis in fact to the drug charge contrary to Mr Roby's due process rights under the Fourth, Fifth and Fourteenth Amendments to the US Constitution, and Article I, Section 9 of the Iowa Constitution, as well as the right to competent counsel under the Sixth Amendment of the US Constitution and Article I, section 10 of the Iowa Constitution.

Ineffective assistance of counsel claims are analyzed under the two-prong test set forth in Strickland v Washington, 466 US 668, 687 (1984). The first prong requires a showing of deficiency in trial counsel's performance. State v Gines, 844 NW2d 437, 440 (Iowa 2014) (citations omitted). When counsel makes fundamental errors, then counsel has breached an essential duty under the Sixth Amendment. *Id.* The second prong requires a showing that the deficient performance prejudiced the defendant. *Id.* at 441.

(citations omitted).

The actions by the trial court are reviewable as an abuse of discretion. State v Powell, 684 NW2d 235 (Iowa 2004). The failure of the court to recognize the failures of defense counsel is reviewable as an error of law, State v Meyer, 705 NW2d 676, 677 (Iowa Ct. App. 2005) and an abuse of discretion. State v Powell, 684 NW2d 235 (Iowa 2004). It also implicates constitutional rights. The scope and standard of review regarding any constitutional issues, are reviewed *de novo*. Everett v State, 789 NW2d 151, 155 (Iowa 2010).

A guilty plea is an admission of guilt to each element of the charge to which a defendant pleads. Thus, there must be an appropriate finding of the elements of the offense for which the plea is being made. A plea of guilty to possession with intent to deliver a controlled substance requires three necessary elements: (1) the defendant knowingly possessed a controlled substance, (2) the defendant knew the substance was a controlled substance, and (3) the defendant possessed the substance with the intent to deliver a controlled substance to another. Iowa Code §124.401(1).

There is nothing in the court pleadings that Christopher Roby intended to deliver anything to anyone. Indeed, a factual basis cannot even be shown that Christopher Roby was guilty of simple possession of a controlled substance. Nowhere in any of

the court documents is there any lab report that the substances tested positive for marijuana, or any other controlled substance.

The State's only evidence of potential possession of any potential drugs was the alleged smell of marijuana on the defendant's person, after he was pulled out of his friend's car. (App. 71). Indeed, after he was pulled from his friend's car at gunpoint, nothing was found on his person or in the vehicle. (App. 88,95,97). After he was searched, and he was taken into custody, there was no further probable cause to investigate further, or obtain a search warrant. Fourth Amendment to the US Constitution; Article I, Section 8 of the Iowa Constitution.

Even if there was probable cause to obtain a search warrant, it would only have been proper to further investigate possible wrongdoing by Mr Roby's friend, the owner of the vehicle and the person in possession of the apartment. The Iowa Supreme Court has been clear and consistent in looking at charges involving possession of drugs. In State v Reeves, 209 NW2d 18 (Iowa 1973), the Court stated that in order to show actual possession by a defendant, the defendant must have direct control over the drug. In this case, drugs were found in his friend's apartment, out of which Mr Roby had allegedly recently exited. No drugs were found on his person. Law enforcement was well aware that his friend had actual possession and control of the apartment, not Mr Roby. (App. 71).

Possession can also be considered "constructive possession." However, in order to show constructive possession, this Court has listed factors required to be shown, rejecting the notion that a person's mere proximity to contraband is sufficient to show the dominion and control required for possession. State v Atkinson, 620 NW2d 1, 4 (Iowa 2000). "[T]he authority or right to maintain control includes something more than the 'raw physical ability' to exercise control over the controlled substance." State v Bash, 670 NW2d 135, 139 (Iowa 2003); see also State v McDowell, 622 NW2d 305, 308 (Iowa 2001) ("proof of opportunity of access to a place where narcotics are found will not, without more, support a finding of unlawful possession...but where the accused has not been in exclusive possession of the premises but only in joint possession, knowledge of the presence of the substances on the premises and the ability to maintain control over them by the accused will not be inferred but must be established by proof"). See also State v Webb, 648 NW2d 72, 76 (Iowa 2002). These required elements are non-existent in this case.

Challenges to the sufficiency of evidence is for correction of errors at law. State v Jorgensen, 758 NW2d 830, 834 (Iowa 2008). Although evidence is reviewed in the light most favorable to the State, State v Webb, 648 NW2d 72, 76 (Iowa 2002), all evidence must be considered. State v Henderson, 696 NW2d 5, 7 (Iowa 2005). In this case, there is insufficient evidence to

support this plea and sentence. Despite that, Mr. Roby's defense attorney did not file a motion to dismiss, allowed this plea to go forward, and did not file a motion in arrest of judgment challenging this guilty plea. Such action by defense counsel is not reasonable, and constitutes a failure to perform an essential duty. State v Doggett, 687 NW2d 97, 102 (Iowa 2004). The failure of trial counsel clearly resulted in prejudice to Christopher Roby. Such failure renders defense counsel constitutionally ineffective. Id.

"No reasonably competent practitioner would allow a client to plead guilty in view of the plain language of this statute." State v Doggett, 687 NW2d 97, 102 (Iowa 2004), *citing with approval State v Brooks*, 555 NW2d 446, 448 (Iowa 1996). ("We will find counsel failed to perform an essential duty if defense counsel allows the defendant to plead guilty to a charge for which no factual basis exists and thereafter fails to file a motion in arrest of judgment challenging the plea."). Defense counsel had her client plead guilty to a criminal offense without any support of evidence. Christopher Roby was clearly prejudiced by the constitutionally ineffectiveness of defense counsel.

D. NONE OF CHRISTOPHER ROBY'S PLEAS WERE KNOWING OR VOLUNTARY

These issues have been preserved for appellate review by the appeal filed April 4, 2019. (App. 13-14, 67-68, 131-132).

Constitutional issues arise surrounding defense counsel's

errors in not ensuring that Christopher Roby's pleas, both written and oral, were knowing or voluntary. The ineffective assistance of defense counsel, implicates due process rights under the Fifth and Fourteenth Amendments to the US Constitution, and Article I, Section 9 of the Iowa Constitution, as well as the right to competent counsel under the Sixth Amendment of the US Constitution and Article I, section 10 of the Iowa Constitution.

The actions by the trial court are reviewable as an abuse of discretion. State v Powell, 684 NW2d 235 (Iowa 2004). The failure of the court to recognize the failures of defense counsel is reviewable as an error of law, State v Meyer, 705 NW2d 676, 677 (Iowa Ct. App. 2005) and an abuse of discretion. State v Powell, 684 NW2d 235 (Iowa 2004). It also implicates constitutional rights. The scope and standard of review regarding any constitutional issues, are reviewed *de novo*. Everett v State, 789 NW2d 151, 155 (Iowa 2010).

Ineffective assistance of counsel claims are analyzed under the two-prong test set forth in Strickland v Washington, 466 US 668, 687 (1984). The first prong requires a showing of deficiency in trial counsel's performance. State v Gines, 844 NW2d 437, 440 (Iowa 2014) (citations omitted). When counsel makes fundamental errors, then counsel has breached an essential duty under the Sixth Amendment. *Id.* The second prong requires a showing that the deficient performance prejudiced the defendant. *Id.* at 441.

(citations omitted).

It was also error for the trial court to not fully explain the ramifications of Mr Roby's pleas in the colloquy in which the court engaged. The actions by the trial court are reviewable as an abuse of discretion. State v Powell, 684 NW2d 235 (Iowa 2004). The failure of the court to recognize the failures of defense counsel is reviewable as an error of law, State v Meyer, 705 NW2d 676, 677 (Iowa Ct. App. 2005) and an abuse of discretion. State v Powell, 684 NW2d 235 (Iowa 2004). It also implicates constitutional rights. The scope and standard of review regarding any constitutional issues, are reviewed *de novo*. Everett v State, 789 NW2d 151, 155 (Iowa 2010).

1. The plea to the eluding charge was facially and factually inaccurate

This issue has been preserved for appellate review by the filling of the notice of appeal. (App. 13-14).

The failure of defense counsel implicates due process rights under the Fifth and Fourteenth Amendments to the US Constitution, and Article I, Section 9 of the Iowa Constitution, as well as the right to counsel under the Sixth Amendment of the US Constitution and Article I, section 10 of the Iowa Constitution.

The failure of the trial court to recognize the failures of defense counsel is reviewable as an error of law, State v Meyer, 705 NW2d 676, 677 (Iowa Ct. App. 2005) and an abuse of discretion. State v Powell, 684 NW2d 235 (Iowa 2004). It also

implicates constitutional rights. The scope and standard of review regarding any constitutional issues, are reviewed *de novo*. Everett v State, 789 NW2d 151, 155 (Iowa 2010).

Without conceding the earlier argument in Section A of this document that the eluding charge was impermissible double jeopardy, it must also be noted that the plea document purporting to plead guilty to the eluding charge is facially and factually inaccurate, thereby making it defective. A written plea to a misdemeanor can certainly be submitted. However, a guilty plea is an admission of guilt to each element of the charge to which a defendant pleads. Thus, if a written plea is offered, it must appropriately lay out the facts of the case. In this case, the written plea indicates that the offense occurred "on or about Oct 23, 2018". (App. 50). That is incorrect. The date of the offense was October 23, 2017. (App. 15,24-25).

Challenges to the sufficiency of evidence is for correction of errors at law. State v Jorgensen, 758 NW2d 830, 834 (Iowa 2008). Although evidence is reviewed in the light most favorable to the State, State v Webb, 648 NW2d 72, 76 (Iowa 2002), all evidence must be considered. State v Henderson, 696 NW2d 5, 7 (Iowa 2005). In this case, there is insufficient evidence to support this plea and sentence.

2. Christopher Roby was not provided with adequate information regarding the sentencing consequences of pleading to a sexual offense

This issue has been preserved for appellate review by the filling of the notice of appeal. (App. 131-132).

The failure of the trial court to fully advise Christopher Roby of the sentencing consequences is a violation of his constitution rights under the Fifth and Fourteenth Amendments to the US Constitution, and Article I, Section 9 and 10 of the Iowa Constitution.

The failure of defense counsel to ensure that Mr Roby was fully advised of his rights as a consequence of his guilty plea and sentencing, implicates due process rights under the Fifth and Fourteenth Amendments to the US Constitution, and Article I, Section 9 of the Iowa Constitution, as well as the right to counsel under the Sixth Amendment of the US Constitution and Article I, section 10 of the Iowa Constitution.

The failure of the trial court to recognize the failures of defense counsel is reviewable as an error of law, State v Meyer, 705 NW2d 676, 677 (Iowa Ct. App. 2005) and an abuse of discretion. State v Powell, 684 NW2d 235 (Iowa 2004). It also implicates constitutional rights. The scope and standard of review regarding any constitutional issues, are reviewed *de novo*. Everett v State, 789 NW2d 151, 155 (Iowa 2010).

Iowa R Crim P 2.8(2) (b) prescribes the process that must be

followed in taking a guilty plea. This includes the requirement that "the mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered." Iowa Code §813.2, Iowa R Crim P 2.8(2)(b)(2).

Christopher Roby was allowed to plead and was sentenced to sexual abuse in the third degree, a class "C" felony, in violation of Iowa Code §709.4(b)(2). (App. 181-184;192, lines 17-25;194, lines 8-25;200, lines 16-19; 201,lines 7-10; 206,line 7 - 207, line 7). There are vague references during the hearing to the special sentence requirements that are mandatory to that sentence. In her recitation, the assistant county attorney made it sound as if special sentence was optional, stating "[w]e also ask that he be specially sentenced to the Director of the Department of Corrections for the remainder of his life under 903B.1." (App. 188, lines 23-25).

The court also gave the requirement short shrift, telling Mr Roby prior to sentencing that "[y]ou would be required to be on parole for the rest of your life." (App. 194, lines 20-21), and then during sentencing "You will be required to be on parole for the rest of your life with the Department of Correctional Services." (App. 206, lines 22-24). Despite supposedly advising Mr Roby "of the maximum and minimum penalties" (App. 194, lines 6-7; 208-209), there was no further explanation of what being on

special sentence parole means.

There is a cursory sentence in the sentencing order about the "special sentence" requirement: "Pursuant to Iowa Code 903B1 the defendant is sentenced to a special sentence into the custody of the director or the Iowa Department of Corrections for lifetime." (App. 183). Again, there is no explanation of the ramifications of what that means.

The Iowa Code is very clear concerning the requirement imposed on a person convicted of a class "C" sexual abuse felony under chapter 709:

shall also be sentenced, in addition to any other punishment provided by law, to a special sentence committing the person into the custody of the director of the Iowa department of corrections for the rest of the person's life...The board of parole shall determine whether the person should be released on parole or placed in a work release program...The revocation of release shall not be for a period greater than two years upon any first revocation, and five years upon any second or subsequent revocation."

Iowa Code §903B.1.

Special sentence parole is a mandatory part of a sex offense. Iowa Code Chapter 903B. Punishment for violating special sentence parole is not merely collateral, but real potential and mandatory punishment, and must be fully explained by a sentencing court. Iowa R Crim P 2.8(2)(b)(2). The absence of such an explanation makes this plea unknowing and involuntary, mandating reversal.

3. Christopher Roby was not provided with adequate information regarding potential ramifications of his guilty pleas to his pending federal indictment

This issue has been preserved for appellate review by the filing of the notice of appeal. (App. 13-14, 67-68, 131-132).

The failure of the trial court to fully advise Christopher Roby of the sentencing consequences is a violation of his constitution rights under the Fifth and Fourteenth Amendments to the US Constitution, and Article I, Section 9 and 10 of the Iowa Constitution.

The failure of defense counsel implicates due process rights under the Fifth and Fourteenth Amendments to the US Constitution, and Article I, Section 9 of the Iowa Constitution, as well as the right to counsel under the Sixth Amendment of the US Constitution and Article I, section 10 of the Iowa Constitution.

The failure of the trial court to recognize the failures of defense counsel is reviewable as an error of law, State v Meyer, 705 NW2d 676, 677 (Iowa Ct. App. 2005) and an abuse of discretion. State v Powell, 684 NW2d 235 (Iowa 2004). It also implicates constitutional rights. The scope and standard of review regarding any constitutional issues, are reviewed *de novo*. Everett v State, 789 NW2d 151, 155 (Iowa 2010).

At the time of the plea/sentencing hearing, Christopher Roby's attorney knew, and advised the court, that Mr Roby was the subject of a "pending federal indictment." (App. 196). There

was some attempt by the trial court to advise Mr Roby that the proceedings that day would only affect the state charges. (App. 196-197).

Mr Roby, you need to understand that if you enter this guilty plea, that's not going to resolve this pending federal indictment that you have, so you're not going to get any benefit on that, and I don't know, there may even be a detriment

(App. 196, lines 16-20).

In fact, federal sentencing works on a system which includes "points", under the federal sentencing guidelines, USSG §4A1.2, and enhancements. 21 USC §851. These provisions can lengthen a defendant's federal sentence significantly. Prior state felony drug convictions impose sentencing enhancements in federal court. US v Golden, 669 F3d 901 (8th Cir 2012); US v Funchess, 422 F3d 698 (8th Cir 2005). Specifically, there has been determined to be a huge disparity with enhancements being imposed against defendants in the Northern District of Iowa. US v Young, 960 F Supp 881 (ND Iowa 2013).

Such potential punishment, albeit by the federal jurisdiction, should have been fully revealed to Christopher Roby at the time of his plea and sentencing. The absence of such an explanation makes this plea unknowing and involuntary, mandating reversal.

D. DEFENSE COUNSEL PERFORMANCE WAS SO DEFICIENT AS TO CAUSE STRUCTURAL ERROR

This issue has been preserved for appellate review by the

filing of the notice of appeal. (App. 13-14, 67-68, 131-132).

The failure of defense counsel implicates due process rights under the Fifth and Fourteenth Amendments to the US Constitution, and Article I, Section 9 of the Iowa Constitution, as well as the right to counsel under the Sixth Amendment of the US Constitution and Article I, section 10 of the Iowa Constitution.

The failure of the trial court to recognize the failure of defense counsel is reviewable as an error of law, State v Meyer, 705 NW2d 676, 677 (Iowa Ct. App. 2005) and an abuse of discretion. State v Powell, 684 NW2d 235 (Iowa 2004). It also implicates constitutional rights. The scope and standard of review regarding any constitutional issues, are reviewed *de novo*. Everett v State, 789 NW2d 151, 155 (Iowa 2010).

If an attorney's performance is so deficient as to cause structural error, it renders the proceeding presumptively unreliable.

Structural errors are not merely errors in a legal proceeding, but errors "affecting the framework within which the trial proceeds...structural error occurs when "(1) counsel is completely denied, actually or constructively, at a crucial stage of the proceeding; (2) where counsel does not place the prosecution's case against meaningful adversarial testing...[n]o specific showing of prejudice [is] required" as the criminal adversary process itself is "presumptively unreliable."

Lado v State, 804 NW2d 248, 252 (Iowa 2011), *citing* State v Feregrino, 756 NW2d 700, 707 (Iowa 2008), Arizona v Fulminante, 499 US 279, 310 (1991), United States v Chronic, 466 US 648, 659

(1984).

First of all, defense counsel apparently wrote, and had her client sign, a plea not only deficient on its face, but for an offense to which he had already pled. (App. 50). Defense counsel should know, or conducted basic research, to ascertain the basis of the eluding charge.

Furthermore, defense counsel did not bother to ensure that there was an appropriate guilty plea proceeding pursuant to Iowa R. Crim P. 2.8(2)(b), in fully explaining the full ramifications and consequences of entering such guilty pleas. Absolute compliance may not be necessary, but substantial compliance is required. State v Kress, 636 NW2d 12,21 (Iowa 2001). In this case, there was no modicum of attempt at compliance.

Christopher Roby was clearly denied meaningful representation in his case. The failure of trial counsel was so deficient as to cause structural error, rendering the pleas and sentencings presumptively unreliable. Lado, 804 NW2d at 252. Such unreliability resulted in unconstitutional prejudice to Christopher Roby.

E. EVEN IF DEFENSE COUNSEL PERFORMANCE WAS NOT SO DEFICIENT AS TO CAUSE STRUCTURAL ERROR, IT WAS SO DEFICIENT TO CONSIST OF INEFFECTIVE ASSISTANCE OF COUNSEL

This issue has been preserved for appellate review by the filing of the appeal. (App. 13-14,67-68,131-132).

The failures of defense counsel implicate due process rights

under the Fifth and Fourteenth Amendments to the US Constitution, and Article I, Section 9 of the Iowa Constitution, as well as the right to counsel under the Sixth Amendment of the US Constitution and Article I, section 10 of the Iowa Constitution.

The failure of the trial court to recognize the failures of defense counsel is reviewable as an error of law, State v Meyer, 705 NW2d 676, 677 (Iowa Ct. App. 2005) and an abuse of discretion. State v Powell, 684 NW2d 235 (Iowa 2004). It also implicates constitutional rights. The scope and standard of review regarding any constitutional issues, are reviewed *de novo*. Everett v State, 789 NW2d at 155.

Ineffective assistance of counsel claims are analyzed under the two-prong test set forth in Strickland v Washington, 466 US 668, 687, 104 S Ct 2052, 2064, 80 LEd2d 674,693 (1984). The first prong requires a showing of deficiency in trial counsel's performance. State v Gines, 844 NW2d 437, 440 (Iowa 2014) (citations omitted). When counsel makes fundamental errors, then counsel has breached an essential duty under the Sixth Amendment. *Id.* The second prong requires a showing that the deficient performance prejudiced the defendant. Gines, 844 NW2d at 441. (citations omitted).

The previous sections of this brief lay out the failure of defense counsel to understand the fundamentals required to provide supportable pleas. Her actions and inactions were not

merely miscalculated trial strategies or mere mistakes in judgment. Her level of representation fell below an objective standard of reasonableness, indicating an abdication - not exercise-of-professional [responsibility]." Lado, 804 NW2d at 251 (citations omitted). Thus, the first prong of *Strickland* is easily met.

The second prong of *Strickland* is also easily met in this case. Attorney Jackson's failure to be aware of the elements of the offenses charged, the rules of criminal sentencing, and the serious and significant ramifications of the pleas and sentences, resulted in a massive amount of prejudice to her client. Such lack of diligence on the part of defense counsel undermined the reliability and fairness of Christopher Roby's pleas. Lado, 804 NW2d at 251.

"To establish a claim of ineffective assistance of counsel, a defendant must show that (1) counsel failed to perform an essential duty, and (2) prejudice resulted...To determine if the prejudice standard has been met, we look to the totality of the evidence, the factual findings that would have been affected by counsel's errors, and whether the effect was pervasive, minimal, or isolated. Nguyen v. State, 707 NW2d 317,324 (Iowa 2005). The failures of trial counsel in this case were not minimal or isolated, but pervasive.

VI. CONCLUSION

All of these violations, taken as a whole, clearly show that Christopher Roby was significantly prejudiced. His constitutional rights under both the US and Iowa constitutions were flagrantly violated. The proper course of action in this case, therefore, is to vacate the guilty pleas, reverse the convictions and remand these cases to district court for further proceedings.

VII. REQUEST FOR ORAL ARGUMENT

Appellant Christopher Roby requests that oral argument be granted in this matter.

Respectfully submitted this 27th day of July 2019.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Proof Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and 6.903(1)(g)(2). This brief has been prepared in a monospaced typeface, and created in WordPerfectX5 in font Courier New 12. It contains 887 lines of text, excluding the parts of the brief

exempted by Iowa R. App. P. 6.903(1)(g)(2).

/Marti D Nerenstone/
Marti D Nerenstone

July 27, 2019
Date

ATTORNEY'S CERTIFICATION REGARDING UNPUBLISHED OPINION

I, the undersigned hereby certify that on July 14, 2019, I have conducted a diligent search for, and fully disclosed, any subsequent disposition of unpublished opinions cited in this brief, as required by Iowa R. App. P. 6.904(2).

/Marti D Nerenstone/
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CERTIFICATE OF COST

The undersigned certifies that, pursuant to the cost amounts allowed by the State Public Defender, the cost of printing this Brief was \$4.80.

/Marti D Nerenstone/
Marti D Nerenstone AT0005818

PROOF OF SERVICE AND CERTIFICATE OF FILING

I certify that on the 27th day of July 2019, I served this document on the attorneys by efileing in EDMS.

I further certify that on the 27th day of July 2019, I will submit this document for filing by EDMS with the Iowa Supreme Court.

I further certify that on the 27th day of July 2019, I will serve the Defendant-Appellant by first-class mail.

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