IN THE SUPREME COURT OF IOWA

No. 19-1259

STATE OF IOWA

Plaintiff-Appellee,

vs.

HOWARD J. THOMPSON

Defendant-Appellant

APPEAL FROM THE SCOTT COUNTY DISTRICT COURT

THE HONORABLE HENRY W. LATHAM II

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

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/s/ Kent A. Simmons

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ROUTING STATEMENT

The Supreme Court must retain this appeal as it raises an issue of first impression: Does legislation enacted July 1, 2019 supersede this Court's inherent supervisory power to govern its own rules of procedure and does the legislature's attempt to override those rules violate the constitutional protection of the separation of powers when the legislation impairs the Judicial Branch's ability to carry out its constitutional duties?

STATEMENT OF THE CASE

NATURE OF THE CASE: This is a direct appeal from Howard J. Thompson's felony convictions on two counts of committing fraudulent acts to attempt to obtain controlled substances with false prescriptions.

PROCEEDINGS: On November 15, 2017, a prosecutor filed a Trial Information charging Mr. Thompson with two counts of Obtain or Attempt to Obtain Prescription Drug or Device by Deceit, a Class "C" felony and one count of Conspiracy to Commit a Non-forcible Felony by Planning or Commission, a class

"D" felony. The case went to a jury trial on February 18, 2019, before the Honorable Henry W. Latham II. (Tr. Info.; App. 6-8)

Under Counts 1 and 3, the State claimed the fraudulent attempt to obtain prescription drugs was punishable under Iowa Code Section 124.401(1)(c)(8) for violations of Section 703.1 and 155A.23(1). The subsection under Chapter 124 defines class "C" felony violations concerning Schedule I, II, or III. With Instruction No. 22, Judge Latham informed the jury that the controlled substances in question are listed under Schedule II. On February 21, 2019, the jury returned verdicts of guilty on all three counts. (Trial Transcript, [hereafter "Tr." pp. 187-189, L. 17-21, pp. 423-424, L. 1-25) (Jury Inst. 22; Verdict Forms; App. 18, 20-22) The Trial Information also notified the Defendant that the State would seek a sentencing enhancement for his status as Habitual Offender. After the jury returned its verdicts, the judge conducted a colloquy whereby Mr. Thompson stipulated that he had been convicted of four felonies in the years 2007 to 2012. (Tr. 427-434, L. 6-17)

On July 19, 2019, Judge Latham sentenced Mr. Thompson on the two class "C" felony counts. He determined that the Conspiracy charge merged with the felonies. On Counts1 and 3, Judge Latham sentenced Defendant with imposition

of the Habitual Offender enhancements to terms of not to exceed 15 years imprisonment on each count, with the sentences to be served concurrently. (Sent. Tr. p.2, L. 11-17, pp. 9-10, L. 2-7 A disposition order was filed on the sentencing date, and an order *nunc pro tunc* adding the Habitual Offender code sections to the written disposition was filed on August 28, 2019. The Defendant had filed a timely Notice of Appeal on July 30, 2019. An additional *pro tunc* order, correcting a clerical error and identifying the controlled substances under Schedule II, was filed October 2, 2019. (Sentencing Order; Notice Appeal , Orders Pro Tunc; App. 23-33)

On December 12, 2019, Mr. Thompson filed his page-proof opening brief. At the same time counsel filed that brief, he also filed the Supplemental *Pro Se* Brief that Mr. Thompson had written and mailed to counsel. With that, counsel filed a motion for the Court to file the *pro se* brief as submitted. Mr. Thompson had authored his brief in handwriting on yellow legal paper, but had not left margins on the sides. In order to avoid cropping content, counsel was forced to file the *pro se* brief on the yellow paper without margins. (App. 34)

The State resisted the motion on December 23, 2019, maintaining that legislation taking effect July 1, 2019, prohibited the Court from filing and

considering *pro se* briefs from represented appellants in criminal cases. This Court's Rule 6.901.2, allowing *pro se* briefs from represented criminal defendants, remains on the books. This Court did not rule on the resisted motion in its December 31, 2019 order. Instead, the Court ordered the parties to address the matter in the appeal briefing process and directed appellant counsel to submit an amended page-proof brief including the argument on the issue. That issue is addressed in Argument II, below. (Resistance, Order; App. 35-38)

Statement of the Facts

Mr. Thompson's defense was entirely based upon the testimony of Markita Elverton. She testified that on June 5, 2017, she was living in DeWitt, Iowa at 1303 14th Street, Apartment # 307. She identified Mr. Thompson as a friend of hers who would occasionally stay with her in DeWitt. Markita told the jury Mr. Thompson had been staying with her on the day in question. He accompanied her to a Hy-Vee store and a Walgreens after Markita asked him to do so. (Tr. 345-347, L. 7-22)

At the Hy-Vee, Markita took a paper prescription slip to the pharmacy and advised she would pick up the medication later in the day. (State Ex. 16; App.15)

She also dropped off some mail at a postal box in the store. After she returned to the car, Markita drove across the street to the Walgreens. (Map, St. Ex. 2) She asked Mr. Thompson if he would go into the store to drop off a prescription for her at the pharmacy. He agreed and delivered the prescription. The pharmacy technician noted the prescription slip was in the name of Claudia Williamson, but the address had been left blank. (State's Ex. 4; App. 13) She asked Mr. Thompson for the address. The tech testified he reported the address of 1330 Sixth Avenue in DeWitt. Mr. Thompson then left the store. The tech passed the prescription on to the pharmacist on duty. (Tr. 209; L. 2-25)

Markita testified that the prescription slips she had taken to both of the stores that day were fraudulent. She admitted to the jury that she had stolen prescription pads from a physician's office in Chicago. Markita had filled out the prescriptions herself and signed the physician's name on both slips. She testified that she had not informed Mr. Thompson of her illegal acts, and he would have no reason to believe the prescriptions were fraudulent. (Tr. 347-350, L. 23-11) (State's Ex's 4 and 16; App. 13, 15)

After leaving the Walgreens, Markita drove back to the Hy-Vee and asked Mr. Thompson to go into the store to pick up the prescription for her. He walked

into the store to the pharmacy to pick up Markita's prescription. (Tr. 356, L. 7-23) Hy-Vee staff alerted the Bettendorf Police Department that Markita's fraudulent prescription had been passed at the store and that a man had appeared to pick up the medication. Police officer Cristina Thomas responded to the pharmacy. Staff pointed out Mr. Thompson, who was still waiting for the prescription. The officer told him why she was there and asked to see identification. When Mr. Thompson stated he had no identification with him, the officer asked if she could pat him down for weapons. With that request, Thompson took off running out of the store. Numerous officers then responded to attempt to locate the Defendant, but they were unable to find him. The jury was then allowed to view the video and audio recording of the officer's encounter with Mr. Thompson. (Tr. 284-288, L. 3-4) (Ex. 11)

The fraudulent prescription passed at the Walgreens was for Hydrocodone, a Schedule II controlled substance. The prescription Marakita dropped at Hy-Vee was for Oxycodone, also a Schedule II controlled substance. (225, L. 7-17; pp. 292-293, L. 8-21, pp. 352-353, L. 2-20) (State's Ex's 4 and 16; App. 13, 15)

SUMMARY OF THE ARGUMENT

The State was faced with the task of proving beyond a reasonable doubt that Mr. Thompson acted with fraudulent knowledge and intent, or knowingly aided and abetted Markita Elvington's fraudulent acts prohibited by Section 155A.23(1). There was no evidence that Mr. Thompson participated in writing either of the prescriptions and very little evidence as to anything Mr. Thompson said in the course of the transactions. The State was left with attempting to assign fraudulent intent to Defendant's acts with the basic fact that he ran from a police officer when confronted at the Hy-Vee and the theory that he had given a false address at Walgreens. The flight could be explained by Mr. Thompson's understandable fear of police and the thought that he was being wrongly accused of a crime. The theory of uttering a false address at Walgreens was critical to the case against Mr. Thompson. The State never developed any foundation to show the address given was false. The trial court erred in allowing irrelevant evidence from court documents to be introduced to that end. The evidence allowed was based on a false premise, confusing to the jury, and unfairly prejudicial. The conviction must be reversed for a new trial.

Mr. Thompson raised a separate issue in a *pro se* brief, arguing there was insufficient evidence to support the conviction. The State resisted the Court's consideration of the brief in light of legislation enacted July 1, 2019, that prohibits the State from responding and prohibits the Court from considering a *pro se* filing from a defendant who is represented by appellate counsel. This Court has found such *pro se* supplemental briefs necessary to carrying out its constitutional duty to secure justice for appellate litigants. Because the new legislation impairs this Court's ability to carry out its constitutional duty, it is in violation of the Iowa Constitution.

ARGUMENT

I.

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO USE INFORMATION FROM COURT DOCUMENTS THAT WAS WITHOUT FOUNDATION AND IRRELEVANT TO PROVE THAT DEFENDANT ACTED WITH FRAUDULENT KNOWLEDGE AND INTENT, AND THE EVIDENCE WAS UNFAIRLY PREJUDICIAL.

PRESERVATION OF ERROR: The evidentiary questions arose during the trial rather than beforehand, and they were addressed in disjointed testimony and proceedings. As a result, the explanation of error preservation must be rather lengthy.

A pharmacy technician from the Walgreens store testified that the name on the prescription she received was "Claudia Williamson", but that the customer who gave it to her was a male. The technician, Hailey Drobushevich watched a video clip the prosecutor displayed and testified the man who handed her the prescription was Defendant Thompson. (Tr. 208-209, L. 9-25, pp. 211-212, L. 12-15) The tech testified that the prescription bore the name of Claudia Williamson, but her address had been left blank on the prescription slip. Her name was not in the Walgreens computer system, so the tech asked the male if he could provide the birthdate and address that was required for the prescription. He provided the address of "1303 6th Avenue, DeWitt." The tech further testified the only name she was working with was "Claudia Williamson." She did not ask Mr. Thompson for his name because the pharmacy does not ask for that. (Tr. 208-209, L. 17-20) The State's next witness was the Walgreens pharmacist, Valerie Koutny. After the pharmacist

and a police officer testified, the State made an evidentiary motion outside the presence of the jury. The prosecutor stated his offer of proof in this way:

> The address given to the pharmacist, [sic], as she testified to, was 1303 6th Avenue in DeWitt, Iowa; however, the address included on the charging complaint as well as the Written Arraignment and Plea of Not Guilty that was signed by the Defendant himself is 1303 14th Street, DeWitt, Iowa. The State believes that is relevant for a number of reasons. Primarily because it shows that the Defendant did provide false information; therefore, it goes to show knowledge, motive and intent. The State certainly thinks it's relevant. (Tr. 237, L. 6-15)

The prosecutor misspoke in referring to "the pharmacist" as the witness in question. It was the pharmacy technician who had testified to an address given by Mr. Thompson. The pharmacist, Ms. Koutny, made no reference to any address information. (Tr. 221-230, L. 10-10)

The defense argued the Written Arraignment form had no relevance to the State's case but that if the Defendant testified, perhaps some of the content would become relevant to cross-examination. Additionally, defense counsel argued that

there was no evidence as to when the information was filled in on the arraignment form, or whether Mr. Thompson or his former attorney had filled in the address information. The attorney may have simply taken the address from the Complaint form, and the attorney may not have verified the address with Mr. Thompson. The handwriting providing information did not appear to match Defendant's signature, and his former attorney was not produced for testimony. (Tr. 238-239, L. 16-3, p. 242-244, L. 14-22, p. 247, L. 5-12)

In that first hearing on the motion, Judge Latham sustained the defense objection that admission of the Complaint and Affidavit would be unduly prejudicial. The judge reserved ruling on the admissibility of the Written Arraignment form. (Tr. 240, L. 5-16, p. 249, L. 8-18)

After the judge ruled the Complaint and Affidavit would be excluded from evidence, the prosecutor asked police officer Herve Denain, before the jury, if he determined an address for Mr. Thompson for the Complaint and Affidavit the officer filed. The officer testified that he did. The officer also testified that there are different ways police can come up with an address for a suspect, but he did not relate how he came up with the address that he put on the Complaint for Thompson. Over objection from the defense, and after a bench conference, the

judge allowed the officer to tell the jury the address he put on the Complaint. It was "1303 14th Street, Apartment Number 307, DeWitt, Iowa 52742." (Tr. 258-260, L. 11-14) The State's point in eliciting that address was to show it was different from the address the pharmacy tech had given to the officer, ie. 1303 6th Avenue, DeWitt. (Tr. 258, L. 2-13, pp. 259-260, L. 9-14)

On cross-examination, the officer admitted he did not know to whom the 1303 6th Avenue address was supposed to be attributed. He did agree with defense counsel that the pharmacy tech would likely be making a record of the address of the person whose name is on the prescription, Claudia Williamson, rather than the person dropping off the paper prescription. (Tr. 267-268, L. 4-6) Again, the pharmacy tech had previously testified the 6th Avenue address she had gotten was for the person whose name was on the prescription, Claudia Williamson. The pharmacy does not ask for personal information for the person dropping off the paper prescription. (Tr. 209, L. 2-25) After the officer's testimony was completed, and outside the presence of the jury, the judge acknowledged that defense counsel had properly objected to the reading of the address from the Complaint and Affidavit. The judge had ruled that it was permissible for the officer to refresh his memory as to the address by using the Complaint. (Tr. 277-278, L. 14-11)

Finally, the judge heard further arguments on the admissibility of the Written Arraignment form. The defense renewed prior arguments and again argued the address for Mr. Thompson at the time he signed the Written Arraignment several months after the day in question was irrelevant to the State's case-in-chief. (Tr. 305-307, L. 22-19) The prosecutor argued that the form was relevant "for the purposes of intent and motive as well as knowledge. The fact that somebody gave false information is actually one of the elements the State is required to prove" (Tr. 308, L. 3-14)

The judge ruled that certain paragraphs in the Written Arraignment were more prejudicial than probative, and he ordered paragraphs 1,3 and 7 to be redacted, but allowed the rest of the document to be admitted. Paragraph 3 stated Mr. Thompson's final level of education at 11th grade. (Tr. 308-309, L. 15-20)

The State put a deputy clerk of Court on the stand to offer the redacted Written Arraignment into evidence. Defense counsel renewed his earlier objection, and Exhibit 20 was admitted into evidence. The State failed to redact paragraph 3 as instructed, but no objection was raised on that point, (Tr. 316-317, L. 5-24) (Ex. 20; App. 16-17)

STANDARD OF REVIEW: Rulings on the admissibility of evidence are reviewed for an abuse of discretion. If the trial court exercises its discretion on grounds or for reasons that are clearly untenable, or to an extent that is clearly unreasonable, this Court will reverse for abuse of discretion. *State v. Dudley,* 856 N.W. 2d 668, 675 (Iowa 2014) If nonconstitutional error is established on the ruling, the Court will then determine the question of prejudice by using the harmless error standard. The question is whether the error affected substantial rights of the defendant to the degree that the trial was unfair. The error may be found harmless if other evidence of guilt was so overwhelming that the error did not affect the fairness of the trial. *State v. Parker,* 747 NW 2d 196, 209-210 (Iowa 2008)

The Merits

"Evidence which is not relevant is not admissible." Ia. R. Evid. 402. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury…" Ia. R.Evid. 403. The probative value of evidence is different than the relevancy of evidence. While the question of relevancy determines whether the evidence tends "to make a consequential fact more or less

probable," the probative value determination "gauges the strength and force of that evidence." *State v. Cromer,* 765 N.W. 2d 1, 8 (Iowa 2009). Unfair prejudice under Rule 403 is established when the evidence has "the undue tendency to suggest decisions on an improper basis." *State v. Niederbach,* 837 NW 2d 180, 202-203 (Iowa 2013) In the instant case, the improper basis is in the facts that Mr. Thompson was not asked for his address at Walgreens or Hy-Vee, and there was no evidence as to how Officer Denain came up with the address that he filled in on the Complaint and Affidavit. The improper basis is that the State used a mass of confusion on false and unsubstantiated facts to persuade the jury that there was documentary evidence of fraudulent knowledge and intent. The State had no other persuasive evidence on state of mind.

The prosecutor's confusion on the facts of the address the pharmacy tech took from Mr. Thompson arose from the police officer's confusion when he interviewed the tech, Hailey Drobushevich. In his report attached to the original Minutes of Testimony, Officer Denain wrote: "While dropping the prescription off, the suspect reported his address to be 1303 6th Ave. in DeWitt…" (Minutes, 11/15/17, p. 17; Confid. App. 4) In fact, Hailey had asked Mr. Thompson for the address of the woman whose name was written on the prescription slip, ie Claudia

Williamson. Although her name was written on the prescription slip, Ms. Williamson's address was left blank. (St. Ex. 4; App. 13) The tech then explained that the personal information she asked Mr. Thompson for was not his information, but rather the address and birthdate of Claudia Williamson:

> A. Yeah, so we get their address from everyone. We have to have their address and their birth date, name, obviously, and then like if they have insurance.
>
> Q. Okay. And did you gather that information in this case?
>
> A. I did. Because the name on the prescription wasn't in our system, so I asked for the address and birth date.
>
> Q. Do you remember the address that the subject provided?
>
> A. Yes. 1303 6th Avenue, DeWitt.
>
> Q. And do you remember the name that the subject provided?
>
> A. It said Claudia Williamson, on the prescription.
>
> Q. That's what the prescription said?
>
> A. Uh-huh.

> Q. And did the subject who was actually providing you with that prescription give you a name?
>
> A. No, we don't ask for that.
>
> Q. Okay. Did it occur to you the prescription was for someone other than the person who was providing it?
>
> A. Yes. So the prescription was for a female and the person dropping it off was a male. (Tr. 209; L. 2-25)

In his testimony, Officer Denain testified he talked to a "clerk" at HyVee. Both the prosecutor and the officer were confused on this testimony. Denain did not talk to any of the store employees at Hy-Vee. He responded to Walgreens where he spoke to "a manager, the pharmacist and the clerk." (Tr. 251-252, L. 22-2) (Minutes, 11/15/17, pp. 17, 21-22; Conf. App. 4-6) In his testimony, Denain said "Hy-Vee" when he clearly meant to say he spoke to a "clerk" at Walgreens. Unfortunately, Denain also testified the clerk from Hy-Vee told him Mr. Thompson had provided to her the address of "1303 6th Avenue in DeWitt." (Tr. 257-258, L. 21-10) There was no testimony from any employee of Hy-Vee as to any address Mr. Thompson had given. This is because no address was needed at

Hy-Vee. Markita had dropped off the prescription slip there and written her own name on it. If Hy-Vee required an address, the pharmacy staff would have gotten it from her when she presented the prescription. No address appears on the slip. (St. Ex. 16; App. 15)

At this point in the testimony, the pharmacy tech from Walgreens had testified Mr. Thompson gave the 6th Avenue address for Ms. Williamson, and Officer Denain had incorrectly testified a clerk at Hy-Vee told him Thompson gave the 6th Avenue address as his own. The unfair prejudice was then compounded when Judge Latham allowed Officer Denain to read the address for Mr. Thompson that the officer had entered for the original Complaint and Affidavit filed a week after the day in question. Remarkably, before being allowed to recite that address to the jury, the officer admitted on the stand that he did not know how he had come up with that address. He explained several different ways police can "come up with an address for the purposes of filing a complaint." He did not explain how he had "come up with an address" for Mr. Thompson. (Tr. 258-259, L. 11-8)

Without objection, the officer was then allowed to tell the jury the address he used for the Complaint was different from the address that Hailey, the pharmacy tech had given him, but he could not remember the address he entered on the

Complaint. The defense objected when the prosecutor asked for leave to show the officer the Complaint to refresh his memory. Defense counsel cited the earlier ruling excluding the Complaint from evidence, and at a bench conference additional arguments were raised. Defense counsel was still pointing to his original objection that the contents of a Complaint are irrelevant in the trial, and like the Trial Information, a Complaint cannot be considered as evidence. Reading from the Complaint in testimony is simply using the Complaint as evidence. (Tr. 238-240, L. 16-4)

Judge Latham changed his prior ruling that the Complaint would be unduly prejudicial. On the matter of allowing just the address on the Complaint, the judge concluded there would be no prejudice in simply allowing the reading of the address. The judge said, "The fact is the State -- my recollection is that they asked if they were able to verify the address of the Defendant and obtain it, and it was just basically verifying that the -- that that was the address that they obtained for the Defendant." (Tr. 281, L. 2-11)

Of course, the defect in the judge's reasoning was that the police had *not* verified Mr. Thompson's address. There was no evidence Mr. Thompson had ever given that 14th Street address to anyone, and Officer Denain had no recollection of

how he had "come up" with an address. Later testimony in the defense case would show that 1303 14th Street, Apt. 307 , in DeWitt was actually the address of Markita Elvington. She also testified Mr. Thompson sometimes visited her there, but he did not live there. (Tr. 345-347, L. 7-22)

Prejudice

As stated, the State's case for proving Mr. Thompson's knowledge and intent was grounded in the basic fact that he ran from the police officer at Hy-Vee and the allegation that he had given a false address to the pharmacy tech at Walgreens. In fact, giving a false address is set out as a possible element establishing fraud in the charged offense under Section 155A.23(1). (Marshaling Instruction #23; App. 19) There is no doubt that Officer Denain was confused about the facts of the 6th Avenue address and the 14th Street address in his testimony. There was never any testimony as to who in fact Claudia Williamson is, or who Mr. Thompson thought she was, or whether he even knew Markita's name was not on the prescription. The State provided no evidence as to what Mr. Thompson's actual address actually was. The basic indisputable facts are that the Walgreens tech did not ask Mr. Thompson for his address, and Officer Denain did not know where he got the14th Street address.

As defense counsel argued, use of information in the filed Complaint improperly gives the jury the implication that because an identification fact is stated in an official document, it must have been verified as correct. The defense made the same objection in regard to the Written Arraignment form. (Tr. 241-244, L. 17-22) In the instant case, the address in the Complaint was low in probative value because the officer could provide no foundation as to where he obtained the information. The improper evidence was unfairly prejudicial because it was the only evidence offered to show Mr. Thompson had any knowledge Markita was acting in fraud. The defense completely depended on Markita's testimony that Mr. Thompson had no knowledge of her fraud. In closing argument, defense counsel argued there is an innocent explanation for the fact a black man from Chicago would run if he believed he was being wrongly arrested. (Tr. 411-413, L. 18-13) There was no effective way to unravel and explain to the jury the incorrect and unsubstantiated evidence about the address confusion by the time closing arguments proceeded. The prosecutor capitalized on the confusion and argued it was the critical evidence of fraud. (Tr. 394-396, L. 19-6)

II.

SECTION 814.6A(4), THE CODE, IMPAIRS THIS COURT'S CONSTITUTIONAL DUTY TO SECURE JUSTICE FOR APPELLATE LITIGANTS AND THEREBY VIOLATES THE IOWA CONSTITUTION'S PROTECTION IN THE SEPARATION OF POWERS GUARANTEED BY ARTICLE III, SECTION 1.

PRESERVATION OF ERROR: By its order of December 31, 2019, this Court ordered Appellant to amend his page-proof brief to address this argument. (App. 38)

STANDARD OF REVIEW: In its resistance to the filing of Mr. Thompson's *pro se* brief, the State maintains "section 814.6A's change in procedure and disallowance of hybrid representation does not violate the constitutional separation of powers." (Resistance, p. 2; App. 36) Constitutional issues are reviewed *de novo*. In statutory interpretation, the Court will endeavor to construe the law in

such a way as to avoid ruling on a constitutional question. "If fairly possible, a statute will be construed to avoid doubt as to constitutionality." *Simmons v. State Public Defender,* 791 N.W. 2d 69, 73-74 (Iowa 2010). Because a statute enjoys a strong presumption of constitutionality, the party who claims the statute is unconstitutional carries a heavy burden of proof to rebut the presumption. The challenging party must show beyond a reasonable doubt that there is no reasonable basis upon which the Court could hold the statute constitutional. *Klouda v. Sixth Judicial District Dept. of Correctional Services,* 642 NW 2d 255, 260 (Iowa 2002).

The Merits

In its Resistance to the filing of the *pro se* brief, the State cited three sources of authority that Mr. Thompson will address here.

First, the State pointed to Article V, Section 14, of the Iowa Constitution:

> It shall be the duty of the general assembly to provide for the carrying into effect of this article and to provide for a general system of practice in all the courts of this state.

While that constitutional provision certainly comes into play in the instant analysis, the Court must keep in mind that the provision allows the legislature the power to "provide" only a "general" structure of practice for the courts. The question presented here is at what point does the legislature's power to create "a general system of practice" end. When does the legislative action invade this Court's province of its inherent power to supervise and control the methods by which it will operate to dispense justice?

The case the State has cited in its Resistance to the filing of the *pro se* brief is *Iowa Civil Liberties Union v. Critelli,* 244 N.W. 2d 564 (Iowa 1976). In that case, this Court said that if the legislature has not promulgated a rule to govern a particular aspect of procedure, the courts retain their inherent power to create and enforce their own rules. That dispute concerned a trial court's power to create and enforce deadlines in local rules for criminal cases. The defendant's position was that only the legislature could enact rules of procedure, and that argument was based on Article V, Section 14, of the Constitution, but this Court disagreed:

> We find Article V, Section 14,
> of the Constitution, read with
> the separation of powers
> clause, Article III, Section 1,
> does not manifest a plain
> intention to abrogate the

> inherent common law powers of the courts to adopt rules of practice. 244 N.W. 2d at 569.

Plainly, the courts retain their common law power to regulate their procedures in areas where the legislature has not spoken. The instant action presents the next question. Where the Supreme Court has properly instituted its own rule of procedure, does the legislature have the power to abrogate that procedural rule by enacting legislation? In this regard, the State relies on Section 602.4202(4), the Code:

> If the general assembly enacts a bill changing a rule or form, the general assembly's enactment supersedes a conflicting provision in the rule or form as submitted by the supreme court.

The question now is, "Where does this Court's Rule 6.901(2) stand?" That rule permits any "criminal defendant, applicant for postconviction relief or respondent committed under Iowa Code chapter 229A" to file a *pro se* supplemental brief after counsel files the page-proof brief. The State now relies on Section 814.6A(1) that was enacted July 1, 2019:

> A defendant who is currently represented by counsel shall

> not file any pro se document, including any brief, reply brief or motion in any Iowa court. The court shall not consider, and opposing counsel shall not respond to, such pro se filings.

The legislature has empowered itself to control the types of court papers the courts can consider and eliminated this Court's power to decide what it will consider for the proper litigation of actions. As a general proposition, the act certainly sounds like an invasion into the Judicial Branch's inherent power to govern its own procedures. The constitutional protection for the separation of powers is set out in Article III, Section 1:

> The powers of the government of Iowa shall be divided into three separate departments -- the legislative, the executive, and the judicial: and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted.

In *Klouda,* this Court faced perhaps the most momentous challenge to the legislature's power to dictate the nature of proceedings and procedures employed in the courts. In statutes enacted under Chapters 907 and 908, the legislature attempted to transfer the adjudication of probation revocation from judicial proceedings to administrative proceedings conducted by an administrative law judge (ALJ). Defendants who were facing such proceedings under a statutory "pilot project" raised a separation-of-powers challenge under Article III, Section 1 of the Iowa Constitution. 642 N.W. 2d at 257-258.

In a unanimous decision striking down the statutory scheme, this Court stated, "Judicial power vested in the courts by the Iowa Constitution is the power to decide and pronounce a judgment and carry it into effect." In a prefatory explanation to that pronouncement, the Court stated that the separation-of-powers doctrine is violated if the legislature "attempts to use powers granted by the constitution to another branch of government." Most importantly to the instanct issue, the Court held: "The doctrine requires that a branch of government not impair another in the performance of its *constitutional* duties." (emphasis supplied) *Klouda,* 642 N.W. 2d at 260-261.

The analysis the *Klouda* court engaged is fully analogous to the facts of the instant case. The Court concluded that certainly the legislature has the "general" power to define offenses and determine the sentencing options that are available to the courts for convictions on the offenses. After that, "the power to decide and pronounce a judgment and carry it into effect… falls within the realm of judicial power." The decisions on imposing probation and deciding whether to revoke it to "carry out" the suspended sentence or some other penalty is simply a function of the district court's power to pronounce the judgment and carry it out. The statutory scheme transferring that function to an ALJ impaired the Judicial Branch's ability to perform its constitutional duty and was a legislative encroachment upon the power of the judiciary. 642 N.W. 2d at 261-262.

By the same token, the legislature has the power by the terms of Article V, Section 14 "to provide for a general system of practice in all the courts of this state." The legislature certainly can create structures and procedures for the courts, but legislation cannot impair or impede the courts in carrying out their judicial duties as a separate branch. Under Article V, section 4 of the Constitution, this Supreme Court "shall have the power to issue all writs and processes necessary to secure justice to parties." It is true that same section recognizes the general

assembly may impose some "restrictions" upon the Court's appellate jurisdiction and some aspects of its processes in correcting errors at law. Those restrictions are limited to restrictions "the general assembly may, *by law,* prescribe." (emphasis added) The *Klouda* court held the legislature cannot impose restrictions that impede the courts from carrying out constitutional duties.

This Court's constitutional duty is "to issue all writs and process necessary to secure justice to parties." Prior to the enactment of Section 814.6A(1), this Court determined that consideration of *pro se* briefs from criminal defendants represented by counsel was necessary to securing justice in its decisions in criminal appeals. The Court created Rule 6.901(2)(b), I.R.A.P. (2009, amended 2017)) in order to carry out that constitutional duty. While the legislature has power to "generally" prescribe rules of practice and procedure, *the law* does not permit the legislature to impair the Court's constitutional duty. Section 814.6A(1) impairs the Court in its duty to secure justice for parties to litigation. There is no "fairly possible" way to construe the statute to avoid the constitutional question. The Court must strike down the section as unconstitutional. *Simmons,* 791 NW 2d at 74, 88.

Additionally, the Court must provide a construction of Section 602.4202(4), the Code, that prevents that section from running afoul of the Constitution. The

section must be construed to reflect the rule of construction that presumes the legislature would not intend to violate the articles of the Constitution. The statute must be construed to mean the legislature may supersede any court rule with a legislative rule that does not impair the Court's ability to carry out its constitutional duty to secure justice for parties in litigation.

CONCLUSION

The Court must first consider Mr. Thompson's *pro se* brief and argument to determine whether there was sufficient evidence to support the conviction. If the *pro se* argument prevails, the Court must reverse the conviction and remand the case with direction for entry of acquittal. Failing that, the Court must address the evidentiary issue.

The judge erred in reversing his initial ruling that evidence gleaned from the Complaint was unfairly prejudicial. Because the unsubstantiated evidence of the address on the Complaint and the Written Arraignment form was without foundation and irrelevant, but was used as the key evidence of fraudulent

knowledge and intent, the Court must find the error was prejudicial, and the conviction must be reversed for a new trial.

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 6.908(1), Appellant requests to be heard in oral argument.

/s/ Kent A. Simmons

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