IN THE SUPREME COURT OF IOWA

STATE OF IOWA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	S.CT. NO. 18-1737
	)	
MARIO GOODSON,	)	
	)	
Defendant-Appellant.	)	

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
HON. JOEL DALRYMPLE (JURY TRIAL & POST-TRIAL MOTIONS), HON. LINDA FANGMAN (ENHANCEMENT STIPULATION), & HON. GEORGE STIGLER (SENTENCING)

APPELLANT'S REPLY BRIEF AND ARGUMENT

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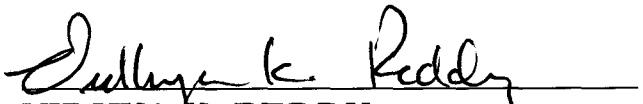
FINAL

CERTIFICATE OF SERVICE

On July 19, 2019, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Mario Goodson, No. 1143207, Fort Dodge Correctional Facility, 1550 "L" Street, Fort Dodge, IA 50501.

STATE APPELLATE DEFENDER



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IV. Whether the district court entered an illegal sentence in specifying the duration of Goodson's sex offender registry obligation?

This issue is not addressed in the reply brief.

STATEMENT OF THE CASE

COMES NOW the defendant-appellant, pursuant to Iowa R. App. P. 6.903(4), and hereby submits the following argument in reply to the State's brief filed on or about June 18, 2019.

ARGUMENT

I. The District Court erred in permitting the State to introduce evidence of Goodson's other crimes, wrongs, or bad acts.

A). Error Preservation: Senate File 589 is not retroactive and does not impact this appeal

Though the State does not appear to argue that Senate File 589 applies to this appeal, the State's brief does make reference to it. (State's Br.29) ("If this Court finds SF 589 is not applicable to pending appeals...."). Defendant notes that S.F.589 did not take effect until July 1, 2019 and thus has no application to this appeal. S.F. 589, 88th GA, §§ 31-32 (2019); Iowa Const. art. III, § 26; Iowa Code § 3.7(1) (2017).

A statute that impacts substantive rights will be applied prospectively only, and even if a statute is deemed procedural

our courts have "refused to apply a statute retrospectively when the statute eliminates or limits a remedy." Iowa Beta Chapter v. State, 763 N.W.2d 250, 266-67 (Iowa 2009). Section 31 of S.F.589 seeks to amend Iowa Code § 814.7 to disallow resolution of ineffective assistance of counsel claims on direct appeal. In depriving Goodson of his ability to remedy the constitutional ineffectiveness of his trial attorney on direct appeal even though the existing appellate record fully establishes his claim for relief, S.F.589 impacts Goodson's substantive rights and deprives him of a remedy available under the pre-amended version of § 814.7. It must be given prospective application.

As with prior legislative changes constricting appeal rights, this amendment must (at minimum) not be applied retroactively to cases where the underlying conviction was entered prior to the July 1, 2019 effective date of the statute. See Simberskey v. Smith, 27 Iowa 177, 178-180 (Iowa 1869) (statute altering time for appeals applies only if *judgment was entered* after effective date; over dissent which would hold it

applies if *appeal was instituted* after the effective date); James v. State, 479 N.W.2d 287, 290 (Iowa 1991); Giles v. State, 511 N.W.2d 622, 624 (Iowa 1994).

Additionally, given that Goodson's notice of appeal was filed before S.F.589 went into effect, the Iowa Code's general savings provision renders the amendments inapplicable to this case. Iowa Code § 4.13 (2017).

Moreover, retroactive application of S.F.589 to already-pending appeal cases to deprive the appellate court of authority to address or remedy claims already before it would be unconstitutional as a violation of separation of powers. McSurely v. McGrew, 140 Iowa 163, 118 N.W. 415, 417–18 (1908); Frink v. Clark, 285 N.W. 681, 685 (1939).

II. The trial judge erred in failing to recuse himself (a) from trial and (b) from consideration of Goodson's post-trial motion alleging improper contact between the judge and jurors.

A). Error Preservation: Where disqualification is required, recusal is required *sua sponte*

Where disqualification is required, judges have a duty to recuse themselves *sua sponte*. Our Iowa Supreme Court has

stated (in the context of a criminal direct appeal case requesting a new trial based on the non-recusal of the trial judge): "Briefly stated, Canon 3C(1)(a), [now Iowa Code of Judicial Conduct R. 51:2.11(A)] is basically a broad standard by which a judge should *sua sponte* determine the matter of self-recusation." State v. Smith, 242 N.W.2d 320, 323 (Iowa 1976) (emphasis added). "Such recusation may be self-initiated, or triggered by the filing of a motion" but "[i]n either event... it is for the judge... to initially determine whether a fair trial dictates recusation." Id. Under the referenced standard, a "judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed." Iowa Code of Judicial Conduct R. 51:2.11 cmt. [2].

The State cites Biddle on error preservation (State's Br.39-40), but the Court in Biddle appears not to have actually addressed the question of whether trial counsel must object to preserve error on a judge's improper failure to recuse, concluding it "need not reach the ineffective-assistance-of-

counsel issue" because "the district court did not improperly aid the prosecution...." State v. Biddle, 652 N.W.2d 191, 198 (Iowa 2002). See also Id. at 199 ("We conclude the district court did not improperly aid the State on the chain-of-custody issue. Because we reach this conclusion, we need not address the ineffective-assistance-of-counsel issue.").

The decisions of both the Court of Appeals and the Supreme Court in State v. Toles support the conclusion that (given the judge's duty to recuse himself sua sponte), even if there is no objection below, the appellate court will address whether the district court abused its discretion "in failing to raise the issue of disqualification *on its own motion.*" State v. Toles, No. 15–0321, 2016 WL 1358959, at *3 (Iowa Ct. App. April 6, 2016) (emphasis added), *aff'd as to this issue by* State v. Toles, 885 N.W.2d 407, 407-408 (Iowa 2016).

The Court of Appeals in Toles noted that "It is arguable whether the issue is preserved for our review" as "Toles did not make a motion for recusal or otherwise raise the issue at the time of sentencing." Id. at *1. "However, Toles argues the

judge had a duty to recuse himself of his own motion." Id. If it were clear-cut that trial counsel must object to error in non-recusal, Toles's failure to make any objection below would render error clearly unpreserved – but the Court of Appeals did not simply conclude error was unpreserved, stating instead that error preservation was "arguable" given Toles's claim that the judge had a duty to recuse himself on his own motion. Id.

Toles also raised an ineffective-assistance-of-counsel alternative on the issue. But the Court of Appeals first concluded "we cannot say the district court abused its considerable discretion in failing to raise the issue of disqualification *on its own mo*tion", before separately addressing the question of whether "counsel was ineffective in failing to request the sentencing judge recuse himself." Id. at *3. The Supreme Court then accepted further review and affirmed both the analysis and the conclusion "in the portion of the court of appeals decision addressing Toles's claim that the judge should have recused himself." Toles, 885 N.W.2d at

408. However, the Supreme Court vacated the portion of the Court of Appeals decision which had held that "Toles's counsel was not ineffective for failing to file a motion for recusal at the sentencing hearing". Id. The Supreme Court concluded "the record on direct appeal in this case is inadequate to determine whether Toles's counsel was ineffective for failing to file a motion for recusal" because with such motion "counsel could have requested a hearing at which Toles may have learned additional facts regarding any bias or prejudice the judge might have had towards Toles." The Supreme Court thus determined that Toles's ineffective-assistance-of-counsel claim must be left for another day. Id.

As in Toles, the question of whether the district court abused its discretion "in failing to raise the issue of disqualification *on its own motion*" may be raised and addressed on appeal regardless of whether any objection was raised below. Toles, 2016 WL 1358959, at *3 (emphasis added), *aff'd as to this issue by* Toles, 885 N.W.2d at 407. Certainly, if this Court were to conclude that the existing

record does not establish the district court judge's obligation to recuse himself on his own motion, the question of whether trial counsel rendered ineffective assistance in failing to discover or present additional information bearing on the disqualification issue would need to be raised and addressed in a postconviction-relief action. See Toles, 885 N.W.2d at 408 (determining ineffective claim required additional record development and, thus, must be left for another day).

B). Merits:

State v. Gardner did not address the standards set forth in Iowa Code of Judicial Conduct Rule 51:2.11, including whether "[t]he judge... served as a lawyer *in the matter in controversy...*" or whether the judge served "in any proceeding *in which the judge's impartiality might reasonably be questioned....*" Iowa Code of Judicial Conduct Rule 51:2.11 (emphasis added). Rather, the Court in Gardner focused exclusively on whether a constitutional or rule 5.605 violation was made out *on the basis that* the judge presided over a proceeding at which he *"function[ed] as a witness"* or was

otherwise "called upon to assess his or own credibility". State v. Gardner, 661 N.W.2d 116, 117-118 (Iowa 2003) (emphasis added).

After noting "A fair trial in a fair tribunal is a basic requirement of constitutional due process", the Court stated "A judge cannot be fair and impartial, however, when he or she is called upon to assess his or her own credibility in determining a matter." Id. at 117. The remainder of the Court's opinion focused solely on whether the judge presided over a proceeding in which he functioned as a witness or had to assess his own credibility. The alleged violation there was raised by the defendant and considered by the Court solely on the theory that recusal and a new trial was required because the trial judge functioned as a witness.

Indeed, the rule requiring recusal when the judge has served "as a lawyer in the matter in controversy" would not even have been at issue in Gardner because there the trial judge's involvement in the earlier proceeding had been *as a judge*, not as a lawyer. See Iowa Code of Judicial Conduct R.

51:2.11(A)(6)(a); Iowa Code § 602.1606(1)(b) (2017) (applying where the judicial officer served "as a lawyer in the matter in controversy"); Compare Gardner, 661 N.W.2d at 117 (trial judge had also "*presided over* a 1989 case in which the defendant pled guilty to second-degree robbery") (emphasis added). And though the question of whether the circumstances were such that the trial "judge's impartiality might reasonably be questioned" under Rule 51:2.11(A) was not addressed in Gardner, if it had been it might have been meaningful that the Gardner judge's involvement in the earlier proceeding had been as a neutral presiding judge, not as a lawyer in the position of an adversary (the prosecuting attorney) like in Goodson's case.

Gardner thus neither addresses or forecloses Goodson's claims that the trial judge's recusal was here required on grounds that the judge had "served as a lawyer *in the matter in controversy...*" or that the judge presided "in any proceeding *in which the judge's impartiality might reasonably be questioned....*" Iowa Code of Judicial Conduct R. 51:2.11(A)

(emphasis added); Iowa Code § 602.1606(1)(b) (emphasis added). To the contrary, the Court in Gardner noted that the State's "designation of judges as witnesses for purposes of proving prior convictions in the habitual violator phase", "while...not automatically a constitutional or rule [5.605] violation,... *causes laypersons to question the fairness of a process* that allows a judge to switch roles from one proceeding to the next." Gardner, 661 N.W.2d at 119 (emphasis added).

With regard to Goodson's alternative argument that the judge should at minimum have recused himself from consideration of Goodson's post-trial motions alleging improper contact between that judge and two jurors outside the courtroom, the State argues that "[t]he judge was not called as a witness and was not converted into a witness by ruling on this motion." (State's Br.50). But Iowa Rule of Evidence 5.605 "is violated whenever the judge functions as a witness, even though the judge may not actually take the stand to testify." Gardner, 661 N.W.2d at 118. 'Functioning

as a witness' encompasses any situation "when he or she is called upon to assess his or own credibility in determining a matter." Id. The fact that the judge was not here listed as a witness by any party does not alter the realities that (1) the judge had personal and unique knowledge concerning the facts in dispute (whether any aspect of the incident involved improper contact or interaction between the judge and the jurors, including possibly outside the view or hearing of Defendant), and (2) the judge's ruling certainly relied on an assessment of the credibility of his own statements "that no conversations took place between the jurors and the undersigned relative to the trial" and that the judge's role or motivation in the interaction was merely "error in assuming the jurors were appearing for the [unrelated] trial occurring" in the other courtroom. (5/9/18 Order, p.5) (App.36).

III. Principles of merger or double jeopardy prohibited cumulative punishment for both First Degree Burglary and Third Degree Sexual Abuse.

A). Error Preservation: State v. Love

State v. Love reaffirmed the well-established principle that, even if a factual record could support a finding of multiple acts to support multiple convictions, merger is required if the instructions did not require the jury to find separate acts. Love does not support the State's suggestions that the issue here is really a jury instruction error, or that merger is avoided if the evidence would merely support a finding of multiple acts (even if the instructions did not require the jury to actually find multiple acts). To the contrary, the Court in Love explicitly stated "we conclude the crimes must merge even though under different instructions, the evidence might have been sufficient to support separate crimes...." State v. Love, 858 N.W.2d 721, 725 (Iowa 2015). This was so despite the fact that Love had not challenged the jury instructions below. See Id. at 724 ("In this case, the instructions developed by the parties and approved by the

district court did not ask the jury to engage in the fact-finding necessary... to support separate acts of assault.").

As to Justice Mansfield's special concurrence in Love, the State correctly states Goodson's position: "that Justice Mansfield's last paragraph in Love only applies if the State 'ensure[s] the defendant is charged and the jury is instructed in a way that requires a finding of separate conduct for each conviction.'" (State's Br.56) (quoting Love, 858 N.W.2d at 727–28 & n.1 (Mansfield, J., concurring specially)).

Justice Mansfield's analysis appears to make this clear, explicitly stating: "***When the instructions permit the jury to convict the defendant twice*** of the same offense (or of an offense and a lesser included offense) ***based on the same conduct***, and two guilty verdicts are returned, merger must follow." Love, 858 N.W.2d at 726 (Mansfield, J., concurring specially) (emphasis added). Thus, where "[i]n [State v.] Flanders, [546 N.W.2d 221, 225 (Iowa Ct. App. 1996)] the instructions did not separate the sexual abuse that was the basis for the defendant's sexual abuse conviction from the

sexual abuse that was the basis for the defendant's first-degree kidnapping instruction", "*merger was required even though the jury could have found two separate acts of sexual abuse if asked to do so.*" Id. (Mansfield, J., concurring specially) (emphasis added). According to Justice Mansfield, the Court in Love "reiterates this basic proposition today, and rightly so." Id. (Mansfield, J., concurring specially) (citing cases holding that, even if evidence would be sufficient to support a finding of multiple acts, merger is required if the instructions don't require the jury to find such separate acts).

"If the State wishes to avoid this outcome, it must ensure the defendant is charged *and the jury is instructed in a way that requires* a finding of separate conduct for each conviction." Id. at 727 (Mansfield, J., concurring specially) (emphasis added). Thus, in Love, "Had the jury been instructed separately on the separate incidents of the kicking, the beating with a table leg, and the pouring of the nail polish remover, this could have supported multiple assault convictions...." Id. (Mansfield, J., concurring specially).

"*Once the State proposes instructions that eliminate the possibility the same conduct will be used to convict the defendant twice* of the same offense or convict the defendant of both a greater offense and a lesser included offense, the ball is in the defendant's court" to raise any issues concerning whether the different acts identified by the State in the instructions on each count qualify as separate units of prosecution under the statute and/or satisfy standards of separateness under Velez and Ross[1]. Id. (Mansfield, J., concurring specially) (emphasis added). On such defense objection: (1) the district court may find that the different acts identified under each count constitute "separate criminal acts" as a matter of law and submit the multiple counts to the jury; (2) the district court may conclude the identified acts fail to

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[1] See State v. Velez, 829 N.W.2d 572, 583 (Iowa 2013) (setting forth "Separate-acts test", "Break-in-the-action test", and "Completed-acts test" for "determining what constitutes multiple acts and thus could be considered multiple counts" for unit of prosecution purposes); State v. Ross, 845 N.W.2d 692, 702-706 (Iowa 2014) (discussing Velez tests in considering unit of prosecution question).

qualify as "separate criminal acts" as a matter of law and thus "allow only one of the counts to go to the jury"; or (3) if the court is uncertain whether the conduct identified in each count was sufficiently separate from the conduct identified in each other count, the court "could ask the jury to make a finding on this issue, based upon the legislature's definition of the offense and using the standards... discussed in Velez... and Ross...." Id. (Mansfield, J., concurring specially).

It is only this latter *unit of prosecution* issue which ("[o]nce the State proposes instructions that eliminate the possibility the same conduct will be used to convict the defendant twice") would have to be raised by a defense objection to the instructions and, if not so raised, would be judged only on whether "substantial evidence supported" a determination that the different acts specified in the instructions on each count were sufficiently separate under Ross and Velez. Id. (Mansfield, J., concurring specially). But this is only *after* the State meets its initial burden to secure "instructions that eliminate the possibility the same conduct

will be used to convict the defendant twice" – if the State does not meet this initial burden within the instructions, than the longstanding rule (reaffirmed by the court in Love) requires that, even if the evidence could support a finding of multiple acts, merger is required where the instructions did not require the jury to find separate acts on each count. Id. (Mansfield, J., concurring specially); See also Bryson v. State, 886 N.W.2d 860, 864–65 (Iowa Ct. App. 2016) ("We agree with Bryson that, even though the record supports different assaults, the fact finder must make separate factual findings that show separate assaults supported the robbery and burglary claims if we are to conclude the offenses do not merge. [...] Because the jury was never asked to do the fact-finding necessary to support two separate assaults, the district court erred in concluding merger was precluded by the existence of sufficient evidence to support two separate, nonsexual assaults.") (citing Love, 858 N.W.2d at 724).

Love controls the outcome under the merger statute, and a similar analysis also applies under the double jeopardy

clause (as merger and double jeopardy claims are analyzed similarly). Statutory merger and constitutional double jeopardy claims of cumulative punishment both implicate the legality of the sentence. State v. Anderson, 565 N.W.2d 340, 342-44 (Iowa 1997) (merger); State v. Bruegger, 773 N.W.2d 862, 872, *citing* Hill v. United States, 368 U.S. 424, 430 (1962) (referencing double jeopardy claim of cumulative punishment); Jeffers v. United States, 432 U.S. 137, 154-155 (1977) (same).

B). The Domestic Abuse verdict does not establish that the jury found Burglary on Alterative 6(a) in addition to Alternative 6(b)

The State argues that merger is not here required on the alternative marshalled in element 6(b) of the Burglary instruction because the jury's other verdicts establish that it found element 6 to have been established under *both* alternatives 6(a) and 6(b). Specifically, the State argues that because the jury also convicted Goodson on the Count 3 charge of Domestic Abuse Assault Causing Bodily Injury, "the jury returned another verdict that establishes facts satisfying alternative 6(a)", obviating any possibility "that the jury might

have convicted... on alternative 6(b) alone." (State's Br.60). Defendant disagrees.

Alternative 6(a) of the Burglary instruction would have required a jury finding that "The defendant *intentionally or recklessly* inflicted bodily injury... on Annie Thomas". (Jury Instruction 19) (App.17) (emphasis added). But no finding of intent or recklessness necessarily inhered in the jury's Count 3 guilty verdict for Domestic Abuse as that offense was marshalled to the jury. While one alternative of element 1 for the Domestic Abuse instruction would have required a finding of intent to inflict pain or injury, the other two alternatives would not have required any finding of intent (nor any finding of recklessness); and the jury was told it could convict on *any one* of the listed alternatives. See (Jury Instruction 33) (App.19) ("1. On or about the 23rd of December, 2016, the defendant did an act which was intended to cause pain or injury to Annie Thomas, *or did an act that resulted in physical contact* which was insulting or offensive to Annie Thomas, *or placed Annie Thomas in fear* of an immediate physical contact

which would have been painful, injurious, insulting or offensive to Annie Thomas.") (emphasis added); (Jury Instruction 18) (App.--) ("Where two or more alternative theories are presented, or where to or more facts would produce the same result, the law does not require each juror to agree as to which theory or fact leads to his or her verdict. It is the verdict itself which must be unanimous, not the theory or facts upon which it is based.").

The jury's guilty verdict on Count 3 thus does not establish that the jury necessarily also found alternative 6(a) of the Burglary instruction, so as to avoid merger. See State v. Love, 858 N.W.2d 721, 724-725 (Iowa 2015) (even where factual record could support finding of separate acts, if instructions did not require the jury *to find* separate acts, merger is required); Id. at 725 ("the test of merger is purely a review of the legal elements and does not consider the facts of a particular case") (citing State v. Hickman, 623 N.W.2d 847, 850 (Iowa 2001)).

C). 903B does not support legislative intent for cumulative punishments

In support of legislative intent to authorize multiple punishments, the state notes that the 903B special sentence that applies to third-degree sex abuse would not apply to first-degree burglary. (State's Br.63). But the inapplicability of the section 903B special sentence to the greater offense has not precluded merger for other Chapter 709 offenses (all of which are subject to some length of special sentence under sections 903B.1 or 903B.2). See State v. Anderson, 565 N.W.2d 340, 342-44 (Iowa 1997) (section 709.11 assault with intent to commit sex abuse merges with first degree burglary; specifically referencing Halliburton rule that legislative intent for multiple punishment would preclude merger); State v. Kolberg, No. 10–1535, 2011 WL 3116959, at *2-4 (Iowa Ct. App. July 27, 2011) (merger of section 709.11 assault with intent to commit sexual abuse into burglary); State v. Jandreau, 846 N.W.2d 529 (Iowa Ct. App. 2014) (same); State v. Morgan, 559 N.W.2d 603, 611 (Iowa 1997) (merger of sex

abuse into kidnapping); State v. Whitfield, 315 N.W.2d 753, 755 (Iowa 1982) (same).

Note also that the other significant impact applicable to sex offenses – registration requirements – is specifically required for First Degree Burglary in violation of section 713.3(1)(d). Iowa Code § 692A.102(1)(c)(16) (2017). Registration is also authorized on for other First Degree Burglaries, upon a determination that the offense "was sexually motivated". Iowa Code § 692A.102(1)(c)(17) (2017).

The fact that 903B special sentences apply to Sex Abuse but not Burglary should not preclude merger.

Alternatively and at minimum, if this Court concludes any greater punishment for the Third Degree Sex Abuse offense based on the prior-offense enhancement actually renders it the 'higher' offense, then the conviction and sentence for First Degree Burglary should be vacated. See State v. Whitfield, 315 N.W.2d 753, 755 (Iowa 1982) (affirming defendant's conviction on the greater offense but reversing

conviction on lesser included offense); State v. Mapp, 585 N.W.2d 746, 749 (Iowa 1998) (same).

IV. The District Court entered an illegal sentence in specifying the duration of Goodson's sex offender registry obligation.

This issue is not addressed in the Reply Brief.

CONCLUSION

On the issue raised in Division I, Goodson respectfully requests this Court reverse his convictions and remand for a new trial, excluding the evidence of prior bad acts.

On the issue raised in Division II, Goodson respectfully requests that his convictions be reversed, and this matter be remanded to the district court for a new trial before a different judge. Alternatively, Goodson respectfully requests that the rulings denying Goodson's post-trial motions for new trial be vacated and remanded to the district court for a new hearing and consideration by a different judge.

On the issue raised in Division III, Goodson respectfully requests this Court vacate his judgment and sentence for the Third Degree Sexual Abuse count. Alternatively, and at

minimum, if this Court concludes the higher punishment for the Third Degree Sex Abuse offense (based on the prior-offense enhancement) actually renders it the 'higher' offense, then the conviction and sentence for First Degree Burglary should be vacated.

On the issue raised in Division IV, Goodson respectfully requests that the portion of the sentencing order specifying the duration of the registration obligation ("lifetime registry") should be vacated, and a corrected sentencing order should be entered which omits to specify any duration of an obligation to register.

ATTORNEY'S COST CERTIFICATE

I, the undersigned, hereby certify that the true cost of producing the necessary copies of the foregoing Reply Brief and Argument was $3.65, and that amount has been paid in full by the State Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS

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

[X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 4,245 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(f)(1).

Vidhya K. Reddy Dated: 7/19/19

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