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. JOAL DALRYMPLE (JURY TRIAL & POST-TRIAL MOTIONS), HON. LINDA FANGMAN (ENHANCEMENT STIPULATION), & HON. GEORGE STIGLER (SENTENCING)

APPELLANT'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED JULY 1, 2020

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CERTIFICATE OF SERVICE

On July 21, 2020, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Mario Goodson, No. 1143207, Fort Dodge Correctional Facility, 1550 "L" Street, Fort Dodge, IA 50501.

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the district court erred in permitting the State to introduce evidence of Goodson's other crimes, wrongs, or bad acts?

II. Whether 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?

III. Whether principles of Merger or Double Jeopardy prohibited cumulative punishment for both First Degree Burglary and Third Degree Sexual Abuse?

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STATEMENT IN SUPPORT OF FURTHER REVIEW

1). *Sua Sponte Recusal.* This Court's guidance is sought on the question of whether the claim that a judge erred in failing to recuse himself *sua sponte* must be preserved below in the district court before it may be raised on appeal (Division II issue). State v. Biddle, 652 N.W.2d 191, 198 (Iowa 2002) does not resolve this question. Goodson believes State v. Toles, 885 N.W.2d 407, 407-408 (Iowa 2016) supports his view that such claims may be raised on direct appeal even absent a timely request for recusal in the district court.

2). *Merger/Double Jeopardy Analysis after West:* This Court's guidance is also sought on the question of how the principles of State v. West, 924 N.W.2d 502 (Iowa 2019) are applied to cumulative punishment claims of merger and double jeopardy where the elementally lesser offense normally carries a lesser punishment, but is subject to a prior offense enhancement which increases its punishment (Division III issue).

Further, this Court is also requested to consider whether the consideration found meaningful in West (that the elementally lesser offense carries a greater punishment than the elementally greater offense[1]) should not *prevent merger altogether* but, rather, should merely control *which* punishment is imposed – e.g., that in this circumstance the "greater" offense (the one surviving merger) is not the one with the extra element, but rather the one carrying the higher punishment.

3). *Prior Bad Acts:* Defendant also urges the Court of Appeals erred in declining to grant a new trial based on the improper submission of prior bad acts evidence (Division I issue).

[1] By 'elementally greater offense' Defendant intends to refer to the offense which includes all the elements of the other offense *plus* one or more additional elements. By 'elementally lesser offense' Defendant intends to refer to the offense which is wholly included in the other offense, and carries fewer elements than the other.

STATEMENT OF THE CASE

Nature of the Case: Defendant-Appellant Mario Goodson seeks further review of the Court of Appeals' decision affirming his convictions for: First Degree Burglary, a Class B Felony in violation of Iowa Code section 713.3; Operating a Vehicle Without the Owner's Consent, an Aggravated Misdemeanor in violation of Iowa Code section 714.7; Domestic Abuse Assault Causing Bodily Injury, a Serious Misdemeanor, in violation of Iowa Code section 708.2A(2); and Third Degree Sexual Abuse, a Class C Forcible Felony in violation of Iowa Code section 709.4(1)(a) and enhanced pursuant to section 901A.2(3).

ARGUMENT

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

In State v. Taylor, 689 N.W.2d 116, 124-125 (Iowa 2004), the Court determined prior incidents of domestic abuse were relevant to the defendant's intent, which was at issue. In contrast, the other acts evidence here was not relevant for any

legitimate purpose, as Goodson's intent was not a disputed issue. Goodson admitted he got "pissed" and hit or backhanded Thomas, but denied the extensive assault claimed by Thomas. Unlike cases where this Court has found prior acts of domestic violence relevant to show intent, Goodson did not claim the charged incident was accidental. See Id.; State v. Newell, 710 N.W.2d 6, 22 (Iowa 2006).

But even if relevant, the probative value of the other acts evidence was substantially outweighed by the danger of unfair prejudice. State v. Richards, 879 N.W.2d 140, 152 (Iowa 2016). The December 8 incident as well as the prior incident observed by a neighbor were heavily disputed and thus addressed frequently to the jury, the scope of the prior acts evidence was not limited, no cautionary instruction was given, and the jury was likely to consider the bad acts evidence for an improper propensity purpose. Goodson must be afforded a new trial.

Conclusion: Goodson respectfully requests this Court reverse his convictions and remand for a new trial, excluding the evidence of prior bad acts.

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

Goodson claims that the trial judge was obligated to recuse himself sua sponte from the trial and post-trial motion hearing at issue, owing to: (a) the judge's prior service as a prosecutor "in the matter in controversy"; (b) because the proceeding was one "in which the judge's impartiality might reasonably be questioned"; and (c) owing to the judge's personal knowledge and function as a witness as to the post-trial motions for new trial.

The Court of Appeals declined to reach the merits of Goodson's recusal claims, instead denying them exclusively on error preservation grounds owing to trial counsel's failure to timely file a motion for recusal below. (Ct.App.Opin.10-11). Defendant urges that this was erroneous. Where

disqualification is required, judges have a duty to recuse themselves *sua sponte*, even in the absence of any motion or request by the parties. The question of whether the district court judge erred and abused his discretion *in failing to recuse himself sua sponte* is thus appropriately raised and addressed directly on appeal, even absent a timely request for recusal in the district court.

As our Iowa Supreme Court has noted (in the context of a criminal direct appeal case requesting a new trial based on the non-recusal of the trial judge): "…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" – e.g., the matter of "whether a fair trial dictates recusation" under the attendant circumstances. State v. Smith, 242 N.W.2d 320, 323 (Iowa 1976) (emphasis added). That is, as made explicit in the comments to that Rule, the "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] (emphasis added).

The Court of Appeals relies on State v. Biddle, 652 N.W.2d 191, 198 (Iowa 2002) in support of its conclusion that recusal matters must be timely raised by motion in the district court before they can be raised on appeal. (Ct.App.Opin.11). But the Supreme 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…." Biddle, 652 N.W.2d at 198. That is, because the Supreme Court in Biddle reached and rejected the recusal claim *on its merits* (concluding recusal was not in fact required under the circumstances), that Court found it unnecessary to resolve the *error preservation question* of whether the recusal claim could be considered directly or only under an ineffective assistance of counsel framework on appeal given that it had not been timely raised below. 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."). In contrast to Biddle, the Court of Appeals in the instant case *declined* to reach Goodson's recusal claims on the merits, instead denying them *exclusively* on error preservation grounds. See e.g. (Ct.App.Opin.11) ("error was not preserved. So we do not address Goodson's arguments.") (footnote omitted).

Goodson urges that the decisions of both the Court of Appeals and the Supreme Court in State v. Toles support his conclusion that, given a judge's duty to recuse himself *sua sponte*, an appellate court should reach and address a defendant's claim that the district court abused its discretion "in failing to raise the issue of disqualification *on its own motion*" even if no objection had been raised by the defendant below. 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' conclusion in the instant case that Toles is not supportive of Goodson's position (Ct.App.Opin.p.11 at n.7), is erroneous.

The Court of Appeals' decision in Toles noted "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". Toles, 2016 WL 1358959, at *1. "However, Toles argues the judge had a duty to recuse himself of his own motion" under Judicial Conduct Rule 51:2.11 "'regardless of whether a motion to disqualify is filed.'" Id. If it were clear-cut that trial counsel must object to error in non-recusal, then Toles's failure to make any objection below would have rendered the error clearly unpreserved – but the Court of Appeals did not simply conclude error was unpreserved, stating instead that error preservation was "arguable" where Toles claimed the judge had a duty to recuse himself *on his own motion*. Id.

As noted by the Court of Appeals herein, the defendant in Toles had also raised an ineffective-assistance-of-counsel

alternative on the recusal issue. See (Ct.App.Opin.11 at n.7). But importantly, the Court of Appeals in Toles *first* concluded (1) "we cannot say the district court abused its considerable discretion in failing to raise the issue of disqualification *on its own motion*", before then *separately* addressing (2) the question of whether "counsel was ineffective in failing to request the sentencing judge recuse himself." Toles, 2016 WL 1358959, at *3.[2] This would seem to suggest the question of

[2] Specifically, the Court of Appeals in Toles (after analyzing whether the district court should have recused itself *sua sponte*) stated as follows:

> […] We cannot say the district court abused its considerable discretion in failing to raise the issue of disqualification on its own motion.
>
> Toles also contends his counsel was ineffective in failing to request the sentencing judge recuse himself. To establish a claim of ineffective assistance of counsel, Toles must show that his "trial counsel failed to perform an essential duty and that this failure resulted in prejudice." State v. Kress, 636 N.W.2d 12, 20 (Iowa 2001). Because we conclude the judge had no reason to recuse himself, counsel did not fail to perform an essential duty in foregoing a motion to disqualify the sentencing judge. Accordingly, Toles's claim of ineffective assistance of counsel fails. See State v. Dudley, 766 N.W.2d 606, 620 (Iowa 2009)("[C]ounsel has no duty to raise an issue that has no merit.").

(1) whether "the district court abused its considerable discretion in failing to raise the issue of disqualification *on its own motion*" (e.g., in the absence of a request by a party), is *separate and distinct* from the question of (2) whether trial counsel renders "ineffective [assistance] in failing to request the sentencing judge recuse himself" (e.g., in failing to timely file a motion for recusal below). Id. The former of these questions (whether recusal was required *sua sponte*) can be addressed directly, and does not depend on the assertion of an ineffective assistance of counsel alternative.

The decision of the Supreme Court after accepting further review in Toles also supports Goodson's position. On further review, the Toles Supreme Court (1) affirmed both the "analysis" and the conclusion reached "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

> For the foregoing reasons, we affirm the defendant's sentence.

State v. Toles, No. 15–0321, 2016 WL 1358959, at *3 (Iowa Ct. App. April 6, 2016), *aff'd in part, vacated in part by* State v. Toles, 885 N.W.2d 407 (Iowa 2016).

(emphasis added). However, the Supreme Court vacated (2) 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. In vacating the Court of Appeals determination on the merits of the ineffective assistance of counsel claim, the Supreme Court determined "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*" by which means *"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." Id. The Supreme Court thus determined that Toles's ineffective-assistance-of-counsel claim must be left for another day. Id.

Again, this resolution by the Toles Supreme Court supports Goodson's view that the question of (1) whether the district court abused its discretion in failing to recuse himself *sua sponte* despite the absence of any request by a party, is *separate and distinct* from the question of (2) whether trial

counsel's failure to timely file a motion for recusal amounted to ineffective assistance of counsel. The former question, which is the one raised here, can be addressed directly and does not depend on the assertion of an ineffective assistance of counsel alternative. Compare (Ct.App.Opin p.11 at n.7) (finding it "significant that the defendant in Toles also raised the recusal issue under the ineffective-assistance rubric" while "Goodson has not raised a similar theory here.").

In both Biddle and Toles the appellate courts addressed and resolved *on the merits* the question of whether the district court should have recused itself sua sponte even in the absence of any motion by a party. In contrast, the Court of Appeals in the instant case *declined to reach or resolve the merits* of Goodson's arguments for sua sponte recusal, rejecting them *exclusively* on error preservation grounds. See e.g. (Ct.App.Opin.11). This was improper and should be corrected on Further Review.

This Supreme Court should accept further review of Goodson's case and hold that, 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 or request for recusal was timely raised below. Toles, 2016 WL 1358959, at *3 (emphasis added), *aff'd as to this issue by* Toles, 885 N.W.2d at 407.[3] Upon then reaching the merits of Goodson's claim, the Supreme Court is requested to conclude the district court judge abused his discretion in failing to recuse himself *sua sponte*, and that Goodson must accordingly be afforded a new trial or, at minimum, a new hearing on his post-trial motions.

Conclusion: Goodson respectfully requests that the Supreme Court accept further review, reach the merits of Goodson's recusal claims, and conclude that the district court

[3] 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 *separate question* of whether trial counsel rendered ineffective assistance in failing to file a motion for disqualification and/or failing to discover or present additional information bearing on the disqualification issue would of course need to be raised and addressed instead by way of 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).

judge abused his discretion in failing to recuse himself *sua sponte*.

As to remedy, 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 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.

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

A). The Judgment and Sentence for Third Degree Sexual Abuse must be vacated.

The Double Jeopardy Clause of the Federal Constitution provides that: "No person shall… be subject for the same offence to be twice put in jeopardy of life or limb…." U.S. Const. Amend. V. The federal Double Jeopardy protection against cumulative punishment bars the imposition of "multiple punishments for the *same offense*." Brown v. Ohio,

432 U.S. 161, 165 (1977) (emphasis added). The question of which crimes will be deemed to be the "same offense" for double jeopardy purposes, in turn, is determined by application of the Blockburger v. United States, 284 U.S. 299, 304 (1932) "legal elements test", which test is met if one offense is wholly included in the other. State v. Bullock, 638 N.W.2d 728, 731-32 (Iowa 2002).

Iowa's merger doctrine, (expressed in Iowa Code section 701.9 and Iowa Rule of Criminal Procedure 2.6(2)), codifies this federal double jeopardy protection against cumulative punishment, by providing that a defendant cannot be convicted of both a "public offense" and an "included" offense:

> **Iowa Code § 701.9. Merger of lesser included offenses**
>
> No person shall be convicted of a public offense which is *necessarily included* in another public offense of which the person is convicted. If the jury returns a verdict of guilty of more than one offense and such verdict conflicts with this section, the court shall enter judgment of guilty of the greater of the offenses only.
>
> **Iowa Rule of Criminal Procedure 2.6(2)**. Prosecution and judgment. Upon prosecution for a public offense, the defendant may be convicted of either the public offense charged or an *included offense*, but not both.

Iowa Code § 701.9 (emphasis added); Iowa R. Crim. P. 2.6(2) (emphasis modified). See also Bullock, 638 N.W.2d at 731; State v. Anderson, 565 N.W.2d 340, 343 (Iowa 1997).

The test for "included" offenses under Iowa's merger statute is identical to the test for "same" offenses under federal double jeopardy protections – that is, the Blockburger legal elements test. See State v. Halliburton, 539 N.W.2d 339, 344 (Iowa 1995); Bullock, 638 N.W.2d at 731-32. Indeed, because section 701.9 codifies double jeopardy protections against cumulative punishment, claims are identically analyzed under both the federal Double Jeopardy Clause and the section 701.9 merger statute. See Halliburton, 539 N.W.2d at 344.

This analysis involves a two-step process. First, the court must determine whether the two crimes at issue constitute the "same" offense – or more precisely, (a) the "same" offense in federal Double Jeopardy terms, and (b) a "public offense" plus a "necessarily included" offense in the terms of the merger statute. See Halliburton, 539 N.W.2d at 344; Iowa Code § 701.9. As noted, this is done by applying

the Blockburger elements test. If the Blockburger elements test is satisfied, the court must then turn to the second step of examining whether the legislature "clearly indicated" an intention to impose "multiple punishments" for the two offenses. State v. Lewis, 514 N.W.2d 63, 69 (Iowa 1994); See also Bullock, 638 N.W.2d at 732. Absent such finding of clear legislative intent for multiple punishments, imposition of a conviction and sentence for both offenses violates double jeopardy and merger principles. Anderson, 565 N.W.2d at 342-44; State v. Mapp, 585 N.W.2d 746, 749 (Iowa 1998).

In the present case, the Court of Appeals agreed that the Blockburger legal elements test was satisfied, as the public offense of third-degree sexual abuse was wholly included in the public offense of first-degree burglary. (Ct.App.Opin.11-15). However, the Court of Appeals rejected Goodson's cumulative punishment claim under the second step of the analysis, reasoning that legislative intent exists for multiple punishment as to both of these particular crimes.

(Ct.App.Opin.15-20). Goodson respectfully urges that such conclusion was erroneous.

Nothing in the language of statutes governing the offenses at issue in the present case evidence any clear legislative intent to authorize multiple punishment for these offenses. See Iowa Code § 713.3 (First Degree Burglary); § 709.4 (Third Degree Sexual Abuse). And while Iowa Appellate Courts have never directly considered the cumulative punishment issue in the context of the two offenses here (First Degree Burglary, and Third Degree Sexual Abuse), appellate courts *have* concluded merger is appropriate as to First Degree Burglary and Assault with Intent to Commit Sex Abuse. Anderson, 565 N.W.2d at 343–44 (concluding assault with intent to commit sexual abuse resulting in bodily injury merges with first degree burglary, even after specifically referencing Halliburton rule that merger would not be required if legislature intended multiple punishments). See also State v. Jandreau, 846 N.W.2d 529 (Iowa Ct. App. 2014) (finding convictions for first degree burglary and assault with intent to

commit sexual abuse should merge); State v. Kolberg, No. 10–1535, 2011 WL 3116959, at *2-4 (Iowa Ct. App. July 27, 2011) (same). It has also been held that First and Second Degree Sexual Abuse merge into First Degree Kidnapping. See Bullock, 638 N.W.2d at 733 (citing State v. Morgan, 559 N.W.2d 603, 611 (Iowa 1997), and State v. Whitfield, 315 N.W.2d 753, 755 (Iowa 1982)).

Defendant acknowledges that in State v. West, 924 N.W.2d 502, 511 (Iowa 2019), our Supreme Court interpreted prior caselaw to "stand for the proposition that where the [elementally[4]] greater offense has a penalty that is not in excess of the [elementally] lesser included offense, a legislative intent to permit multiple punishments arises" because "[o]therwise, there would be little point to the greater offense." But the present case is distinguishable. The elementally lesser offense of Third Degree Sexual Abuse generally carries a

[4] By 'elementally greater offense' Defendant intends to refer to the offense which includes all the elements of the other offense *plus* one or more additional elements. By 'elementally lesser offense' Defendant intends to refer to the offense which is wholly included in the other offense, and carries fewer elements than the other.

lesser penalty than the elementally greater offense of First Degree Burglary. This is thus not a case where "there would never be a reason to charge a defendant with the greater offense." West, 924 N.W.2d at 510 (discussing Halliburton rationale). It is only when the Sex Abuse offense is enhanced under section § 901A.2(3) due to a prior offense that the penalty for the Sex Abuse offense grows. This enhancement is based on *the offender* and not the underlying crime itself. As our Supreme Court has previously recognized, recidivist sentencing statutes are irrelevant to double jeopardy analysis, which analysis focuses on the underlying offenses rather than the enhanced sentence predicated on the existence of prior convictions. See State v. Tobin, 333 N.W.2d 842, 845 (Iowa 1983). See also State v. Klemme, No. 10-0859, 2011 WL 2112463, at *4 (Iowa Ct. App. May 25, 2011) ("…[S]entence enhancements do not create a separate crime"; citing State v. Woody, 613 N.W.2d 215, 217 (Iowa 2000)).

Neither should the fact that 903B special sentences apply to Sex Abuse but not Burglary be deemed to evidence a

legislative intent for multiple punishments. Importantly, 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, as for other First Degree Burglaries, upon a determination that the offense "was sexually motivated". Iowa Code § 692A.102(1)(c)(17) (2017).

Because the elements test is satisfied, and there is no "clearly indicated" legislative intent to impose multiple punishments as to these offenses, a merger or combining of convictions was required under both merger and double jeopardy principles. Hickman, 623 N.W.2d at 851. The required remedy is to affirm the conviction and sentence only for the "greater" offense, while vacating the conviction and sentence for the "lesser" offense. Whitfield, 315 N.W.2d at 755; Mapp, 585 N.W.2d at 749. Thus, in the present case, this Court should vacate the conviction and sentence for Third Degree Sexual Abuse as the elementally lesser offense, while affirming the conviction and sentence for First Degree Burglary as the elementally greater offense (e.g., the offense which includes all the elements of the other offense *plus* one or more additional elements). See Whitfield, 315 N.W.2d at

755 (affirming defendant's conviction on the greater offense but reversing conviction on lesser included offense); Mapp, 585 N.W.2d at 749 (same).

B). Alternatively, the First Degree Burglary Judgment and Sentence must be Vacated.

Alternatively, if this Court determines that the higher enhanced punishment applicable to Third Degree Sexual Abuse makes it improper to merge that offense out, then at minimum the Court should instead vacate the conviction and sentence for the First Degree Burglary. In doing so, this Court is requested to clarify that the consideration found meaningful in West (that the elementally lesser offense carries a greater punishment than the elementally greater offense) should not *prevent merger altogether* but, rather, should merely control *which* punishment is imposed. That is, the Court is requested to clarify that the evaluation of the respective punishments may speak to legislative intent concerning *which* of the two crimes should be considered the "greater" (and thus surviving) offense, as distinct from evidencing a legislative intention that

no merger occur at all and that *both* convictions should be imposed and simultaneously coexist.

The Court of Appeals rejected this alternative argument, stating: "The problem is the elements test" and the fact that "the burglary charge is not 'necessarily included in' the sexual-abuse charge, an essential prerequisite to merger. See Iowa Code § 701.9." (Ct.App.Opin.19 at n.12). Defendant urges that this conclusion is grounded in a misinterpretation of Iowa Code section 701.9.

That statute, which codifies double jeopardy protection against cumulative punishment, states as follows:

> No person shall be *convicted* of a public offense which is necessarily included in another public offense of which the person is *convicted*. If the jury returns a verdict of guilty of more than one offense and such verdict conflicts with this section, the court shall enter judgment of guilty of the greater of the offenses only.

Iowa Code § 701.9. The first sentence of section 701.9 requires merger (by prohibiting the simultaneous existence of convictions for both offenses), while the second sentence

specifies *which* offense should survive the merger (the "greater of the offenses only").

The first sentence of section 701.9 establishes *when* a merger must occur. This sentence prohibits the entry of convictions for *both* a "public offense" *and* a "necessarily included" offense. It is the simultaneous existence of *convictions for both* which is prohibited – the first sentence cares not whether conviction is entered only on the "public offense" or instead only on the "included offense", so long as convictions are not entered on them *both.* See also Iowa R. Crim. P. 2.6(2) ("…the defendant may be convicted of either the public offense charged or an included offense, but not both.").

The question of *which* offense survives the merger (e.g., which controls the conviction entered) is instead controlled by the second sentence of the statute: "If the jury returns a verdict of guilty of more than one offense and such verdict conflicts with this section, the court shall enter judgment of guilty of the greater of the offenses only." Iowa Code § 701.9.

This second sentence does not speak in terms of either the 'necessarily included offense' or in terms of the 'public offense' in which the other is necessarily included. Rather, it states that the surviving conviction should be for "the greater of the offenses only."

Putting these together, the first sentence prohibits the coexistence of convictions for both a public offense and a necessarily concluded offense ("No person *shall*…"), and the second sentence states a conviction should be entered on "the greater of the offenses *only*." Iowa Code § 701.9 (emphasis added). Nothing in the language of this statute states that, if the "necessarily included" offense happens to be the "greater of the offenses", then the first sentence of the statute should be disregarded – e.g., that the person *can* then be convicted of both the public offense and the necessarily included offense, in direct contravention of the explicit prohibition contained in the first sentence. Iowa Code § 701.9 ("*No person shall be convicted* of a public offense which is necessarily included in

another public offense *of which the person is convicted*")
(emphasis added).

Note also that § 701.9 codifies double jeopardy protections against cumulative punishment. Bullock, 638 N.W.2d at 731. The double jeopardy protection against cumulative punishment prohibits the entry of cumulative punishments for the "same" offense – and crimes are deemed to be the "same" offense if one is wholly included in the other, regardless of whether the elements match exactly (without either offense including an element not included in the other) or whether one offense includes all the elements of the other plus an extra element not required by the other. See e.g., State v. Lewis, 514 N.W.2d 63, 68-69 (Iowa 1994); State v. Coffin, 504 N.W.2d 893, 896 (Iowa 1993); State v. Wilson, 523 N.W.2d 440, 441 (Iowa 1994). In both of these circumstances, the offenses are deemed the "same", regardless of whether one or the other offense includes an extra element not included in the other. And what is prohibited under both the double jeopardy protection against cumulative punishment

and under the §701.9 merger statute, is that convictions should not simultaneously exist for both such offenses.

Thus, the first sentence of § 701.9 states that a defendant cannot be convicted of both a public offense and a 'necessarily included' offense (that is, two offenses which satisfy the Blockburger elements test and are thus deemed the "same" offense for purposes of cumulative punishment). The second sentence of § 701.9 then specifies which of the two offenses a conviction should be entered on – "the greater of the offenses only." The Court's analysis in West examining the punishment applicable to each offense should be understood only as aiding the Court's understanding of which offense is the "greater" (and thus surviving) offense under the language of the second sentence. This view better comports with the language of Iowa's merger statute, and thus with the legislative intent as expressed in the words of that statute itself.

Conclusion: Goodson respectfully requests this Court vacate his judgment and sentence for the Third Degree Sexual Abuse count.

Alternatively and at minimum, Goodson respectfully requests this Court vacate his judgment and sentence for the First Degree Burglary count.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was $ 0 , and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR FURTHER REVIEWS

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

[X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style, font 14 point and contains 5,206 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

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