SUPREME COURT NO. 19-1509
POLK COUNTY NO. AGCR325199

IN THE SUPREME COURT OF IOWA

STATE OF IOWA
Plaintiff-Appellee,

v.

JAMEESHA RENAE ALLEN
Defendant-Appellant.

ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
HONORABLE DAVID PORTER, DISTRICT COURT JUDGE

RESISTANCE TO APPLICATION FOR FURTHER REVIEW OF A DECISION OF THE COURT OF APPEALS OF IOWA FROM JANUARY 21, 2021

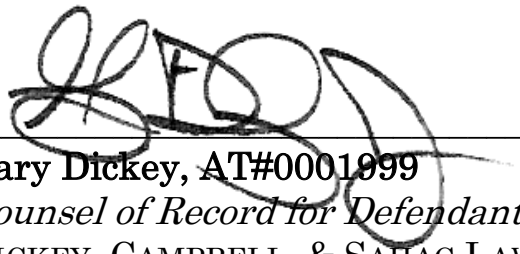
Gary Dickey
Counsel of Record
DICKEY, CAMPBELL, & SAHAG LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008 FAX: (515) 288-5010
EMAIL: gary@iowajustice.com

PROOF OF SERVICE & CERTIFICATE OF FILING

On February 16, 2021, I served this resistance on the Appellant at her last known address in Des Moines and all other parties by EDMS to their respective counsel:

Attorney General
Criminal Appeals Division
Hoover Building
Des Moines, Iowa 50319
(515) 281-5976

I further certify that I did file this resistance with the Clerk of the Iowa Supreme Court by EDMS on February 16, 2021.



Gary Dickey, AT#0001999
Counsel of Record for Defendant-Appellant
DICKEY, CAMPBELL, & SAHAG LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008 FAX: (515) 288-5010
EMAIL: gary@iowajustice.com

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REASONS FOR DENYING FURTHER REVIEW

FURTHER REVIEW IS NOT NECESSARY BECAUSE THE COURT OF APPEALS CORRECTLY APPLIED *STATE V. SHARPE*, 304 N.W.2D 22 (IOWA 1983), AND THE *SHARPE* DECISION REQUIRES REVERSAL OF ALLEN'S CONVICTION

On the morning of the first day of trial, Jameesha Allen's prosecutor faced a dilemma. He charged her with assault causing bodily injury, yet he did not subpoena her accuser to appear at trial. Consequently, the prosecutor had no means to prove the existence of bodily injury beyond a reasonable doubt. Rather than dismiss the case for lack of evidence, he amended the trial information to charge assault with a dangerous weapon. Not only did the amendment change the elements of Allen's charge, it ratcheted up her punishment. The court of appeals correctly held that Iowa Rule of Criminal Procedure 2.4(8) prohibits such gamesmanship. *State v. Allen*, 2021 Iowa App. LEXIS 57 (Iowa Ct. App. Jan. 21, 2021).

There are three problems with the State's arguments, both of which demonstrate why further review should not be granted. First, the State of Iowa is simply wrong to assert in its application for further review that the court of appeals conflicts with any

decision from this Court. (Application at 8). In *State v. Sharpe*, 304 N.W.3d 220 (Iowa 1981), this Court observed that an amended offense is not "wholly new" if it merely charges an alternative means of committing the same crime. *Id.* at 223. But, an amended charge that includes a new element and increases penalty is a wholly new offense for purposes of Rule 2.4. *Id.* The court of appeals correctly applied the *Sharpe* decision to the facts of this case and reversed Allen's conviction. *Allen*, 2012 Iowa App. LEXIS 57 at *6-10. Neither the court's ultimate conclusion, nor its analysis conflicts with any decision of this Court.

Second, the State's further review request offers no principled approach to interpreting Rule 2.4. The State's attempt to distinguish between the "elements" of an offense and the "means" of committing is simply a results-oriented attempt to preserve Allen's conviction. It is also inconsistent with the post-*Apprendi* understanding as to ascertaining the elements of a criminal offense.

Third, further review would not provide the State any relief because the day-of-the-trial amendment prejudiced her trial

strategy, which is an independent basis to reverse her conviction. *See* Iowa R. Crim. 2.4(8) (prohibiting an amendment to an indictment if it would prejudice the defendant's substantial rights). In addition, Allen's conviction should be set aside because of the erroneous admission of evidence, ineffective assistance of counsel, and prosecutorial misconduct—all of which this Court would have to decide for the first time on further review. Whether the amendment constitutes a wholly new offense would not change the outcome of the case, making this a poor vehicle for further review.

A. Applicable legal principles

Iowa Rule of Criminal Procedure 2.4(8) governs amendments to trial informations and provides in part:

> The court may, on motion of the state, either before or during the trial, order the indictment amended so as to correct errors or omissions in matters of form or substance. Amendment is not allowed if substantial rights of the defendant are prejudiced by the amendment, or if a wholly new and different offense is charged.

Iowa R. Crim. P. 2.4(8).[1] An amendment prejudices the "substantial rights" of the defendant if it creates such surprised that the defendant would have to change trial strategy to meet the charge in the amended information." *State v. Maghee*, 573 N.W.2d 1, 6 (Iowa 1997). Likewise, an amendment adds a "new and different offense" if the new charge has different elements. *Sharpe*, 304 N.W.2d at 223.

B. The court of appeals correctly applied the *Sharpe* decision to prohibit the State's day-of-trial amendment

The decision in *Sharpe* illustrates how Rule 2.4(8) is designed to operate. In *Sharpe*, the State originally charged the defendant by trial information with second-degree murder. *Id.* at 222. It later amended the trial information and substituted the crime of first-degree murder. *Id.* The Iowa Supreme Court held that the amendment was erroneous. *Id.* at 225. In particular, the court found relevant the fact that first-degree murder contains elements not found in second-degree. *Id.* at 223. Additionally, the court also noted that "there is a great disparity in punishment"

[1] The term "indictment" embraces the trial information, and all provisions of law applying to prosecutions on indictments apply also to informations. Iowa R. Crim. P. 2.5(5).

between the two charges. *Id.* Accordingly, the court concluded that it would be "difficult to say that first-degree murder is not a 'wholly new and different offense' from second-degree murder." *Id.*

As explained in *Sharpe*, the Rule 2.4(8) provides "a relatively narrow view" of amendments to an indictment. *Id.* at 222-23 (noting the rule merely adopted the prior statutory law). Prior case law supports this view. *Id.* at 222. For example, this Court has previously held that the State could not amend a trial information charging escape to charge willful escape because the former did not require the element of intent. *Id.* (citing *State v. Gowins*, 211 N.W.2d 302, 306 (Iowa 1973)). Similarly, this Court has held the State could not amend the charge in an information from forgery to uttering a forged instrument for the same reason. *Id.* (citing *State v. Hancock*, 164 N.W.2d 330, 336-37 (Iowa 1969)).

There is no serious dispute that assault causing bodily injury and assault with a dangerous weapon have different elements:

Assault Causing Bodily Injury	Assault with a Dangerous Weapon
Assaultive act	Assaultive act
Apparent ability	Apparent ability
Caused bodily injury	Display a dangerous weapon in a threatening manner

Compare Iowa Code § 708.2(2) *with* § 708.2(3). From *Sharpe*, *Gowins*, and *Hancock*, therefore, it follows *a fortiori* that the State's amendment to the trial information ran afoul of Rule 2.4(8) because it substituted a new offense with different elements. *See also State v. McLachlan*, 2014 Iowa App. LEXIS 941 at *7-9 (Iowa Ct. App. Oct. 1, 2014) (explaining that offenses are different when the latter expands "criminal liability by charging a separate offense, with separate elements"). For this reason, the court of appeals was correct to hold that reversal was required "[b]ecause the new charge had elements not included in the original charge and carried a harsher punishment." *Allen*, 2021 Iowa App. LEXIS 57 at *10.

C. The State's attempt to distinguish between elements of an offense and the means of committing an offense does not change the outcome

The State seeks further review by suggesting the new charge was simply "a different means of committing assault." (State's Br. at 21). In this way, the State attempts to find a foothold in *State v. Williams*, 305 N.W.2d 428 (Iowa 1981). There, the prosecution added a drug trafficking conspiracy count to a trial information that already contained charges for delivery and possession with intent to deliver. *Id.* at 430. The statute at issue in *Williams* provided:

> Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance, or to act with, enter into a common scheme or design with, or conspire with one or more other persons to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

Id. (citing Iowa Code section 204.402(1) (1977)). In *Williams*, this Court found persuasive federal case law distinguishing the elements of an offense from "alternative means of committing the same offense." *Williams*, 305 N.W.2d at 431 (citing *United States v. Viserto*, 596 F.2d 531 (2d Cir. 1979)). The Court also noted that

the "[s]everity of punishment for the various violations does not turn upon which the various *acts* were committed in violation of the section, but rather what the controlled *substance* was involved." *Id.* at 43

Subsequent federal case law has undermined this reasoning. In *Mathis v. United States*, ___ U.S. ___ 136 S. Ct. 2243 (2016), the United States Supreme Court clarified the difference between the "elements" of an offense and the "means" by which to commit the offense. "Elements are the constituent parts of a crimes legal definition—the things the prosecution must prove to sustain a conviction." *Id.* at ___, 136 S. Ct. at 2248. The means of committing an offense, in contrast, are "legally extraneous circumstances." *Id.* at ___, 136 S. Ct. at 2249. "If statutory alternatives carry different punishments, then under *Apprendi* they must be elements." *Id.* at ___, 136 S. Ct. at 2256. "Conversely, if a statutory list is drafted to offer illustrative examples, then it includes only a crime's means of commission." *Id.* Consistent with *Mathis*, federal courts now interpret Iowa Code chapter 124 to contain different elements; not alternate

means of committing a unified controlled substance violation. *See United States v. Ford*, 888 F.3d 922, 930 (8th Cir. 2018) (holding Iowa's drug statute is divisible because different drug types and quantities have different punishments); *United States v. Maldonado*, 864 F.3d 893, 898 (8th Cir. 2017) (explaining that Iowa Code chapter 124 "lists elements in the alternative, and thereby define[s] multiple crimes").

Under *Apprendi* and its progeny, the amendment in Allen's case is a distinct offense and not merely an alternative means of committing the offense. The amended charge of assault with a dangerous weapon altered the thing the "prosecution must prove to sustain a conviction." *Mathis*, 136 S. Ct. at 2248 (citing *Black's Law Dictionary* 634 (10th ed. 2014)). It also resulted in a harsher punishment. Thus, the State's reliance on *Williams's* outdated analysis amounts to nothing because assault while displaying a dangerous weapon is not simply a different means of committing assault causing bodily injury. *See United States v. McGee*, 890 F.3d 730, 736-37 (8th Cir. 2018) (explaining that Assault While Displaying a Dangerous Weapon is a separate offense because it

contains section "708.2(3) imposes an increased punishment when a dangerous weapon is use or displayed in committing an assault").

D. This case is a poor vehicle to grant further review because Allen is entitled to have her conviction set aside on several other grounds

Even if the State is correct in its analysis of whether the amended charge constituted a wholly new offense, the inquiry would not end there. Rule 2.4(8) also prohibits substitution of charges if the defendant's substantial rights would be prejudiced by the amendment. Iowa R. Crim. P. 2.4(8). There can be no meaningful dispute that the change from a serious misdemeanor to an aggravated misdemeanor adversely affected Allen's substantial rights. The difference between the two categories of misdemeanors is significant in terms of the severity of punishment, place of confinement, and requirement to submit a DNA specimen. Iowa Code §§ 81.2, 903.1(1); 903.4. The State has virtually no answer to the prejudice analysis except to say, by virtue of facing an increased punishment except to suggest that it could have been worse:

> The penalty did increase. And it is true the difference might mean serving in prison (rather than jail) and submitting a DNA sample. . . . But the most pressing change here was one year, not the difference between life in prison and a 25-year sentence discussed in *Sharpe*.

(State's Application at 30). The text of Rule 2.4(8), however, requires only a showing of "prejudice" to her "substantial rights." That inquiry does not depend on whether the State could have sought an even more severe penalty.

Allen was also prejudiced by the eleventh-hour nature of the amended charge. The prosecutor kept the amendment in his pocket for months as a negotiation tool and waited until the very last moment to file it:

> THE COURT: Okay. As it relates to Count III, the assault while displaying a dangerous weapon, why are we now charging Ms. Allen with that effectively six days before trial when you had all those same facts on April 2?
>
> MR. STERBICK: I believe that we had a status conference only a matter of weeks ago. I believe we had the ability to conclude this without the need for trial. That did not proceed that way. The State didn't amend the trial information prior to that date in the belief that we could resolve this case.

(Vol. I Trial Tr. at 11). But, it was clear to both the State and Allen that the complaining witness, Desean Waldrip, was not going to testify at trial. (Vol. I Trial Tr. at 27-28, 59-60). Indeed, the State did not even try to subpoena him for trial. (Vol. I Trial Tr. at 60). Thus, it was entirely reasonable for Allen to proceed to trial on the belief that the State would not be able to prove the bodily injury element in Waldrip's absence. A "defendant has a right to rely upon the acts alleged as constituting the offense with which he is charged and rest his defense upon a lack of proof by the State of the acts specified." *State v. Cooper*, 223 N.W.2d 177, 180 (Iowa 1974) (finding reversible error in allowing amendment at the close of evidence). Here, the State prejudiced Allen's right to rest her defense on a lack of proof of a bodily injury. For this reason, the ultimate outcome of the appeal would not change even with further review.

CONCLUSION

For the reasons set forth above, Jameesha Allen requests this Court deny the State's application for further review.

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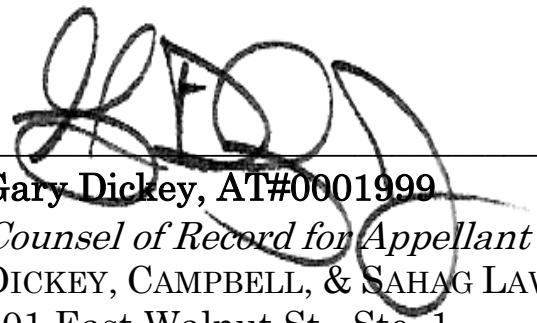

Gary Dickey, AT#0001999
Counsel of Record for Appellant
DICKEY, CAMPBELL, & SAHAG LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008 FAX: (515) 288-5010
EMAIL: gary@iowajustice.com