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IN THE SUPREME COURT OF IOWA

NO. 19-1981
Muscatine County No. FECR059164

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANNETTE DEE CAHILL,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR MUSCATINE COUNTY
THE HONORABLE PATRICK A. MCELYEA

APPELLANT'S FINAL BRIEF

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Routing Statement

Pursuant to Rule 6.1101(2)(c) of the Iowa Rules of Appellate Procedure, this is a case presenting substantial issues of first impression therefore, this case should be retained by the Iowa Supreme Court.

Statement of the Case

Annette Cahill was charged with Murder in the First Degree in a Complaint issued May 31st, 2018, in relation to the October 1992 death of Corey Wieneke. Cahill was tried in March of 2019; the jury was unable to reach a unanimous verdict, and the Court declared a mistrial on March 13th, 2019. Cahill was retried in September of 2019, and was found guilty of Murder in the Second Degree on September 19th, 2019. She was sentenced on November 22nd to a fifty year indeterminate prison sentence.

Cahill filed several pretrial motions which were denied by the Court, and those denials are appealed herein: Motion under Iowa Rules of Evidence 5.104 to exclude the testimony of Jessica Becker and Cynthia Krogh; subsequent Motion to exclude testimony of Scott Payne, whom the State listed as a witness between the two trials; and a Motion to Dismiss based on pre-accusatorial delay.

At the time of the second trial, defense counsel was presented with late discovery by the State. One of these newly-discovered items was a document describing attempted DNA testing on the hairs found in Wieneke's hand at the scene of the crime. The document was incomplete (as described in the relevant sections below), though it suggested that the hairs were not suitable for testing.

After Cahill's conviction, defense counsel engaged in additional research and discovered that the hairs were never tested for mitochondrial DNA, a new method discussed at length below. Defense counsel filed a post-trial Motion to compel the State to test these hairs. This Motion was denied.

Statement of Facts

Corey Wieneke (hereafter, "Wieneke"), was killed in his residence in Muscatine County, Iowa on October 13, 1992 (Transcript p. 22, Lines 10-15). The cause of death was blunt force trauma to the head (Transcript p. 100, Lines 7-8), caused presumably by a baseball bat found at the edge of the gravel road near Wieneke's house (Transcript p. 25, Lines 24-25, p. 26, Lines 1-4).

At the time of his death, Wieneke had ongoing sexual relationships with several women (Transcript p. 309, Lines 17-23). Understanding these myriad relationships is helpful to follow the narrative of the days surrounding Wieneke's death. The Defendant Annette Cahill, had a relationship with Wieneke in the months prior to his death, fostered by Cahill's part-time employment at the Wieneke family bar, Wink's Tap, in West Liberty (Transcript p. 444, Lines 6-14). In the same time period, Wieneke also fathered a child with Wendi Marshall (Transcript p. 310, Lines 7-11). The child Wieneke conceived with Marshall was an infant at the time of Wieneke's death (Transcript p. 311, Lines 4-6). Wieneke had not officially claimed paternity of the child, and had limited interactions with her (Transcript p. 310, Lines 7-25; Transcript p. 311, Lines 4-5).

In addition to his ongoing relationships with Cahill and Marshall, Wieneke was engaged to his high-school sweetheart, Jody Hotz. Hotz and Wieneke lived together in a two-bedroom house on a small piece of land near their hometown of West Liberty (Transcript p. 28, Lines 7-8). Finally, Wieneke was engaged in a sexual relationship with Missy Morrison, who was married to another man (Transcript p. 361, Lines 13-24).

On October 12, 1992, the night before Wieneke died, he was working at Wink's Tap (Transcript p. 192, Lines 4-9). Cahill and Marshall, both of whom were romantically involved with Wieneke at the time, were also at the bar that night (Transcript p. 313, Lines 9-15). Cahill became intoxicated and went to Wieneke's car to wait for him to get off work (Transcript p. 313, Lines 19-24; p. 314, Lines 13-15). In the early morning hours of October 13th, 1992, Wieneke left the bar with Marshall and the pair got into his car (Transcript p. 314, Lines 13- 18). Cahill was annoyed that Wieneke brought another woman (Marshall) with them in the car (Transcript p. 316, 8-16). Wieneke planned to drop off Cahill at her home, and then proceed with Marshall (Transcript p. 316, Line 2). While the car was en route to Cahill's home, she became upset and tried to get out (Transcript p. 316, Lines 2-7). Wieneke stopped the car and had a conversation with Cahill at the side of the road, witnessed by Marshall (Transcript p. 316, Lines 21-22). After the conversation by the side of the road, Wieneke changed his plans and drove Marshall back to her car, which was parked behind Wink's Tap (Transcript p. 317, Lines 24-25, p. 318, Lines 1-3). At that point, he and Cahill went to Cahill's home, where they had sex (Transcript p. 481, Lines 8-9). After having sex with

Cahill, Wieneke was seen at an after-hours party in honor of a friend's birthday, and then went to Marshall's apartment in West Liberty (Transcript p. 322, Lines 21-25, p. 323, Lines 1- 8). He left a brown paper bag with a six pack of beer and two shotgun shells inside the refrigerator at Marshall's apartment (Transcript p. 322, Lines 7-13).

Wieneke finally made it home in the early morning hours of October 13, sometime before his fiancée, Hotz, left for her job as a bank teller (Transcript p. 192, Lines 16-23). Hotz saw Wieneke asleep in bed prior to leaving for work on October 13 (Transcript p. 194, Lines 2-4). Hotz found Wieneke's body upon returning home from work that day, at approximately 6:30 pm (Transcript p. 197, Lines 5-10; p. 20-24). She noted that he was cold to the touch (Transcript p. 200, Lines 10-14). She called 911 immediately (Transcript p. 200, Lines 13-16).

There were no signs of forced entry to the house (Transcript p. 42, Lines 9-12). The house would not have been difficult to enter because, according to witnesses, only a piece of particle board blocked the space where a pane of glass had been, near the doorknob (Transcript p. 44, Lines 10-15). This particle board had been removed and was sitting near the side of the house after the murder (Transcript p. 41, Lines 20-25, p. 42, Lines 1-4). There did not appear to law enforcement, or Hotz, to have been any property stolen or disturbed in the home (Transcript p. 42, Lines 9-12, p. 200, Lines 22-24). Wieneke's pet dog had been released into the yard, where she was running freely when Hotz arrived home (Transcript p. 197, Lines 18-25, p. 198, Lines 1-6).

Wieneke's body was found, face-down, on the floor near his bed (Transcript p.

111, Lines 17-18). He was wearing a pair of briefs (Transcript p. 111, Lines 19-20). Wieneke sustained 13 blunt force injuries, only one of which—the blow to the back of his head—could have been fatal (Transcript p. 100, Lines 11-23, p. 102, Lines 16-23). Wieneke sustained the other injuries prior to his death (Transcript p. 105, Lines 4-14). Wieneke was a large young man, at 5'9" tall and 225 pounds (Transcript p. 112, Lines 6-7). He was physically strong and had played football in high school (Transcript p. 202, Lines 16-17).

A reporter with a local news station found a bloody, youth-size aluminum bat near the side of the road, about a quarter mile east of Wieneke's house (Transcript p. 78, Lines 20-22). There were no fingerprints found on the bat (Transcript p. 235, Lines 20-25, p. 236 Lines 1-2).. The blood on the bat was of the same type as Wieneke (Transcript p. 40, Lines 4-12). There were microscopic red fibers on the bat, but no other distinctive markings (Transcript p. 47, Lines 6-19). The bat was of a type easily obtainable at Walmart in 1992 (Transcript p. 42, Lines 19-25, p. 43, Lines 1-4). Hotz denied that she or Wieneke owned a bat of any type (Transcript p. 190, Lines 4-5). No evidence was presented at trial that anyone in Cahill's household had a bat, either. State and local law enforcement investigated the Wieneke murder in the months and years following his death (Transcript p. 43, 18-25, p. 44, 1-3). During this time, they identified three reasons Wieneke may have been murdered: drugs, gambling, and infidelity.

Wieneke was a known drug user, and his autopsy results found both cocaine and

marijuana in his system (Transcript p. 111, Lines 10-13; p. 133, Lines 10-17; p. 323, Lines 10-15). Wieneke sourced his drugs from multiple individuals, including suppliers Slim Zamora, Ken Hammond, and Otis Sanders (Transcript p. 59, Lines 6-13; p. 134, Lines 5-17). In the late night and early morning hours shortly before he was killed, Wieneke attended an after-hours party with one of his drug suppliers, Slim Zamora (Transcript p. 58, Lines 15-25, p. 59, Lines 1-13). At trial, the defense argued that an unpaid debt to one of his suppliers may have been a motive for the baseball bat attack (Transcript p. 482, Lines 6-8). Law enforcement did, in fact, explore this possibility, but did not arrest Zamora (Transcript p. 132; Lines 16-25, p. 133, Line 1). Wieneke also ran a small illegal gambling operation from his workplace, Wink's Tap, which was discovered by investigators (Transcript p. 133, Lines 2-9). Despite the obvious potential for conflict arising from the purchase and sale of illegal drugs, the operation of an illegal gambling operation, and the transport of cash associated with such enterprises, authorities never arrested anyone who might have had reason to harm Wieneke in connection with drugs and gambling (Transcript p. 132; Lines 16-25, p. 133, Line 1).

Investigators also pursued a theory that Wieneke may have been murdered by a jealous husband of one of his romantic partners (Transcript p. 142, Lines 4-19). Around the time of his death, Wieneke was involved in sexual relationships with at least four women: his fiancée (Hotz), his two girlfriends (Marshall and Cahill), and another local woman named Missy Morrison (Transcript p. 142, Lines 4-8; p. 361, Lines 13-24). Missy Morrison's husband, Bob Morrison, was a large and violent man (Transcript p.

62, Lines 4-9; p. 138, Lines 13-20). In fact, Bob Morrison later murdered his wife Missy amid accusations of her infidelity and intent to leave him, and then killed himself (Transcript p. 138, Lines 13-20). Investigator Lieutenant Orr (later Muscatine County Sheriff, now deceased) theorized that Morrison was the real killer, but ultimately did not follow up further, because with Morrison dead, there was no one to prosecute for Wieneke's murder (Transcript p. 142, Lines 4-19).

The Morrison theory was considered credible within law enforcement on the Wieneke case, to the extent that a meeting was held in October of 1995 to discuss the numerous links between Bob Morrison, his wife, Missy, and Wieneke. A memorandum, created presumably by Orr, was circulated at this meeting. The memo was included in the original discovery items produced to Defendant, and was presented to the Trial Court as Exhibit O in the materials supporting her Motion to Dismiss. In it, the unknown author describes how "Bob was a powerfully built man" and was "of the correct height" to have committed the Wieneke homicide. Missy Morrison was known to frequent local bars, and had affairs with men younger than she was. Bob was "quick tempered" and was known for his remorseless abuse of animals and his wife. Although he was a "workaholic" who put in enormous amounts of overtime, Bob Morrison took the day off on the date of Wieneke's murder (a Tuesday).

The Wieneke death investigation team of the 1990's conducted several interviews with Cahill (Transcript p. 55, Lines 4-11), including a polygraph, which she passed. She also provided law enforcement with several samples for forensic testing: her coat and

shoes; a sample from the interior of the vehicle she was in on the day of the murder; her finger and palm prints; and her blood (Transcript p. 46, Lines 13-25; p. 47, Lines 1-19; p. 52, Lines 22-25; p. 53, Lines 1-24). None of these samples matched anything at the crime scene (Transcript p. 46, Lines 13-25; p. 47, Lines 1-19, p. 54, Lines 23-25; p. 55, Line 1). The 2018 DCI investigative team attempted testing on the fibers from Jacque Hazen's car and Annette's coat, to see if either had DNA profiles (Transcript p. 155, Lines 9-25; p. 156, Lines 1-11). The tests, which occurred in June of 2018, showed no blood or DNA on these fibers (Transcript p. 155, Lines 9-25; p. 156, Lines 1-11). On the DCI report form, several men are listed as the suspects in the Wieneke homicide: "Dennis Stromer, Corey Prowant, Robert Steven Burke, William James Wade, Steven Charles Young, et. al. (Defendant's Exhibit G)"

In 1992, Cahill lived with her brother-in-law, Denny Hazen, and Denny's wife, Jacque, in their two-story farmhouse near Atalissa, (Transcript p. 358, Lines 13-21). In the years between Wieneke's death and the onset of this prosecution, Cahill moved to Tipton, Iowa, about twenty miles from West Liberty (Transcript p. 172, Lines 15-17). In 1994, Cahill married Bill Cahill, and the two lived a quiet life, raising their children and working full-time. Outside of this case, Cahill has no criminal history. For several years, and through her pretrial release in this matter, Cahill worked at Police Law Institute, a small tech company that produces legal training videos for police officers.

In December 2017, a 34-year-old nurse named Jessica Becker approached DCI Special Agent Trent Vileta at the University of Iowa Hospitals and Clinics, where she

worked. After attempting to "kick [SA Vileta] out of the ICU," (Transcript p. 278, Lines 1-2), Becker then changed her approach and told SA Vileta a story from when she was nine years old (Transcript p. 278, Lines 11-25; p. 279, Lines 1-2). In this story, she told a bizarre tale of seeing Cahill lighting black candles in a dining area, and weeping in front of the candles while saying things like "Corey, I never meant to hurt you" (Transcript p. 275, Lines 1-19). Becker testified at trial that, as a nine-year-old, she asked her mother about the symbolism of black candles, and her mother replied "sometimes people light black candles, and it means they can speak to, you know, spirits or bring out evil spirits" (Transcript p. 276, Lines 17-25; p. 277, Lines 1-2). Becker's bizarre story about black candles and evil spirits, suddenly recollected after 25 years and told to a stranger, formed the State's entire theory of the case and led them to arrest Annette Cahill shortly thereafter.

The evidence presented at trial showed that Becker could not have witnessed the bizarre scene she described, in the way she described it. Becker testified that when she was eight to nine years old, she was friends with a group of children including Kayla Hazen, who often had sleepover parties at the Hazen home (Transcript p. 265, Lines 10-24). Kayla Hazen's parents were Denny and Jacque Hazen (Transcript p. 358, Lines 5-25). Annette Cahill, Denny's sister and Kayla Hazen's aunt, also was living at the home with her children (Transcript p. 358, Lines 18-21). Becker testified that Cahill was "the fun, the favorite aunt" who would take the kids out to get "movies, scary movies, [and] pizza" (Transcript p. 266, Lines 6-12). Becker told SA Vileta that during

a sleepover party in Fall 1992, she and Kayla Hazen were sneaking down the stairs for a snack, when they heard Cahill's voice (Transcript p. 273, Lines 19-25; p. 274, Lines 1-5, 19-22). Becker testified that she and Kayla stopped on the stairs and heard Cahill speaking and crying; and that they could see her from the back side but could not see her face (Transcript p. 274, Lines 19-22; p. 284, Lines 9-11).

A few months after Becker approached Valeta at the hospital, the Department of Criminal Investigation (DCI) paid Cahill a visit at her home in Tipton (Transcript p. 171, Lines 1-9). On the day of this first encounter, SA Jon Turbett asked Cahill to go to the local sheriff's department and meet with him (Transcript p. 174, Lines 21-25; p. 175, Lines 1-2). During that interview, SA Turbett asked Cahill to draw a diagram of the Hazen house, which she did (Transcript p. 218, Lines 14-23). Cahill explained to Turbett how Jacque and Denny Hazen slept on the main floor, near the living and dining room (Defendant's Trial Exhibit H). She drew the stairway, which was fully enclosed, and the door at the base of the stairs (Transcript p. 219, Lines 11-23). When opened, this door would obscure a person's line of sight between the base of the stairs and the dining room (Transcript p. 220, Lines 1-7). At trial, the Court accepted Cahill's diagram as Defendant's Exhibit H (Transcript p. 218, Lines 14-25; p. 219, Lines 1-9). The diagram shows that it would be impossible to be on the stairs of the Hazen home, or to peer around that door, and see a pacing figure in the dining room. Therefore, Becker's claim that she could see Cahill in the dining room from her perch on the staircase was not credible.

In 1992, Jessica Becker told her "black candles" story to her mother, now known as Cynthia Krogh (Transcript p. 245, Lines 19-25, p. 246, Lines 1-24). Krogh testified she did not take her daughter, or her daughter's story, to the police (Transcript p. 246, Line 25; p. 247, Lines 1-8). At the time of the alleged "black candles" incident, Krogh had recently been divorced from a man named Lester McGowan (Transcript p. 240, Lines 1-8). During their marriage, McGowan had affairs with a number of women, including Annette Cahill (Transcript p. 241, Lines 10-25; p. 242, Line 1). Krogh testified that she had no negative feelings toward Cahill regarding her romantic involvement with Krogh's husband (Transcript p. 243, Lines 24-25; p. 244, Lines 1-7). However, Krogh later reunited with McGowan, and then later appeared in court to testify against Cahill as a witness for the State (Transcript p. 253, Lines 20-25). Despite her testimony, Krogh clearly has a motive to hurt Cahill in retribution for her affair with Krogh's husband.

The State called a known criminal and heavy drug user, Scott Payne, to "corroborate" the so-called "confession" through his story of Cahill and Jacque Hazen burning clothing after Wieneke's murder (Transcript p. 297, Lines 1-5; p. 298, Lines 4-9). Payne's testimony was shown to be inconsistent and lacking in credibility at trial (Transcript p. 328, Lines 10-25; p. 329, Lines 1-7). Payne also testified he was unhappy with Jacque Hazen over an unpaid loan he extended to her in the mid-nineties (Transcript p. 329, Lines 8-16) and he thus had a motive to be untruthful in his testimony about her.

During depositions, the main DCI agents involved in the 2017 investigation acknowledged that the so-called "confession" (Cahill's alleged statements during the "black candles" story) is the main piece of evidence against Cahill, and that it was the main reason leading up to the reopening of the Wieneke murder investigation. (*See* Deposition of Trent Vileta at 73, ln. 19 – 74, ln. 1; Deposition of Jon Turbett, p. 43, ll. 13-19.) At trial, the State did not produce any eyewitnesses to the actual murder. The State's witness admitted at trial that there was no physical evidence linking Annette Cahill to Wieneke's murder (Transcript p. 46, Lines 13-15). The State's witness admitted at trial that DNA tests did not yield any evidence linking Annette Cahill to Wieneke's murder (Transcript p. 155, Lines 9-25; p. 156, Lines 1-11). The State's entire case was built on the "black candles" story, as remembered by a nine-year-old, twenty-five years after the fact, and corroborated only by the testimony of a drug-abusing criminal. After the trial, the State resisted the Defendant's attempt to obtain mitochondrial DNA testing of the hairs found in Corey Wieneke's hand, although this type of testing is available for free through regional FBI laboratories.

Argument

I. The Court erred in its denial of Defendant's Motion to Compel testing of the four hairs found in the victim's hand at the crime scene.

Standard of Review:

Constitutional claims related to discovery issues are reviewed de novo. *State v. Leedom*, 938 N.W.2d 177, 185 (Iowa 2020). To the extent this appeal challenges the district court's application of the provisions of Iowa Code § 81.10 review is for errors of law. *State v. Tong*, 805 N.W.2d 599, 601 (Iowa 2011). The appellate court is not bound by the trial court's determination of law. *Id.* To the extent Cahill's constitutional rights are implicated the review is *de novo*. *State v. Bumpus*, 824 N.W.2d 561 (Iowa Ct. App. 2012).

Preservation of Error:

Defendant filed a Motion to Compel, as well as a Supplemental Motion to Compel, on November 1st and 19th (respectively), 2019. In these Motions, Defendant requested that mitochondrial DNA testing be performed on the four hairs found in Corey Wieneke's hand at the scene of the crime, either by the Iowa Department of Criminal Investigation, or a private lab of Defendant's choosing. She also requested "any additional information related to testing done on these hairs, including who performed the testing, what type of tests were done, and what dates the tests were performed." See Motion to Compel (Appendix p. 304), p.1.

Argument on the Merits:

During the lunch break, on day three of the second trial in this matter (September 11th, 2019), the State provided Defendant with a copy of an incomplete DCI lab report. The report, which had no date, signature, or even case name, stated that the hair samples found in Wieneke's hand were not suitable for "DNA STR analysis." *See* incomplete DCI lab report. The report was identifiable as being part of the Wieneke investigation file, because the exhibit letters and descriptions matched other DCI reports and exhibit identifiers in the case.

The State commented, in chambers, that it had only discovered the report by conferring with DCI SA Vileta after testimony on the morning of September 11th. Trial Transcript, p.177, 14-25, p.178, 1-11. The State said it was prompted to look further into the hairs because the defense cross-examined two of its witnesses about the presence of the hairs. Id. At the time of the hearing in chambers, Defendant did not know of any additional testing which could be done, beyond STR analysis. Without additional information, and because the State said it would not attempt to introduce the report as evidence, the defense offered no motions, mid-trial, about it. Trial Transcript, p.178.

After trial, the Defendant learned of the availability of mitochondrial DNA (mtDNA) testing. *See* Supp Motion (Appendix p. 304). This type of testing is commonly used on older, smaller samples, especially hair. In peer reviewed studies, samples of 0.5 cm or less are testable using this method over 90% of the time;

samples originating from as early as 1969 have been successfully tested. *(*Affidavit of Gloria Dimick, p. 2) (Appendix p.312). This type of DNA technology has a high chance of success with the four human hairs known to have been in Wieneke's hand, found in 1992.

Mitochondrial DNA differs from STR DNA analysis in that it looks at the genome located in the mitochondria of the cell, rather than the nucleus. (Dimick affidavit, p. 12) (Appendix p. 322). Each cell has hundreds of thousands of copies of this genome, which is why it can be pulled from old or degraded samples. Id. In comparison, the nucleus of the cell has just two copies of DNA, which is needed for STR DNA analysis. Id. mtDNA is best used to exclude candidates; mtDNA matches to a group of people, based on matrilineal family ties. Id. So, instead of matching to guilty perpetrator A, the mtDNA would match to guilty perpetrator A or any of his or her matrilineal relatives: mother, sibling, etc. Id. For that reason, mtDNA is best used where the array of people to be identified are not related. Fortunately, that could be accomplished in testing the Wieneke hair sample.

The Defense team learned that this testing would cost $13,600 if done at a private lab. Defendant requested that state funds be utilized to complete this testing. At the Post-Trial Motion hearing, Defense presented evidence that mtDNA testing was available, at no cost, to the State of Iowa through the Federal Bureau of Investigation (FBI) regional laboratories. (Post Trial Motion Hearing transcript, p. 26, 1-4).

Discovery motions are usually pretrial motions, pursuant to Iowa Rule of

Criminal Procedure (IRCP) 2.11(2)(d). However, under IRCP 2.11 (3), the Court may grant relief from a failure to raise the motion, pretrial, for good cause shown. The Defendant asked the District Court to grant her Motions to Compel, between conviction and sentencing, rather than wait for appellate proceedings. The Iowa Supreme Court has previously held that "litigation should be final at the earliest possible date," and that failing to act promptly, with knowledge that an issue will only wait for post-conviction relief proceedings, is error on the part of the trial court. *State v. Ortiz*, 766 N.W.2d 244 (Iowa 2009).

Defendant's pursuit of DNA testing complies with the requirements outlined in I.C.A. § 81.10, which requires the court to order "DNA profiling be performed on a forensic sample collected in the case for which the person stands convicted." As of July 1st, 2019, Iowa law has required courts to grant defendants like Annette Cahill their requests for DNA testing, made post-conviction. I.C.A. § 81.10. Cahill did not explicitly cite to this new code section in her *ad hoc* quest for testing of the hairs in Wieneke's hand. However, her Motions to Compel echoed the necessary components of a request made under this code section. Thus, the Trial Court should have acted at that point; by not doing so, it violated the mandate in *Ortiz* to "act promptly" because "litigation should be final at the earliest possible date." *Ortiz* at 244.

In the motions, Cahill described what forensic evidence existed, whether testing was previously conducted on that evidence, why testing would prove

material to her case, and why it would have changed the outcome of trial if it had been conducted timely. I.C.A. § 81.10, h-l. Subsections a-g of I.C.A. § 81.10 require an applicant to describe procedural and factual questions (crime for which defendant was convicted, facts of underlying case, etc) in his or her application.

These facts, which were not enumerated in the Motions to Compel, would have nonetheless been well-known to the State and Court, since the case was ongoing, there had been two trials, and the Hon. Judge Patrick McElyea was specially assigned.

The relief offered by I.C.A. § 81.10 extends beyond new testing; the section also mandates that the State provide any information about previous testing done regarding Defendant's DNA, or testing of the sample. This is precisely the information Defendant requested in her Motions to Compel: full information about what testing the DCI had already attempted. As a response to this request, the State offered only a vague assertion at the Post-Trial Motion hearing that the testing had been performed by Paul Bush, and that the hairs were still in DCI storage. See Post Trial Motion Hearing Transcript, p. 23, 21-25, and p. 24, 1-5. The code section does not exclude the mtDNA analysis that Defendant here requests.

The State committed a *Brady* violation by failing to provide the lab report related to the hairs until midway through Defendant's trial.

The failure to promptly provide information about the testing performed on the hairs found in Wieneke's hand violated the constitutional principles outlined in *Brady v. Maryland*. "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, **irrespective of the good faith or bad faith** of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–97, 10 L. Ed. 2d 215 (1963) (emphasis added). In the present case, the State and Defendant entered into a Reciprocal Discovery Agreement, filed June 25th, 2018. In that agreement, the State agreed to provide the Defendant with "f. Any results or reports of physical or mental examinations, and of scientific tests or experiments, made in connection with the particular case, or copies thereof, within the possession, custody or control of the State." *See* Reciprocal Discovery Agreement.

The Court erred in its assessment that mtDNA testing of the hairs in Wieneke's hand would leave the jury in only a "slightly better position than they were during the trial." Sentencing p5, lines18-19. "[E]vidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone v. Bell,* 556 U.S. 449, 469–470, 129 S.Ct. 1769, 173 L.Ed.2d 701 (2009). The case at bar involved zero physical evidence pointing to Cahill as Wieneke's killer. Further, Cahill was tried alone, without co-defendants or alleged co-conspirators. If testing the hair using mitochondrial DNA excludes her, Wieneke, and Hotz, then it necessarily would

implicate another suspect. As such, testing of the hairs found at the scene is material to Defendant's innocence.

II. Trial Court erred in denying Defendant's 5.104 Motions and allowing the jury to be influenced by the unreliable and incredible testimony of Jessica Becker, Cynthia Krogh, and Scott Payne.

Standard of Review:

Iowa Rule of Evidence 5.104 concerns the preliminary question of a witness's qualification to testify. "Our review of the district court's ruling on a preliminary question of admissibility is for the correction of legal error." *State v. Veverka*, 938 N.W.2d 197, 202 (Iowa 2020).

Preservation of Error:

Defendant filed a Motion for 5.104 Ruling to exclude the testimony of Jessica Becker and Cynthia Krogh prior to the first trial, in February of 2019. Defendant filed another Motion for 5.104 Ruling related to the testimony of Scott Payne (a State's witness who was added to the Minutes of Testimony between the two trials) in September of 2019.

Argument on the Merits:

Lacking physical evidence, the State built its case against Annette Cahill entirely on testimony. DCI special agents on the case testified under oath that the recollected

story presented by Becker, which described Cahill sobbing in front of black candles and apologizing aloud as if speaking to Wieneke directly, was the primary piece of evidence against Cahill. (February 2019 5.104 motion, p. 1) (Appendix p. 193), quoting deposition transcript of Trent Vileta.

Because the testimony of Jessica Becker, her mother, Cynthia Krogh, and Scott Payne, was inconsistent and implausible, the defense filed 5.104 motions to keep out all three witnesses. Absent the testimony of these three witnesses, the State would have had no more evidence for the 2019 trials than it did in the 1990's; this placed a uniquely high level of importance on the 5.104 motions. Had the Court granted these motions, there would have been no path to conviction for the State, and potentially no trial at all.

a. Denial of 5.104 Motions as to Jessica Becker and Cynthia Krogh

Defendant filed a 5.104 Motion, prior to the first trial, asking the Court to find Jessica Becker's testimony inadmissible. Specifically, Defendant pointed out how Becker's testimony was logistically improbable—both Becker and her mother stated to DCI agents, prior to Cahill's arrest, that Becker saw the alleged confession while on the stairs in the Hazen home. (5.104 Motion, page 9) (Appendix p.237). At depositions, Becker continued to testify that she was standing on the stairs of the home when she saw the confession, even after being reminded that the Hazen stairwell was completely enclosed. Id. at 10. Later in the deposition, she said she didn't remember where she was she saw the confession. Id.

Where a witness's testimony is "impossible and absurd and self-contradictory," it "should be deemed a nullity by the court." *Graham v. Chicago & N.W.Ry.Co.* 119 N.W.708, 711 (Iowa 1909).

The case at bar is similar to *State v. Smith*, 508 N.W.2d 101 (Iowa Ct. App. 1993). In *Smith*, defendant was convicted of sexual abuse involving his three stepdaughters. On appeal, defendant argued that the evidence against him was insufficient, noting "that direct evidence in the case is inconsistent. [And pointing] to contradictions in the testimony of the children and portions of the children's testimony where they were unable to explain or describe what happened." *Id.* at 102.

Applying *Graham*, the Court of Appeals agreed with defendant that the testimony of his stepdaughters should have been excluded, and in particular noted the lack of any other evidence against defendant: "In *the present case the only evidence against appellant is the statements and testimony of the three girls*. When read separately or together, the accounts of alleged abuse are inconsistent, self-contradictory, lacking in experiential detail, and, at times, border on the absurd." *Smith*, 508 N.W.2d at 103 (emphasis added).

Applied to this case, *Smith* is important for two main reasons. First, *Smith* shows that under *Graham*, a Court determines whether or not to exclude testimony based on the totality of the circumstance, including the inconsistent testimony of a corroborating witness. As the *Smith* Court explains:

> S.A.K. testified to seeing appellant touch S.M.K. in the living room in Storm Lake while S.M.K. was on his lap covered with an afghan. Yet S.M.K., when asked about where the touches occurred in Storm Lake, said, "just the

> bedroom." In interviews and depositions before trial, S.M.K. stated appellant had not touched her in Ames. When testifying at trial she first confirmed her earlier statements, then contradicted herself and said, "I'm sure that he touched me in Ames." When asked about her testimony in the videotaped deposition about the touches in Storm Lake, she replied, "I'm not sure about any of them. I think I guessed when I told her."

Id. at 104.

Thus, when determined whether to exclude the testimony of a certain witness (e.g. S.M.K.), courts are allowed to infer inconsistencies from outside that witness's testimony, e.g. the testimony of other witnesses (e.g. S.A.K.).

Second, *Smith*makes explicit that courts are permitted to consider "lack of experiential detail" when considering whether to exclude a witness's testimony. This is because a lack of experiential detail points toward non-probative testimony that should be excluded. As the Smith Court discusses:

> S.M.K.'s testimony, like S.A.K.'s, is almost completely devoid of any experiential detail. When questioned about what she was wearing, who was in the room at the time, where appellant was, or what appellant did, her responses frequently began with "probably ..." or "might have been ..." as if she were trying to fill in details she never experienced. When asked about her deposition statement that appellant had licked her while holding her over his head, she changed her story and said, "we were laying down." She was not able to say, when questioned, in what city or what part of the house this occurred. . . . S.M.K.'s testimony as a whole is self-contradictory, lacks experiential detail, and describes scenes, such as the birthday party, that border on the surreal. *S.M.K.'s testimony lacks the probative value needed to support a guilty verdict*.

Smith, at 104 (emphasis added).

Becker's testimony contains both inconsistencies and lack of experiential detail, as described in *Smith*. The most glaring example of these problems lies in her testimony about how she witnessed Cahill in front of the black candles. Becker stated that she saw the alleged confession when she was on the stairs in the Hazen home, or at the base of the stairs; she could not "remember if [they] were at the bottom of the stairs. [They came] downstairs, and [were] peering into the dining room," when she and Kayla Hazen saw Cahill pacing in front of the candles. (Deposition of Jessica Becker, questioning on p. 23). Becker acknowledged that she never saw Cahill's face that night, in front of the candles, though she could see her "pacing," "tearful," and "crying." (Deposition of Becker, p.23-26).

In the spring of 2018, months prior to her arrest, Annette Cahill was questioned by DCI SA Jon Turbett. SA Turbett asked Cahill to draw a diagram of the Hazen home during this meeting, ostensibly to remind her of what her life was like in 1992, when she lived there. Cahill made a drawing, submitted at trial as Defendant's Exhibit H. Cahill's diagram of the home showed a fully enclosed staircase, with a door at the base. As viewed coming down the stairs, the door hinged on the right, and opened out and away from the stairs. (Defendant's Exhibits A-D) (Appendix p.347-356). The base of the stairs in the home is a small area, hardly deeper than the door would have been, when opened[1]. A person descending the stairs could not see into the dining room unless she opened AND closed the door at the base of the steps. Without closing the door at the base of the stairway, it would be impossible to see in to the

dining room, which was to the right as one descended the steps.

Becker's testimony contained other indicia of a lack of experiential detail. Like Cahill, Becker was also asked to create a diagram of the Hazen home as she recalled it in 1992. Becker made her diagram at depositions in December of 2018, and again while being questioned by the State in the second trial, in September of 2019. Becker could not remember where Denny and Jacque Hazen's bedrooms were in the house, or where Kayla Hazen's two siblings slept. Trial Transcript, p. 171, 11-15. This is in spite of the fact that she claimed to have spent many overnights in this home, over the course of several years.

She could not remember the date of the sleepover, or even the time of year, except that it was after Wieneke's death and it was "cooler outside." Trial Transcript, p.273, 5-9. Becker testified at the second trial that she could not quite remember if other

[1] There are no known photos of the home as it was in 1992. The 2019 photos of the home were taken by law enforcement, with permission of the home's current owner. The stairwell does not, at present, have a door at the base, but the photos show a door frame with evidence of hinges for a door.

children were present at the sleepover where she allegedly witnessed the confession. Trial Transcript, p. 282, 1-4.

b. Denial of 5.104 Motion as to Scott Payne

On September 3rd, 2019, prior to her second trial, Defendant filed a 5.104 Motion for the exclusion of testimony of Scott Payne. Mr. Payne was a State's witness, added to the Minutes of Testimony in August of 2019. The Additional Minutes of Testimony stated that Payne observed Defendant burning clothes "that appeared to be bloody" on the day of Corey Wieneke's death. See Additional Minutes, filed August 7, 2019. However, DCI investigators who interviewed Payne in 1996 quoted him in their report as having "stated that ANNETTE HAZEN was seen burning a bunch of stuff after Wieneke was killed. This information came from NANCY POWERS, according to Scott Payne." (5.104 Motion related to Payne testimony, page 1, and exhibit AAA.) (Appendix p. 262) In that same 1996 interview, Payne identified Jeff Murdoch, a local man who Payne said had bragged about killing Wieneke at two popular local bars in that era. (5.104 Motion, p.2) (Appendix p.263).

At his deposition in the summer of 2019, Payne denied any conversation with Nancy Powers. (Exhibit BBB, excerpt of Payne Deposition, p. 18) (Appendix p. 263). Payne denied knowing Jeff Murdoch at all, in spite of multiple references to Murdoch in the 1996 interview. Payne did not know why his own testimony was different in 2019 than it was in 1996; he could not recall that it was different at all. *Id.* Payne could not remember detail, when deposed, from the interview with law enforcement one

month prior to his deposition, including whether he was asked about Nancy Powers at all during that interview. *Id.*

The testimony of Scott Payne is "so impossible and absurd and self-contradictory that it should be deemed a nullity by the court." *Graham v. Chicago & N.W.Ry.Co.* 119 N.W.708, 711 (Iowa 1909). Payne's own story, from 1996 to present, exemplifies "self-contradiction." In 1996, Payne pointed the finger for the Wieneke homicide at Jeff Murdoch, a man he denied even knowing when he testified at Cahill's 2019 trial. Payne told law enforcement that he heard a rumor about Cahill burning "stuff" in 1996; by 2019, he claimed he personally saw her burning bloody clothes.

Payne could not clearly remember where he was living at the time of the murder—his confusion as to this basic autobiographical fact took up much of his testimony at trial. In 1996, he told law enforcement that he was living in Keokuk, and moved back after learning of Wieneke's murder. (Exhibit AAA) (Appendix p. 263). At the time of trial, he stated that he was at the Hazen farm house for a multi-day party involving the use of hard drugs, right after the Wieneke murder. Trial Transcript, p.295-296. On redirect, Payne stated that he may have been drinking heavily when interviewed by law enforcement in 1996, since they met with him around the anniversary of his younger brother's death. Trial Transcript, p.331, 8-10.

When Payne's 1996 statements are contrasted with his 2019 deposition statements and his trial testimony, the glaring discrepancies present conflicts on par with the testimony declared a "nullity" in *Graham*. In *Graham*, a key eyewitness to

an accidental death on a train changed his testimony (in a second trial on the matter) in such a way to strongly favor the plaintiff's case. *Graham* at 709. The new testimony presented a new version of events related to the accident on the train; the witness attempted to explain away the change in story by saying he "was never asked that question" at the first trial. *Id.* at 709. The witness was an employee of the plaintiff, with motive to do what the plaintiff wanted. *Id.* at 711.

Payne's testimony, like the witness in *Graham*, was tainted by bias. Payne loaned $5,000 to the Hazen family in the mid-nineties. This loan was never repaid, and Payne said he felt they had lied to him. (Trial Transcript 329, lines 8-16). Certainly, no one but Mr. Payne knows why he chose to testify in this trial, or why his story changed so dramatically since 1996, but animosity towards the Hazen family could have been a factor.

III. The evidence was insufficient to support the verdict that Defendant "struck" the victim, therefore the Trial Court should have granted Defendant's Motion for New Trial.

Standard of Review:

The court reviews challenges to sufficiency of the evidence for corrections of errors at law. *State v. Hearn*, 797 N.W.2d 577, 579 (Iowa 2011).

Preservation of Error:

Error was preserved in this case because the Defendant made a Motion for Judgment of Acquittal at the end of the State's case, alleging there was insufficient evidence that the Defendant was the perpetrator of the offense. The Trial Court denied the motion.

Argument on the Merits:

In reviewing challenges to the sufficiency of evidence, the Court considers all of the evidence viewed "in the light most favorable to the State, including all reasonable inferences that may be fairly drawn from the evidence." *State v. Williams*, 695 N.W.2d 23, 27-28 (Iowa 2005). A verdict will be upheld only if substantial evidence in the record supports it. *State v. Nitcher*, 720 N.W.2d 547, 556 (Iowa 2006). The Court considers all the evidence presented, not only inculpatory evidence. *State v. Jacobs*, 607 N.W.2d 679, 682 (Iowa 2000) ("We view the evidence in the light most favorable to the State but consider all of the evidence, not just that which supports the verdict.").

Evidence is considered substantial if it can convince a rational jury that the defendant is guilty beyond a reasonable doubt. *Williams*, 695 N.W.2d at 27-28. In

reviewing a challenge to the sufficiency of the evidence, the relevant question is whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See State v. Turner*, 345 N.W.2d 553, 555-556 (Iowa 1983); *State v. Robinson*, 288 N.W.2d 337, 339 (Iowa 1980). "Inferences drawn from the evidence must raise a fair inference of guilt on each essential element. An inference must do more than "create speculation, suspicion, or conjecture. Evidence that allows two or more inferences to be drawn, without more, is insufficient to support guilt." *State v. Brubaker*, 805 N.W.2d 164, 172 (Iowa 2011), *as amended on denial of reh'g* (Nov. 3, 2011) (citations omitted).

Again, since the Court must view "all of the evidence," it is important to emphasize the exculpatory evidence in this case, including evidence of law enforcement's failure to properly conduct an investigation:[2]

[2] Evidence of law enforcement's failure to investigate is exculpatory in nature because such evidence supports an inference of reasonable doubt. Courts have even found trial court error where the the trial court prevented a defendant from presenting evidence in support of such a failure-to-investigate theory. "[Defendant's] efforts to raise a reasonable doubt of his guilt hinged on his failure-to-investigate theory. The trial court should have admitted the clerk's and landlord's testimony for that purpose. The trial court accordingly erred by excluding this testimony entirely." *State v. McCullar*, 2014 UT App 215, ¶ 43, 335 P.3d 900, 908; *see also Alvarez v. Ercole*, 763 F.3d 223, 225 (2d Cir. 2014).

- There is no physical evidence connecting Defendant to the scene of the crime.
- There is no contemporaneous testimonial evidence connecting Defendant to the commission of the crime.[3]

[3] Despite a lack of a confession to law enforcement, throughout trial, the State repeatedly referred to Defendant's police interviews in attempt to show inconsistencies that were indicative of guilt. Here, it would be important to re-iterate the reasoning of the Supreme Court's decision in *Miranda v. Arizona*:

> To highlight the isolation and unfamiliar surroundings, [police are instructed] to display an air of confidence in the suspect's guilt and from outward appearance to maintain only an interest in confirming certain details. The guilt of the subject is to be posited as a fact. The interrogator should direct his comments toward the reasons why the subject committed the act, rather than court failure by asking the subject whether he did it. Like other men, perhaps the subject has had a bad family life, had an unhappy childhood, had too much to drink, had an unrequited desire for women. The officers are instructed to minimize the moral seriousness of the offense,[12] to cast blame on the victim or on society.[13] *These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty. Explanations to the contrary are dismissed and discouraged.*

Miranda v. Arizona, 384 U.S. 436, 450 (1966) (emphasis added)

- Defendant has cooperated with the Wieneke murder investigation since its inception in 1992.
- The Defendant voluntarily interviewed with the DCI and other law enforcement agencies over the course of 26 years. Throughout hours upon hours of uncounseled police interviews, not once did Defendant confess to law enforcement.
- As a facet of this participation, she provided investigators with an accounting of her whereabouts during the commission of the murder. Defendant's accounting of her whereabouts was sufficient to satisfy the original DCI agent Ken Sandy, who ultimately turned away from her as a suspect.
- Defendant voluntarily provided investigators with her shoes, fibers from clothing, her shoes, her prints, and her blood. During the early years of the investigation, law enforcement tested all the physical samples that they had in their possession, but did not find any evidence connecting Defendant to the scene of the crime.
- Law enforcement in the renewed investigation of 2017-2018 did not conduct any new lab testing of the samples provided by Defendant, or the crime scene evidence. Law enforcement took a DNA sample from Defendant's sister-in-law, Jacque Hazen, and did nothing with it.

The State failed to provide any physical evidence connecting Defendant to the

scene of the crime. Further, the State failed to provide any testimonial evidence of Defendant committing the acts alleged. No witness testified that they observed Defendant strike Corey Wieneke. No witness testified that they saw Defendant with any murder weapon. No witness testified that they overheard or otherwise were cognizant of any plan or design made by the Defendant to kill Wieneke.

Thus, the State's case is built on testimony of witnesses of alleged facts that occurred after the commission of the crime. Defendant notes, as she argued in her motion to dismiss before the first trial, that the decision of the State not to file charges until after learning about the testimony of Jessica Becker signifies that the State was not in a position to initiate charges absent such testimony. Jessica Becker's testimony that she overhead a supposed confession when she was a nine-year old child is one of the key pieces of evidence in support of the State's theory of the case. Defendant further notes that Jessica's statements did not come to light until 2017, 25 years after Wieneke's death, a span of time during witness key evidence and potential witnesses were lost through no fault of Defendant. (Defendant's Motion to Dismiss) (Appendix p. 115).

This prosecution resulted in a hung jury at the conclusion of the first trial. At the second trial, the State offered additional testimony from Scott Payne. The inconsistencies with Payne's testimony are described at length earlier in this brief. Even viewing the evidence in the light most favorable to the State, the testimony of Mr. Payne, Ms. Becker, and Ms. Krogh, is, at best, inconsistent.

The State chose not to prosecute Defendant until the 2017 reinvestigation

spurred on by Jessica Becker's statements. Since the 2017 reinvestigation, the only new evidence presented by the State is the testimony of Jessica Becker, Cynthia Krogh and Scott Payne. No physical evidence was uncovered linking Defendant to the murder scene, or the murder weapon. The DCI did not even try to obtain this evidence—the bat was not retested, the DNA sample taken from Jacque Hazen was not tested, none of the crime scene evidence was touched by the new team of investigators.

Special Agent John Turbett interviewed the Defendant over the course of three separate interactions. Despite the DCI's best efforts, its agents were unable to elicit a confession, either to the commission of the crime or to knowledge of either the murder or the murder weapon.

When a case is built on circumstantial evidence alone, evidence of either motive or opportunity alone is insufficient to carry a case to the jury. *See State v. Pastuer*, 205 N.C. App. 566, 571–72, 697 S.E.2d 381, 385 (N.C. 2010) ("The State relied entirely on circumstantial evidence to establish that defendant was the perpetrator of victim's murder. Viewing this evidence in the light most favorable to the State, we believe there was arguably sufficient evidence of defendant's motive to murder the victim. However, evidence of motive alone is insufficient to survive a defendant's motion to dismiss, and evidence of a defendant's opportunity and means to commit the crime must also be considered.").

In the instant case, the State solely uses Defendant's admission that she went to Wieneke's house to bootstrap a host of hypotheticals that allegedly point towards guilt.

However, the State nowhere shows anything except mere opportunity. Corey Wieneke was home alone during business hours on the day he was killed. He lived in a rural farm house with few neighbors. Nothing in the record concluded a specific time of death - many people had the opportunity to kill him, and to leave undetected.

Defendant does not believe that the State's evidence of motive is sufficient to sustain a conviction under these circumstances. At most, the State proved that Defendant was upset about Wieneke's relationships with other women in the early morning hours of the day he died. However, the pair went back to Defendant's house, made up, and had sex. If the State is correct, the hurt feelings from a spurned relationship would be sufficient motive in *any* murder trial, as it is only human to emotionally react to the interpersonal dynamics of an ambiguous relationship.[4]

While the evidence at trial was sufficient to show a motive to have hurt feelings toward Wieneke, none of the evidence indicates a motive to *kill* him. There was no evidence of any prior acts of violence between the two, no evidence that Wieneke was scared or otherwise afraid of Defendant, no evidence that Defendant was capable of murder (e.g. prior acts of violence), and no evidence that Defendant desired to kill or otherwise wish him dead prior to his murder. Furthermore, Defendant again asserts that the weak motive in the case and the fact that she admitted to being outside of the house on the day of the murder cannot override the complete lack of physical evidence.

[4] Defendant notes that this same weak motive could have been attributable to any one of the multiple women that Wieneke was having a relationship with. For example, Jody

Hotz, Wieneke's fiancé, would have had the same motive to kill him based on the State's logic that every spurned lover has motive to kill, since Defendant was having an affair with Wieneke at the time.

IV. The delay in prosecution of Defendant violated her right to Due Process of Law, as guaranteed by Article I, Section 10 of the Iowa Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution.

Standard of Review:

To determine whether a defendant's due process rights have been violated due to prosecutorial delay, the Iowa Supreme Court has adopted the following legal standard: "[t]o prevail on a claim that such a delay violated due process, a defendant has the heavy burden of proving both (1) the defendant's defense suffered actual prejudice due to a delay in prosecution and (2) the delay causing such prejudice was unreasonable." *State v. Brown*, 656 N.W.2d 355, 363 (Iowa 2003). Furthermore, each case must be decided on its own facts. *See United States v. Helmich*, 521 F. Supp. 1246 (M.D. Fla. 1981); *judgment aff'd*, 704 F.2d 547 (11th Cir. 1983).

Preservation of Error:

Error was preserved in this case by Defendant's Motion to Dismiss, based in large part on the issue of prosecutorial delay. A hearing on that motion was held on January 28th, 2019; Trial Court later denied the motion.

Argument on the Merits:

Both Federal and Iowa Courts have recognized that a delay in prosecution for the commission of a crime implicates due process rights. *State v. Trompeter*, 555 N.W.2d

468, 470 (1971) (*quoting United States v. Marion*, 404 U.S. 307, 324 (1971)). "These rights are violated if the actual prejudice to the defendant in view of the length and reasons for the delay offends the 'fundamental conceptions of justice which lie at the base of our civil and political institutions.'" *State v. Edwards*, 571 N.W.2d 497, 501 (Iowa Ct. App. 1997) (*quoting United States v. Lovasco*, 431 U.S. 783, 790 (1977)).

In order to establish actual prejudice, "a defendant must show loss of evidence or testimony has meaningfully impaired his ability to present a defense. Generalized claims of prejudice, such as loss of memory, loss of witnesses, or loss of evidence, do not constitute actual prejudice." *Brown*, 656 N.W.2d at 363. Once actual prejudice is established, "the inquiry turns to the reasons for the delay, which are then balanced against the demonstrated prejudice." *Edwards*, 571 N.W.2d at 501.

Instructive here is the case of *State v. Luck*. *See State v. Luck*, 15 Ohio St. 3d 150, 472 N.E.2d 1097 (1984). In *Luck*, the Ohio Supreme Court affirmed a motion to dismiss base on pre-accusatorial delay. Defendant Katherine Luck was accused of the October 30, 1967 murder of Marie Tietjen. Law enforcement investigated the Tietjen murder and conducted numerous interviews of potential witnesses and suspects and collected a variety of real evidence from the crime scene. Law enforcement officers interviewed defendant Luck in late 1967 and early 1968.

In the *Luck* case, the State decided to charge the defendant fifteen years after the initial investigation. Defendant Luck moved to dismiss the case against her based on pre-accusatorial delay, alleging the loss of certain evidence, including: the death of a

witness who was at the scene of the crime and could have supported a justification defense on her behalf, the diminished memory of a cab driver who could no longer recall if defendant was a passenger in his cab, and the loss of recorded interviews with potential suspects and witnesses.

The Ohio Supreme Court, basing its decision on the Federal Constitution, agreed with defendant Luck. First, the court found that Luck had suffered actual prejudice:

> The prejudicial factors enumerated by defense counsel (*the deaths of witnesses, the fading of memories, and the loss of evidence*), *when balanced against the other admissible evidence in this case*, show that the defendant has suffered actual prejudice by the fifteen-year delay in prosecution. Although the state is in possession of circumstantial evidence which may link the defendant to Tietjen's death, it cannot be said that the missing evidence or the dead witnesses would not have minimized or eliminated the impact of the state's circumstantial evidence.

Luck, 15 Ohio St. 3d at 157 (emphasis added).

After finding prejudice, the *Luck* Court then turned to the reasons for the delay to determine if there was a justifiable reason for the delay in prosecution that caused the prejudice. The Court ultimately found that the delay in prosecution was unjustifiable as it based on the state's error in judgment:

> We believe, however, that a delay in the commencement of prosecution can be found to be unjustifiable when the state's reason for the delay is to intentionally gain a tactical advantage over the defendant*, or when the state, through negligence or error in judgment*, effectively ceases the active investigation of a case, but later decides to commence prosecution upon the same evidence that was available to it at the time that its active investigation was ceased. The length of delay will normally be the key factor in determining whether a delay caused by negligence or error in judgment is justifiable. In

> the instant case, the state delayed prosecuting the defendant because of an alleged "error in judgment," which lead to a halt in the Lakewood Police Department's active investigation of Tietjen's death. This investigation remained at a stand-still for approximately fifteen years. During that time, witnesses died, memories faded, and evidence was lost. When the state finally decided to commence its prosecution of the defendant herein, it did so without one shred of new evidence—its case being substantially the same as it had been since 1968. For these reasons, we find that the pre-indictment delay in the instant case is unjustifiable.

Luck, 15 Ohio St. 3d at 158–59 (internal citations omitted) (emphasis added).

A. Defendant Suffered Actual Prejudice from the State's Nearly 26 Year Delay in Prosecution.

Because of the nearly 26-year delay between the commission of the offense and Defendant's arrest, Defendant lost evidence and testimony critical to her defense. As a result, her ability to present a defense was meaningfully impaired. Because the prosecutorial delay analysis is fact-specific, it is important to note that there is no physical evidence directly implicating Defendant in Wieneke's murder. The State's case, according to the testimony of Special Agent Jon Turbett, was entirely based on circumstantial evidence and, most importantly, Defendant's supposed confession. When SA Turbett was asked what evidence existed to charge Defendant for Wieneke's murder, Agent Turbett stated:

> So you have a confession out of the defendant's mouth, a corroborated confession. You have the defendant at the crime scene in the window of – when this homicide occurred. You have – although it's not an element

of defense, you have considerable motive on the part of her as well. Those would be some thoughts that come to mind.

(Deposition of Jon Turbett, p. 43, ll. 13-19).

B. Defendant Had a Constitutional Right to Present a Complete Defense, Including Introducing Evidence of a Third Party's Guilt.

As a threshold issue, Defendant would like to address the kinds of evidence that she was not able to present in her defense due to the delay in prosecution, namely, evidence of a third-party's guilty. Such evidence is permitted by the U.S. Constitution, and the Rules of Evidence. Therefore, it is proper for this Court to ask whether the loss of such evidence in this particular case prejudiced Defendant.

A Defendant has a constitutional right to a "meaningful opportunity to present a complete defense." *See Crane v. Kentucky*, 476 U.S. 683, 690 (1986). This right encompasses other rights, including: (1) A right to present evidence on her own behalf. *Washington v. Texas*, 388 U.S. 14, 17-19 (1967); (2) A right to physically inspect and know the physical characteristics of real evidence the state expects to use against her. *State v. Eads*, 166 N.W.2d 766, 773 (Iowa 1969); (3) A right to subject the State's physical evidence to scientific testing. *Id.*; (4) A right to the services of an expert witness that may assist in evaluating and rebutting the expert analysis of physical evidence and testimony of the State's witnesses. *State v. Van Scoyoc*, 511 N.W.2d 628, 630 (Iowa Ct. App. 1993); (5) A right to examine witnesses against her by cross examination, to test the witness' recollection, to probe into the details of his testimony, or to "sift" his conscience, all of which are designed to protect the "integrity of the fact-finding

process." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); (6) A right to have compulsory process for obtaining witnesses and evidence in her favor. *Washington v. Texas*, 388 U.S. 14 (1967); and (7) A right to effective representation of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984).

One defense strategy used by defendants where the State relies on a confession is to present evidence indicating a third party's guilt. In this context, a defendant is permitted to present evidence of a third-party's guilt, and evidence of a failure-to-investigate viable leads, both kinds of evidence raising a reasonable doubt about defendant's guilt. Such evidence is permissible even though it may rely on out-of-court statements made by a third-party suspect who is not on trial. As the Court of Appeals of Utah has found, even though such defenses usually rely on out-of-court statements, these statements are not hearsay because they are not offered to prove the truth of the matter asserted, but rather they are "offered at least in part to demonstrate the inadequacy of the police investigation and, by extension, to raise a reasonable doubt about [defendant's] guilt." *State v. McCullar*, 335 P.3d 900, 907 (Utah Ct. App. 2014).

Defendant claimed that the prosecutorial delay in this case prevented her from introducing evidence of a third-party's guilt, evidence which law enforcement learned of during the course of its investigation, and that the absence of such evidence meaningfully impaired her ability to present a defense. It did not matter that the third-party suspects were not on trial, as the Defendant had the right to present evidence of third-party guilt as part of her Constitutional right to present a complete defense.

C. Defendant was Unable to Present Evidence of Third-Party Guilt in her Defense because of Prosecutorial Delay, which Diminished the Memory of Witnesses.

Due to the inordinate delay in prosecution, Defendant was unable to present evidence of third-party guilt at trial derived from original interviewees of the Wieneke murder investigation whose memories are now diminished.

As part of his investigation, Defendant's private investigator identified individuals who, had their memories not been diminished, would have been able to provide testimony regarding third-party guilt. However, these individuals now cannot substantially recall the facts they provided to the DCI.

Both Scott Payne and Megan Kaufmann now have diminished memory due to the passage of time. Absent diminished memory, Mr. Payne would have been able to recollect the facts surrounding Jeff Murdoch's confession to the Wieneke murder on two separate occasions. *(*Affidavit in Support of Motion to Dismiss, hereinafter "Affidavit," at ¶ 10) (Appendix p. 125). Absent diminished memory, Ms. Kaufmann would have beenable to recollect facts regarding the involvement of Mark Rodriguez, her ex-boyfriend, and Joey Brockert, both members of a gang called "The Clan," in the Wieneke Murder. (Affidavit, at ¶ 16) (Appendix p. 126). However, due the passage of time resulting from prosecutorial delay, Defendant was unable to thoroughly investigate the claims that these witnesses made to law enforcement, and thus Defendant could not uncover evidence and/or testimony of third-party guilt from these witnesses.

Jaime Marin also told DCI that he was told that Mr. Brockert was responsible for the Wieneke murder. (Affidavit, at ¶ 29) (Appendix p. 128). However, due to strokes he suffered in 2014 and 2018, Mr. Marin can no longer recollect the facts surrounding his statements, and thus Defendant could not uncover evidence and/or testimony of third-party guilt from this witness. (Affidavit, at ¶ 34) (Appendix p. 128).

The missing testimony of these witnesses and in particular, their inability to now recall information that law enforcement learned about during the Wieneke murder investigation, meaningfully impaired Defendant's ability to present a defense.

Instructive here is the decision in *State v. Edwards*. *See Edwards*, 571 N.W.2d at 501. In *Edwards*, the defendant appealed his conviction and sentence for delivery of a controlled substance, arguing that the twenty-one-month delay between the commission of the offense and the indictment violated his due process rights. Relevant here, defendant argued that he was prejudiced because "the undercover agent had little recollection at trial of the events outside a written report prepared the day after the drug transaction occurred." *Id.* The Court of Appeals rejected this argument, finding that "Edwards has failed to show how the undercover agent *would have testified had her memory not been diminished*." *Id.* (emphasis added); *citing United States v. Sherlock*, 962 F.2d 1349, 1354 (9th Cir. 1989) ("the record does not indicate how Billie and Bennally would have testified had their memories not dimmed. It does not show that the loss of their memories had meaningfully impaired defendants' abilities to defend themselves.").

Unlike the defendants in *Edwards* and *Sherlock* Defendant definitively showed

the Trial court that Mr. Payne would have testified that Mr. Murdoch admitted to murdering Mr. Wieneke had his memory not been diminished, and that Ms. Kauffmann would have testified regarding the possible involvement of Mr. Rodriguez and Mr. Brockert had her memory not been diminished, and that Mr. Marin would have testified regarding Mr. Brockert's involvement had he not had a stroke. The inability to present such testimony meaningfully impaired Defendant's ability to present a defense, and thus satisfies the actual prejudice prong of the prosecutorial delay analysis.

D. Defendant was Unable to Present Evidence of Third-Party Guilt in her Defense because Several Witnesses with Evidence of Third-Party Guilt have Died.

In addition to the diminished memory of several witnesses, the prosecutorial delay in this case significantly impaired Defendant's defense, because several key witnesses with information of a third party's guilt have died. Because these individuals are no longer available, Defendant was unable to interview them to uncover any leads and/or evidence of third-party guilt, nor was Defendant able to present them as witnesses to testify regarding their prior statements. Such loss of evidence meaningfully impaired Defendant's defense.

These witnesses included: Stanley Phelps, Harvey Peden, Jeffery Lobdell, Nancy Powers, Missy Morrison, and Brenda Pedersen. Stanley Phelps, Harvey Peden, Jeffery Lobdell and Nancy Powers, all of whom died after Ms. Becker informed West Liberty police of Defendant's alleged involvement in the Wieneke murder, each would have spoken to Kenneth ("Kenny") Hammons's possible involvement in the Wieneke

murder. (Affidavit, at ¶¶ 44-68) (Appendix pp. 129-132). In fact, Mr. Hammons admitted to Mr. Lobdell that he had dropped Mr. Wieneke off at home on the morning of the murder. (Affidavit, at ¶ 65) (Appendix p. 132).

Jeffery Lobdell would also have been able to speak to Bob Morrison's possible involvement in the Wieneke murder. (Affidavit, at ¶ 66) (Appendix p. 132). Relatedly, any information that Bob Morrison's wife, Missy Morrison, whom Mr. Lobdell confirms was having an affair with Corey Wieneke, had regarding Bob Morrison's involvement in the murder is no longer available.

Finally, Brenda Pedersen, who also died after Ms. Becker informed the West Liberty police of Defendant's alleged involvement in the Wieneke murder, would have been able to implicate drug dealers from Missouri, to whom Mr. Wieneke owed money. (Affidavit, at ¶ 82) (Appendix p. 134). Mr. Lobdell and Ms. Powers also would have been able to speak to Mr. Wieneke's involvement in the drug trade. (Affidavit, at ¶¶ 56, 62) (Appendix p. 131).

Because these witnesses are deceased, Defendant was unable to interview any of them regarding the statements they made to DCI, statements which law enforcement was made aware of during the course of their investigation. Defendant was unable to ask any questions to these witnesses regarding the facts surrounding their statements, including any questions clarifying or otherwise exploring their knowledge of a third party's guilt. Defendant's ability to present a complete defense was meaningfully impaired by her inability to investigate the statements made by these witnesses, and her

inability to present any resulting evidence and/or testimony of third-party guilt in her defense. Obviously, dead witnesses cannot testify.

Stanley Phelps, Harvey Peden, Jeffery Lobdell, Nancy Powers, and Brenda Pedersen all died after Jessica Becker first informed law enforcement of Defendant's alleged involvement in the Wienke murder. Had law enforcement acted upon that information at that time, these witnesses would have still been alive, and Defendant would have been able to investigate their claims thoroughly. It is manifestly unjust to allow Defendant's conviction to stand, when she was denied even the *possibility* of investigating the credible claims made by these witnesses against a third party. In short, Defendant was actually prejudiced because, under these circumstances, prosecution against Defendant offends the "fundamental conceptions of justice which lie at the base of our civil and political institutions." *State v. Edwards*, 571 N.W.2d at 501.

E. Defendant was Unable to Investigate Viable Potential Suspects Due to Prosecutorial Delay.

In addition to the witnesses with diminished memories and the witnesses who are now deceased discussed above, Defendant was unable to interview and thoroughly investigate several viable suspects. In particular, Defendant was unable to investigate the possible involvement of the following individuals in the Wieneke murder: Jeff Murdoch, Mark Rodriguez, and Bob Morrison. Mr. Murdoch, on two separate occasions, confessed to murdering Mr. Wieneke. *See* (Affidavit, at ¶ 10) (Appendix p. 125). Mark Rodriguez, along with Joey Brockert, was implicated by his ex-girlfriend in

the Wieneke murder based on his involvement with a gang called "The Clan" and their drug dealings. (Affidavit, at ¶ 17) (Appendix p. 126). Bob Morrison was married to Missy Morrison, whom Mr. Lobdell confirms had an affair with Corey Wieneke. Mr. Wieneke specifically mentioned to Mr. Lobdell that he feared Mr. Morrison would become aware of the affair, because "he would probably kill him." (Affidavit, at ¶ 66) (Appendix p. 132).

Defendant's inability to thoroughly investigate and possibly interview these deceased suspects meaningfully impaired her ability to present a complete defense. *See Crane v. Kentucky*, 475 U.S. at 690, *citing Chambers v. Mississippi*, 410 U.S. 284 (1973) (finding that a defendant may not be denied opportunity to explore confession of third party to crime for which defendant is charged). Defendant was unable to question these suspects, and was unable to compel them to testify either through deposition or at trial. Defendant was thus unable to present any evidence and/or testimony of third-party involvement from theses suspects, including their own involvement in the Wieneke murder.

Of particular importance is Jeff Murdoch, who twice confessed to killing Mr. Wieneke. Mr. Murdoch died in 2004, after Ms. Becker first informed the West Liberty Police, in 2001, of Defendant's alleged involvement. Mr. Murdoch was never interviewed by DCI as part of the Wieneke murder investigation. Defendant has voluntarily cooperated with the DCI since the beginning of this investigation, and has consistently denied her involvement in the murder. It is manifestly unjust to uphold

Defendant's conviction, based on a supposed confession made by her that was not reasonably and thoroughly investigated, when Mr. Murdoch twice confessed to the murder and never was on record denying his involvement. The State, through its prosecution under these circumstances, upended the principles of due process and fundamental fairness.

F. The delay causing prejudice in this case was unreasonable.

Having established actual prejudice, the next step in the prosecutorial delay analysis is to inquire into "the reasons for the delay, which are then balanced against the demonstrated prejudice." *Edwards*, 571 N.W.2d at 501. In other words, Defendant must show that "the delay causing such prejudice was unreasonable." *State v. Brown*, 656 N.W.2d 355, 363 (2003). As the Luck Court found,

> a delay in the commencement of prosecution can be found to be unjustifiable when the state's reason for the delay is to intentionally gain a tactical advantage over the defendant, or when the state, through negligence or error in judgment, effectively ceases the active investigation of a case, but later decides to commence prosecution upon the same evidence that was available to it at the time that its active investigation was ceased.

Luck, 15 Ohio St. 3d at 158–59 (internal citations omitted).

The agents involved in the renewed Wieneke murder investigation admit that substantially the same evidence exists now against Defendant, except for the statements made to them by Jessi Becker. When asked by defense counsel what evidence there was against Defendant, Agent Vileta echoed the statement made by Agent Turbett, namely,

that the evidence against Defendant mainly involves motive, opportunity, and Ms. Becker's statements. (Deposition of Trent Vileta at 49, ll. 3-19) (noting, in particular, that Mr. Wieneke and Defendant allegedly had a fight the night before his death, and that Defendant and Jacque Hazen were the only people known to be at Mr. Wieneke's house that day).

Any evidence regarding a possible motive, e.g. that Defendant and Mr. Wieneke had a fight the night before his murder, was known to law enforcement during the original investigation. Any evidence placing Defendant and Ms. Hazen at the Wieneke residence on the day of the murder was also available to law enforcement investigators during the original investigation.

In fact, according to Agent Vileta, Defendant was the subject of intense investigation from the onset of the Wieneke Murder investigation. When asked whether Defendant was considered as a suspect in the original investigation, agent Vileta responded: "She was. What was interesting about this is there was a laser focus on her form – from the get-go, and – the biggest reason was, is because Annette by her own statements, puts her at the house that day – puts her at Corey's house that day." (Deposition of Trent Vileta, at 25, ll. 21-25).

Thus, absent the "new" statement from Jessi Becker, the prosecutorial delay in this case would be unreasonable. The new investigation into the Wieneke murder uncovered no new evidence against Defendant, except for the alleged confession. All the other evidence against Defendant, specifically evidence regarding her motive and

opportunity, was available to the original investigators in this case. Defendant was a major suspect in the original investigation, and was thoroughly investigated. Therefore, if the statements made by Jessi Becker were not at issue, the conclusion that the delay in prosecution here was unreasonable would be unproblematic.

The statements made by Jessi Becker regarding Defendant's alleged confession were the only new evidence against Defendant, when she was arrested in 2018. This fact was confirmed by Agent Vileta when he asserted that the statements of Jessi Becker were the primary new evidence against Defendant, and that this evidence led to the reopening of the Wieneke murder investigation. (Deposition of Trent Vileta at 73, ln. 19 – 74, ln. 1.) Importantly, Agent Vileta notes that Ms. Becker's statements are the most important pieces of evidence against Defendant. *Id.*

These statements do not undermine a finding of unreasonable delay for two main reasons: 1) law enforcement officers themselves did not treat this new evidence as important enough to thoroughly investigate it, and 2) Ms. Becker states that she told law enforcement officers about Defendant's involvement sixteen years prior to the new investigation.

Even though Agent Vileta identified Becker's statements as the most important piece of evidence against Defendant, law enforcement did not thoroughly investigate these statements. According to Agent Vileta, there was another witness to Defendant's alleged confession, Kayla Hazen. Agent Vileta did not ever contact Kayla Hazen prior to charging Defendant. (Deposition of Trent Vileta, at 18, line. 3).

Agent Turbett also speaks to the decision not to interview Kayla Hazen. During his deposition, he and defense counsel had the following exchange:

> Q. Did Jessi Becker give you any other names of anyone else who may have been a witness to the events she described?
> A. She said that Kayla, which was her friend at the time, Kayla Hazen, would have seen and heard the same thing that she did.
> Q. And did you follow up on that?
> A. We did not interview Kayla.
> Q. And who made that call?
> A. I don't remember specifically. That – that certainly was discussed amongst the investigative team, which would be Investigator Riess, Special Agent Vileta, and myself, if not a prosecutor – the prosecutor at some point as well.
> Q. Why didn't you contact Kayla Hazen?
> A. Jessi makes it very clear that even immediately after the defendant had made the statement and had – made the statement confessing to killing Corey Wieneke, that she had talked to Kayla and Kayla had said she did not want to talk about it. She'd been very defensive and protective and so – based on Jessi's statements, it was thought that Kayla would – would not want to be forthcoming or cooperative in speaking with law enforcement.

(Deposition of Jon Turbett at 13, ln. 16 – 14, ln. 14).

The failure of law enforcement to interview the only other witness to Defendant's supposed confession is very puzzling if, in fact, law enforcement viewed Becker's statements as significant enough to warrant thorough investigation.

Alternatively, the failure of investigators to thoroughly investigate the only witness to the supposed confession belies a general unreasonableness of those conducting the new investigation, and perhaps, a certain conclusion regarding Defendant's guilt to which subsequent evidence has conformed.

This general unreasonableness is further reflected in law enforcement's failure to

view or photograph the scene of the purported confession until after charges were filed and depositions taken. In fact, the apparent reason for examining the scene (over six months after Defendant was charged) is Ms. Becker's description during her deposition of where she was standing in relation to Defendant when she heard the supposed confession; and, the fact that the description of their positions was impossible to reconcile with the description of the home offered by another deponent very familiar with the scene. The photographs taken by law enforcement, subsequent to the depositions, undermine Ms. Becker's account of how she saw and heard the supposed confession, issues which should have been addressed prior to charging Defendant.

While the unreasonableness and lack of thoroughness in the new investigation is not dispositive of the prosecutorial delay inquiry, one other aspect of this case is: Ms. Becker alleges that she told law enforcement about Defendant's involvement prior to December 2017. According to Ms. Becker, shortly after she graduated high school in 2001, she told law enforcement about Defendant's possible involvement while at the police station on a different matter. Although she did not provide the officer exact details, she discussed with the officer the Wieneke murder case in general and "said something about Annette, and I believed [sic] that the officer dismissed me, and I couldn't even tell you which officer it was." Deposition of Jessi Becker at 35, ll. 20-22. Becker also told her mother about this interaction with the West Liberty police officer. According to her mother, Becker told the officer generally about Defendant's

involvement, but the officer "didn't want to pursue it." Deposition of Cynthia Krogh at 29, ll. 20-21. In fact, Ms. Krogh implies that Ms. Becker spoke with the officer specifically about the circumstances of the alleged confession:

> Q. To your knowledge, who else has Jessica told about this confession or the letters that she found of Annette's before she mentioned it to Agent Vileta?
> A. Only to the – to the police officer that she talked to in West Liberty. But I don't know if she told them about the – the letters and the – *but she told them about the – you know, the candles and –*

(Deposition of Cynthia Krogh at 31, ll. 8-14).

Thus, it is clear from the State's key witness that sometime shortly after 2001 she told law enforcement about Defendant's involvement in the Wieneke murder. Her mother adds that she even went into specific details, including discussing the candles.

Thus, law enforcement became aware of the key witness in this case on or around the year 2001, years before reinvestigating the Wieneke murder and years before deciding to charge Defendant with murder. Had law enforcement investigated Defendant's involvement when it first became aware of Ms. Becker's allegations in 2001, then several key witnesses with evidence pertinent to Defendant's defense would still be available, and could provide exculpatory evidence or evidence of a third-party's guilt. Therefore, for all the above reasons, this Court should find that the delay in prosecution in this case was unreasonable.

Conclusion

For the reasons enumerated above, Appellant respectfully requests the Iowa Supreme Court to overrule the incorrect decisions of the Court below and to remand with instructions to grant a new trial, only after mtDNA testing has been completed on the testing of the hairs in Corey Wieneke's hand, pursuant to Iowa Code § 81.10.

Respectfully submitted,

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Request for Oral Argument

Oral argument would assist this Court in its analysis of the issues presented. Consequently, Appellant requests oral argument.

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Certificate of Compliance

1. This Proof Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 13,690 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).
2. This Proof Brief complies with the typeface requirements of Iowa. R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Garamond, Font size 14.

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Certificate of Filing and Service

The undersigned hereby certifies that this Final Brief was filed via EDMS on the 16th day of October, 2020 and that a copy of this document will be served this date by US Mail upon any counsel of record or unrepresented parties in this action not served by the electronic filing system.

The undersigned further certifies that a copy of this Final Brief will be served as soon as possible, via U.S. Mail, to her client at the Iowa Correctional Institution for Women, 420 Mill St SW, Mitchellville, IA 50169.

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