IN THE SUPREME COURT OF IOWA

No. 21-0664

(Warren County No. SRCR031908)

STATE OF IOWA,

Plaintiff-Appellee,

vs.

PAMELA MILDRED MIDDLEKAUFF,

Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT IN AND FOR WARREN COUNTY

THE HONORABLE KEVIN PARKER

DEFENDANT-APPELLANT PAMELA MILDRED MIDDLEKAUFF'S APPELLATE BRIEF

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FINAL BRIEF

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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because the case presents a substantial constitutional question as to the validity of a statute, because the case presents a substantial issue of first impression, and because the case presents a fundamental and urgent issue of broad public importance requiring prompt or ultimate determination by the supreme court. Iowa R. App. P. 6.903(2)(d); Iowa R. App. P. 6.1101(2)(a); Iowa R. App. P. 6.1101(2)(c); Iowa R. App. P. 6.1101(2)(c).

STATEMENT OF THE CASE

This case involves the Warren County government's criminal prosecution of an Arizona medical marijuana patient who traveled with Iowa with her prescription medication.

Nature of the Case: This is an appeal by Defendant-Appellant Pamela Mildred Middlekauff from adverse pretrial rulings and from her conviction, sentence, and judgment for Possession of a Controlled Substance (Marijuana), a serious misdemeanor in violation of Iowa Code Section 124.401(5). Judgment was entered following a jury trial in Warren County District Court. Appeal has been perfected by timely filing of the Notice of Appeal and by Combined Certificate.

Course of Proceedings: On January 20, 2020, the State of Iowa alleged by trial information in Warren County District Court that on or about December 23, 2019, Defendant-Appellant Pamela Middlekauff had unlawfully possessed a controlled substance (marijuana) in violation of Iowa Code Section 124.401(5). (Information) (App. 8). Ms. Middlekauff pleaded not guilty and waived her right to a speedy trial. (Written Arraignment) (App. 19).

Jury trial commenced on May 13, 2021. (Trial Transcript 1:1-1:25) (App. 221). The jury returned a verdict finding Ms. Middlekauff guilty of Possession of a Controlled Substance (Marijuana). (Verdict Form Count 1)(App. 221) and the trial court entered judgment and sentence. (Judgment and Sentence p. 1) (App. 216). Ms. Middlekauff was sentenced to two days incarceration. (Judgment and Sentence p. 2)(App. 217). Her jail time was suspended and she was placed on probation. (Judgment and Sentence p. 2) (App. 217). She was instructed to pay a $315 fine and a $47.25 surcharge. (Judgment and Sentence p. 2) (App. 217). She was also directed to obtain a substance abuse evaluation and complete any recommended treatment or education and to abstain from all controlled substances. (Judgment and Sentence p. 2-3) (App. 217-218).

FACTS

Ms. Middlekauff suffers from chronic pain arising from osteoarthritis. (Trial Transcript 69:11-69:19) (App. 289). Dr. Kareen O'Brien, a licensed practitioner in the State of Arizona, prescribed medical marijuana to Ms. Middlekauff as a treatment for the chronic pain arising from this condition. (Trial Transcript 67:8 - 67:17; 69:16-69:22) (App. 287; 289). Based on Dr. O'Brien's medical marijuana physician certification, the State of Arizona issued Ms. Middlekauff a medical marijuana identification card that was still active and valid in December of 2019. (Trial Transcript 69:4-69:8; 67:8-67:10; 70:24-71:4) (App. 289; 287; 290).

In December of 2019, Ms. Middlekauff purchased marijuana from Giving Tree dispensary, a medical marijuana dispensary licensed by the State of Arizona. (Trial Transcript 71:5-71:24) (App. 291).
When she purchased her medication, Ms. Middlekauff was required to show the dispensary employees her state medical marijuana identification card. (Trial Transcript 72:11-72:19) (App. 292). Dispensary employees verified that Ms. Middlekauff's prescription was valid at the time she entered the dispensary and again at the time she purchased her medication. (Trial Transcript 72:20-72:24) (App. 292).

Dispensary employees scanned the barcode on Ms. Middlekauff's medical marijuana identification card and would not have permitted Ms. Middlekauff to purchase more marijuana than the amount prescribed to her. (Trial Transcript 73:1-73:25) (App. 293).

Ms. Middlekauff drove from her home in Arizona to Wisconsin to transport a family dog whose person had passed away. (Trial Transcript 75:13-75:20) (App. 295). Police stopped her for speeding in Iowa and the State of Iowa charged her with possessing marijuana in violation of Iowa Code Section 124.401(5) notwithstanding that at the time of the stop, Ms. Middlekauff had a valid marijuana prescription. (Trial transcript 67:8-67:10) (App. 287).

The State introduced two witnesses at trial. The State's first trial witness, Megan Reedy, is a criminalist for the DCI lab. The State did not file a Minute of Testimony for Ms. Reedy that included Ms. Reedy's name. At trial, Ms. Reedy testified that she tested the substance at issue and that the substance was marijuana.

The State's second trial witness was Agent Luke Valenta. (Trial Transcript 106:25-107:2) (App. 326-237). Agent Valenta testified that on December 23, 2019, he stopped Ms. Middlekauff for speeding. (Trial

Transcript 109:7-109:24) (App. 329). While speaking to Ms. Middlekauff, Agent Valenta smelled marijuana and asked Ms. Middlekauff whether she had smoked it. (Trial Transcript 111:15-111:20) (App. 331). Ms. Middlekauff told him that she had not smoked marijuana in the car but did have marijuana with her. (Trial Transcript 111:15-111:23) (App. 331). Agent Valenta asked Ms. Middlekauff for the marijuana. (Trial Transcript 111:5-111:7) (App. 331). Ms. Middlekauff handed Agent Valenta a "pouch with the little small individual pouches of marijuana in it." (Trial Transcript 111:6-111:20) (App. 331).

Ms. Middlekauff was not permitted at trial to present any evidence of her affirmative defense to the jury. (Pretrial Conference 10:23-10:24) (App. 40); (Pretrial Conference 13:2-13:5) (App. 43). The trial court refused to offer Ms. Middlekauff's requested instructions and interrogatories. (Pretrial Conference 13:13-14:17) (App. 43-44). Ms. Middlekauff was permitted to make an offer of proof regarding her affirmative defense outside the presence of the jury. (Trial Transcript 67:3-75:25) (App. 287-295).

The trial court allowed the government to introduce Agent Valenta's testimony, criminalist Reedy's test results, and some bags of marijuana into evidence over Ms. Middlekauff's objections. The jury convicted Ms.

Middlekauff of illegal possession of marijuana without ever being told that Ms. Middlekauff had a prescription for medical marijuana or that it is not illegal to have a controlled substance obtained pursuant to a valid prescription.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING MS. MIDDLEKAUFF'S THIRD MOTION TO DISMISS.

a. Error Preservation and Standard of Review

Defendant's third motion to dismiss was predicated on both the Iowa Rules of Criminal Procedure and the state and federal Constitutions. (Motion to Dismiss (Third) p. 1) (App. 55).

This Court should review the trial court's denial of Ms. Middlekauff's motion to dismiss the trial information pursuant to the Iowa Rules of Criminal Procedure for errors of law. *State v. Johnson*, 528 N.W.2d 638, 640 (Iowa 1995).

Ms. Middlekauff's constitutional rights are also implicated. Review is *de novo* for those arguments predicated on constitutional precepts. *State v. Tague*, 676 N.W.2d 197, 201 (Iowa 2004) (*citing State v. Naujoks*, 637 N.W.2d 101, 106 (Iowa 2001)). The Court independently evaluates the totality of the circumstances shown in the record. *Tague* at 201 (*quoting State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001)).

When a law limits a fundamental constitutional right, such as the Due Process right to be free from prosecution under vague statutes, strict scrutiny

applies strict scrutiny applies. *State v. Hartog*, 440 N.W.2d 852, 854 (Iowa 1989). Under strict scrutiny, a law is unconstitutional if it does not "promote a compelling or overriding" governmental interest that justifies its infringement on a fundamental right. *Id*. (*citing Roe v. Wade*, 410 U.S. at 155).

b. Argument

i. An Arizona medical marijuana card is a "prescription" or an "order of a practitioner" under Iowa law.

Neither "prescription" nor "order of a practitioner" is defined in the Iowa Code. A prescription or practitioner's order is an affirmative defense to the charge of possession of a controlled substance. Iowa Code Section 124.401(5); *see also State v. Gibbs*, 239 N.W.2d 866, 868 (Iowa 1976); *State v. Gallardo*, 871 N.W.2d 703 (Iowa Ct. App. 2015) ("[O]ne may lawfully possess a controlled substance obtained pursuant to a valid prescription.")

"Prescription" is not defined in the Iowa Code. Words without legislative definitions are given their ordinary meanings. *State v. Kidd*, 562 N.W.2d 764, 765 (Iowa 1997) (*citing State v. White*, 545 N.W.2d 552, 555 (Iowa 1996)). The dictionary is one way to ascertain a word's common and

ordinary meaning. *Kidd* at 765 (*citing State v. Romeo*, 542 N.W.2d 543, 548 (Iowa 1996)).

The Oxford English and Spanish Dictionary defines "prescription" as:

> - "An instruction written by a medical practitioner that authorizes a patient to be provided a medicine or treatment."
>
> OR
>
> - "A recommendation that is authoritatively put forward."
>
> Oxford English and Spanish Dictionary, Synonyms, and Spanish to English Translator, "prescription." https://www.lexico.com/en/definition/prescription (July 8, 2020).

While the Iowa Code never explicitly defines "prescription," the Pharmacy chapter does define prescription drug:

> "Prescription drug" or "drug" means a drug, as classified by the United States food and drug administration, that is required by the United States food and drug administration to be prescribed or administered to a patient by a practitioner prior to dispensation.
>
> Iowa Code. § 155A.3

The United States food and drug administration's "drug" definition includes substances intended for use in the treatment of disease. U.S. Food and Drug

Administration, "Drugs@FDA Glossary of Terms." https://www.fda.gov/drugs/drug-approvals-and-databases/drugsfda-glossary-terms (September 29, 2021). The FDA further defines a "prescription drug product" as something that "requires a doctor's authorization to purchase." *Id*. (August 23, 2021). Because marijuana is, in this context, a substance intended for use in the treatment of symptoms arising from disease, it is a "drug" under the FDA's definition. Because Iowa law defines "prescription drug" as a drug that the FDA says must be prescribed and because the FDA definition of prescription drug is a drug that requires a doctor's authorization to purchase, Ms. Middlekauff's marijuana, which required her doctor's authorization to purchase, is a prescription drug under the definition in the Pharmacy chapter of the Iowa Code.

Iowa Code Section 124.401(5) must "give fair warning of what is prohibited" (*State v. Welton*, 300 N.W.2d 157, 160 (Iowa 1981) (internal citations omitted)) and must "be interpreted strictly with doubts therein being resolved in favor of the accused." *Id*. Where, as here, a doctor evaluated and diagnosed a patient, recommended a treatment, and submitted documentation to the state government authorizing the patient to access an otherwise-restricted medication, it is clear that a medical marijuana

identification card provided to the patient by the government for the purpose of enabling the patient to legally purchase marijuana was proof of a valid "prescription." Iowa Codes Section 124.401(5) exempts patients who have valid prescriptions from prosecution. Ms. Middlekauff therefore never should have been charged.

The State argued Ms. Middlekauff's Arizona medical marijuana card did not exempt Ms. Middlekauff from prosecution because Ms. Middlekauff did not show that her physician was a "practitioner."[1]

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[1]

> No evidence was provided the prescribing person identified in the attachments to the motions to dismiss was in fact a person licensed, registered or otherwise permitted to distribute, dispense or administer controlled substances in the State of Iowa. While she may be licensed in Arizona, for purposes of Iowa law, she is not a practitioner. Additionally, there has been no authority presented by the defendant an out of state doctor can provide a prescription for marijuana to a person that would legalize that conduct in the State of Iowa.
>
> State's Resistance to Defendant's Motion to Dismiss, March 4, 2020, pts. 8-9 (App.).

The State's argument was, at its core, that Iowa will not recognize any prescription as "valid" unless it was written by a physician licensed *in Iowa*. (*See also*: Pretrial Conference 9:7-9:11) (App. 39) ("What we are saying is that unless the defendant can provide some sort of authority that allows for out-of-state prescriptions for controlled substances to be valid in the state of Iowa, they are not valid in the state of Iowa.").

Iowa does not require nonresident physicians to register in Iowa. *State v. Rasmussen*, 213 N.W.2d 661, 666 (Iowa 1973). Furthermore, "[t]he [. . .] definition of 'practitioner' incorporated in the Iowa statute is the same definition for 'practitioner' as that adopted by [. . .] the Uniform Controlled Substances Act. See also definition of 'practitioner' in 21 U.S.C.A. [§] 802(20)." *Id*. at 664.

The Federal Controlled Substances Act readily acknowledges that doctors licensed in the jurisdiction where they practice are "practitioners:"

> The term ''practitioner'' means a physician, dentist, veterinarian, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted, **by the United States or the jurisdiction in which he practices or does research**, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research.

21 U.S.C.A. § 802(21) (emphasis added).[2]

The Uniform Controlled Substances Act, which the Iowa Supreme Court acknowledged in *State v. Rasmussen* is the source of Iowa's definition of "practitioner," limits its definition to doctors who are licensed "by this State:"

> "Practitioner" means a physician, dentist, veterinarian, scientific investigator, pharmacist, pharmacy, hospital, or other person licensed, registered, or otherwise permitted, by this State, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research.
>
> *Rasmussen* at 664 (citing Art. 1, Sec. 101 (20), Uniform Controlled Substances Act (1994)).

"Several provisions of the Uniform Controlled Substances Act (1990) are derived from the wording of the federal Controlled Substances Act. In most instances, deviations from the wording of the federal act are intended to improve readability, with no change in substance." Uniform Controlled Substances Act (1994) p. 11 (emphasis added). The "practitioner" definition is necessarily one of those instances where the wording of the definition may

[2] It appears that the *Rasmussen* court's intended citation was 21 U.S.C.A. § 802(21), defining "practitioner," not 21 U.S.C.A. § 802(20), defining "poppy straw."

have changed between the federal act and the Uniform Controlled Substances Act but the substance of the definition must be static.

If each state adopted the Uniform Controlled Substances Act and interpreted "practitioner" to mean only persons licensed in that particular state, a patient driving from North Dakota to Texas would need separate prescriptions from physicians in North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, and Texas in order to avoid running afoul of each state's controlled substance possession laws. The State's preferred interpretation of the Uniform Controlled Substance Act's definition of "practitioner" thus flies in the face of the purpose of the Uniform Controlled Substances Act, which "was drafted to maintain uniformity between the laws of the several States and those of the federal government." Prefatory Note for Uniform Controlled Substances Act (1990) (Noting also that the act seeks "[t]o assure the continued free movement of controlled substances between States," and to "ensur[e] legislative and administrative flexibility[.]")

This is further clarified by Iowa Code Section 155A.30 (2019) ("Pharmacy"), which states unambiguously that "prescription drug orders issued by out-of-state practitioners who would be authorized to prescribe if they were practicing in Iowa may be filled by licensed pharmacists operating in licensed Iowa pharmacies." Because Iowa allows out-of-state doctors'

prescriptions to be filled in Iowa, the State's assertion that Iowa only recognizes prescriptions written by doctors licensed to practice in Iowa is unquestionably wrong. *See also* Iowa Code Section 155A.3(38) (including persons "licensed in another state in a health field in which, under law, licensees in this state may legally prescribe drugs" in the pharmacy chapter's "practitioner" definition.)

Because the substance of the "practitioner" definition that Iowa borrowed from the Uniform Controlled Substance Act is clearly meant to be identical to the substance of the Federal Controlled Substances Act (changes in the wording notwithstanding), because the Federal Controlled Substances Act acknowledges physicians licensed in their home states as "practitioners," and because Iowa statutorily acknowledges out-of-state practitioners' prescriptions, a physician licensed in Arizona is necessarily a "practitioner" whose prescriptions can be acknowledged under Iowa law.

Under applicable Arizona law in December of 2019, in order for a patient to receive an Arizona medical marijuana ID, a doctor must first submit a written certification to the Arizona Department of Health Services certifying that they have made or confirmed the diagnosis of a debilitating medical condition (A.R.S. 36-2801,) that they have established medical records documenting care, that they conducted an in-person physical

examination of the patient, that they reviewed the prior medical records and profile on the Arizona Board of Pharmacy Controlled Substances Prescription Monitoring Program database, that they explained the potential risks and benefits of the medical use of marijuana to the patient, that they disclosed any personal or professional relationships they had with any dispensaries that they referred the patient to, and that they explained the possible risks and legal consequences of use of marijuana while pregnant or breastfeeding. A.R.S. 36-2804.02(A)(1) (Registration of qualifying patients and designated caregivers); A.R.S. 36-2801 (Definitions). The certifying doctor must also attest that in their professional opinion, the patient "is likely to receive therapeutic or palliative benefit from [their] medical use of marijuana to treat or alleviate [their] debilitating medical condition."

An Arizona patient in 2019 could receive a medical marijuana card only after a practitioner had made this certification. Ms. Middlekauff's Arizona medical marijuana prescription authorized her by statute to obtain up to 2.5 oz of "usable marijuana," in a 14 day period, including "the dried flowers of the marijuana plant[] and any mixture or preparation thereof." A.R.S. 32- 2801(1)(a)(i); A.R.S. 36-2806.02(A)(3); A.R.S. 32-2801(17)(a). Medical marijuana was a medicine or treatment that was legally inaccessible in Arizona without Ms. Middlekauff's doctor's written instruction. Ms.

Middlekauff's Arizona medical marijuana card is thus a "prescription" under the dictionary's first definition. ("An instruction written by a medical practitioner that authorizes a patient to be provided a medicine or treatment." (https://www.lexico.com/en/definition/prescription) (July 8, 2020)).

An Arizona medical marijuana card is also a prescription under the dictionary's other definition. A physician is an authority on proper medical treatment. When a physician diagnoses a patient and recommends a treatment, the physician has issued a "prescription," defined as "[a] recommendation that is authoritatively put forward." Oxford English and Spanish Dictionary, "prescription," (2), (https://www.lexico.com/en/definition/prescription) (July 8, 2020); *Conant v. Walters*, 309 F.3d 629, 635 (9th Cir. 2002) (the First Amendment precludes the government from prohibiting physicians' *recommendations* for medical marijuana unless **"the physician intends for the patient to use [the recommendation] as the means for obtaining marijuana, as a prescription is used as a means for a patient to obtain a controlled substance [. . .]."** (emphasis added)).

It is thus apparent that a physician's written recommendation issued for the purpose of enabling a patient to obtain marijuana is a "prescription."

When a doctor recommends marijuana and furnishes that recommendation in writing to a state government for the purpose of enabling a patient to obtain medical marijuana, the doctor has prescribed medical marijuana.);[3] *see also* *Gonzales v. Oregon*, 546 U.S. 243, 243–75 (2006) (internal citations omitted) (internal quotation marks omitted):

> [T]he [Controlled Substances Act] allows prescription of drugs that have a currently accepted medical use,[4] requires

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[3] The federal Controlled Substance Act ("CSA") permits the revocation of a physician's registration to distribute or dispense controlled substances upon a finding that the registrant has "committed such acts as would render his registration under [21 U.S.C. § 823] inconsistent with the public interest." 21 U.S.C. § 824(a)(4).

Whether or not a practitioner's decision to prescribe medical marijuana in compliance with applicable state law could seriously be found "inconsistent with the public interest" when as of the writing of this brief, "[a] total of 36 states, District of Columbia, Guam, Puerto Rico and U.S. Virgin Islands have approved comprehensive, publicly available medical marijuana/cannabis programs" (National Conference of State Legislatures, State Medical Marijuana Laws, https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx, accessed May 31, 2021) seems dubious.

[4] Notwithstanding that marijuana's federal "Schedule I" classification stubbornly denies the existence of any "currently accepted medical use in treatment," (21 U.S.C. § 812(b)(1)(B)) the existence of medical marijuana's accepted medical applications is firmly underpinned by scientific consensus:

> Scientific data indicate the potential therapeutic value of cannabinoid drugs, primarily THC, for pain relief, control of nausea and vomiting, and appetite stimulation [. . .]. The psychological effects of

> cannabinoids, such as anxiety reduction, sedation, and euphoria can influence their potential therapeutic value.
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> *Id*. (*quoting* Institute of Medicine. 1999. Marijuana and Medicine: Assessing the Science Base. Washington, DC: The National Academies Press. https://doi.org/10.17226/6376).

Additionally, in 1988, federal Administrative Law Judge Francis L. Young filed an *Opinion and Recommended Ruling, Findings of Fact, Conclusions of Law and Decision of Administrative Law Judge in the Matter of Marijuana Rescheduling Petition*, Docket No. 86-22 (Dep't Justice D.E.A., Sept. 6, 1988) (hereinafter, "ALJ Opinion"). Judge Young found that "**it is clear beyond any question that many people find marijuana to have, in the words of the Act, an 'accepted medical use in treatment in the United States [. . .]**." ALJ Opinion at 26 (emphasis added). The government would be hard-pressed to come up with any medical authority whatsoever that contravenes the existence of accepted medical uses.

Further undermining marijuana's federal Schedule I status, the ALJ Opinion noted that "there is accepted safety for use of marijuana under medical supervision." ALJ Opinion at 66. While between twenty million and fifty million (as of 1988) Americans "routinely [. . .] smoke marijuana without the benefit of direct medical supervision," there has never been a single "proven, documented cannabis-induced fatality." ALJ Opinion at 57. A patient would need to smoke roughly 1,500 pounds of marijuana within 15 minutes to die from marijuana overdose. ALJ Opinion at 57. In contrast, hundreds of people die from consuming aspirin each year. ALJ Opinion at 57.

Clearly, the Arizona legislature, in permitting doctors to write recommendations that authorized patients to access marijuana for medical use, acknowledged the existence of currently-accepted medical uses for marijuana.

> a medical purpose for dispensing the least controlled substances of those on the schedules, and defines a valid prescription as one issued for a legitimate medical purpose. [. . .]
>
> [T]he prescription requirement [. . .] ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse. As a corollary, the provision also bars doctors from peddling to patients who crave the drugs for those prohibited uses. [. . .]
>
> [T]he [Controlled Substance Act']s prescription requirement does not authorize the Attorney General to bar dispensing controlled substances [. . .] in the face of a state medical regime permitting such conduct.

The validity of Ms. Middlekauff's prescription should have been assessed under Arizona law:

> It is unlawful for any person knowingly or intentionally to possess a controlled substance **unless such substance was obtained directly from, or pursuant to, a valid prescription** or order of a practitioner while acting in the course of the practitioner's professional practice.
>
> Iowa Code Section 124.401(5) (emphasis added).

In order to be exempt from prosecution, a patient must have obtained the marijuana directly from or pursuant to a valid prescription. The prescription therefore must have been valid at the time of obtainance. Ms. Middlekauff obtained her marijuana in Arizona pursuant to a prescription written by her doctor and authorized by Arizona law. It is therefore Arizona law governing

medical marijuana prescriptions, not Iowa law, that was determinative on the issue of whether Ms. Middlekauff's prescription was "valid" at obtainance and thereby exempted Ms. Middlekauff from prosecution for possession of a controlled substance under Iowa law.[5] Whether or not a doctor could write a

[5] Federal law does not explicitly prohibit prescribing marijuana, leaving legless any State argument that the validity of Ms. Middlekauff's Arizona prescription was prempted by federal law.

> [T]he case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there is between them. [. . .]
>
> Since December 2014, congressional appropriations riders have prohibited the use of any [Department of Justice] funds that prevent states with medical marijuana programs ... from implementing their state medical marijuana laws.
>
> *Hager v. M & K Constr.*, A.3d 137, 149 (N.J. App. Div. 2020) (internal citations omitted) (internal quotation marks omitted).
>
> [T]o convict a practitioner under [21 U.S.C.A. § 841 (prohibiting the distribution or dispensation of controlled substances)], the government must prove (1) that the practitioner distributed controlled substances, (2) that the distribution of those controlled substances was outside the usual course of professional practice and without a legitimate medical purpose, and (3) **that the practitioner acted with intent to distribute the drugs and with**

valid prescription for marijuana for an Iowa patient is immaterial when the Iowa Code says that a patient must have a "valid prescription," not "a prescription that could be validly issued in Iowa."

The Arizona Medical Marijuana Act ("AMMA") "allows a patient with a debilitating medical condition to obtain a registration identification card that permits possession and use of marijuana for medicinal purposes." *State v. Okun*, 296 P.3d 998, 1000 (Ariz. Ct. App. 2013) (internal citations omitted.) Authorized patients under the Arizona Medical Marijuana Act have "a state-law right to possess the drug" (*Okun* at 1000). Under the AMMA, no penalty – civil or criminal – can be imposed on qualified patients "possessing an allowable amount of marijuana." *Okun* at 1000 (*citing* Arizona Revised Statutes § 36-2811(B)(1)).

Because Ms. Middlekauff's had a prescription which was valid and recognized under Arizona law at the time that Ms. Middlekauff obtained her

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> **intent to distribute them outside the course of professional practice.** In other words, the jury must make a finding of intent not merely with respect to distribution, but also with respect to the doctor's intent to act as a pusher rather than a medical professional.
>
> *United States v. Feingold*, 454 F.3d 1001, 1008 (9th Cir. 2006) (emphasis added).

medical marijuana pursuant to that prescription, the marijuana that Ms. Middlekauff had in her possession was obtained pursuant to a valid prescription. Because the marijuana in Ms. Middlekauff's possession was obtained pursuant to a valid prescription, Ms. Middlekauff could not be validly prosecuted for possession of marijuana under Iowa Code Section 124.401(5).

ii. If an Arizona medical marijuana card is not a "prescription" or a practitioner's order under Iowa law, then Iowa Code 124.401(5) is unconstitutionally vague as applied.

The district court erroneously claimed that "the vagueness argument isn't part of a current Iowa law [. . .]." (Trial Transcript 151:24-152:1). (App. 371-372).

> Among other things, the Due Process Clause prohibits enforcement of vague statutes under the void-for-vagueness doctrine. [. . .] [A] statute cannot be so vague that it does not give persons of ordinary understanding fair notice that certain conduct is prohibited. [. . .] [D]ue process requires that statutes provide those clothed with authority sufficient guidance to prevent the exercise of power in an arbitrary or discriminatory fashion.
>
> *State v. Nail*, 743 N.W.2d 535, 539 (Iowa 2007).
>
> The prohibition of vagueness in criminal statutes is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled

> rules of law, and a statute that flouts it violates the first essential of due process.
>
> *Johnson v. United States*, 576 U.S. 591, 595 (2015) (citations omitted) (quotation marks omitted).

The text of Iowa Code Section 124.401(5) is clear: patients are not to be prosecuted for the possession of controlled substances that they have prescriptions for – and yet, this prosecution persisted until conviction. If Ms. Middlekauff's medical marijuana card was not legally a prescription or a practitioner's order, then the law's obfuscation violated Ms. Middlekauff's fundamental right to live unmolested by prosecution under vague criminal statutes. The law is therefore subject to strict scrutiny on review.

Criminal prohibitions, including Iowa Code 124.401(5), "are to be interpreted strictly with doubts therein being resolved in favor of the accused." *Welton* at 160 (*citing State v. Lawr*, 263 N.W.2d 747, 750 (Iowa 1978)); the laws must also "give fair warning of what is prohibited." *Welton* at 160 (*citing State v. Price*, 237 N.W.2d 813, 815 (Iowa 1976).

Statutes are presumed constitutional. *State v. Little*, 710 N.W.2d 545 (Iowa Ct. App. 2005) (*citing State v. Robinson*, 618 N.W.2d 306, 314 (Iowa 2000)). In order to prove that Iowa Code Section 124.401(5) is unconstitutionally vague, Ms. Middlekauff "must negate every conceivable

reasonable basis on which the statute must be upheld." *Little* at 545 (*citing Robinson* at 314). To survive a vagueness claim, "a penal statute must give a person of ordinary intelligence fair notice of what is prohibited and must provide an explicit standard for those who apply it." *Little* at 545 (*quoting State v. Bock*, 357 N.W.2d 29, 33-34 (Iowa 1984)).

Statutes are not unconstitutionally vague when their meaning can be ascertained by reference to other statutes, adjudicated cases, or dictionary definitions. *State v. Powers*, 278 N.W.2d 26, 29 (Iowa 1979) (*citing Knight v. Iowa Dist. Ct. of Story Cty*., 269 N.W.2d 430, 432 (Iowa 1978)). Because Iowa law does not define "prescription," the trial court was required to adopt the ordinary meaning of the word (*Kidd* at 765) resolving any doubts in Ms. Middlekauff's favor. *Welton* at 160.

If a medical marijuana identification card which was issued after a doctor evaluated a patient and recommended medical marijuana as a medical treatment and which permitted a patient to obtain a treatment that was otherwise legally inaccessible to her is not a "prescription" or an "order of a practitioner," then Iowa Code section 124.401(5) does not provide fair notice or provide an explicit standard for those applying the law. If an Arizona medical marijuana identification card does not bring Ms.

Middlekauff's conduct into compliance with Iowa Code Section 124.401(5), then Iowa Code Section 124.401(5) is impermissibly vague and this prosecution violated Ms. Middlekauff's fundamental right to due process.

c. Because the Minutes of Testimony acknowledged Ms. Middlekauff's Arizona medical marijuana card and did not rebut the card's validity, the Minutes of Testimony were bereft of probable cause and thus improperly filed under the Iowa Rules of Criminal procedure.

The trial court was required to find that the State had shown probable cause prior to approving the Trial Information. Iowa R. Crim. P. 2.5(4); *State v. Epps*, 322 N.W.2d 288, 291 (Iowa 1982). Probable cause exists when there "is a reasonable ground for belief of guilt." *Brinegar v. United States*, 338 U.S. 160, 175, (1949) (internal citations omitted). Because the Incident Report, filed as an attachment to the Minutes of Testimony, acknowledged Ms. Middlekauff's medical marijuana identification card and did not rebut the card's validity, the Minutes of Testimony contained uncontested evidence of Ms. Middlekauff's affirmative defense. (Incident Report) (App. 13-18). The Minutes were therefore impermissibly bereft of probable cause. The charging documents were therefore defective and the trial court was required to dismiss this matter. Iowa R. Crim. P. 2.11(6)(a) ("If it appears from the indictment or information and the minutes of evidence that the particulars stated do not constitute the offense charged [. .

.] the court may and on motion of the defendant shall dismiss the indictment or information.")

d. Ms. Middlekauff's prosecution in the absence of probable cause violated Ms. Middlekauff's right to be free from unreasonable seizures under the Fourth Amendment of the United States Constitution and under Article 1, Section 8 of the Iowa Constitution.

The trial court should have dismissed the charging document against Ms. Middlekauff when she demonstrated that the Trial Information violated her constitutional rights. *State v. Hall*, 235 N.W.2d 702, 712 (Iowa 1975).

The Fourth Amendment safeguards people's right against unreasonable seizures. While Ms. Middlekauff was not physically restrained – she never spent time in custody during the prosecution – she was nonetheless "seized" for constitutional purposes during the pendency of the prosecution.[6]

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[6] A person facing serious criminal charges is hardly freed from the state's control upon his release from a police officer's physical grip. He is required to appear in court at the state's command. He is often subject, as in this case, to the condition that he seek formal permission from the court (at significant expense) before exercising what would otherwise be his unquestioned right to travel outside the jurisdiction. Pending prosecution, his employment prospects may be diminished severely, he may suffer reputational harm, and he will experience the

Ms. Middlekauff presented Agent Valenta, the State, and the trial court with evidence of her affirmative defense. The State filed Agent Valenta's report, referencing Ms. Middlekauff's medical marijuana identification card, as an attachment to the Minutes of Testimony. At no point did the State so much as hint at evidence which might have invalidated Ms. Middlekauff's defense. With no basis to believe that Ms. Middlekauff violated Iowa Code Section 124.401(5), the government had no probable cause and therefore no interest that justified broaching Ms. Middlekauff's interest in freedom. Her seizure was thus constitutionally unreasonable.

> financial and emotional strain of preparing a defense.
>
> A defendant incarcerated until trial no doubt suffers greater burdens. That difference, however, should not lead to the conclusion that a defendant released pretrial is not still "seized" in the constitutionally relevant sense. Such a defendant is scarcely at liberty; he remains apprehended, arrested in his movements, indeed "seized" for trial, so long as he is bound to appear in court and answer the state's charges. He is equally bound to appear, and is hence "seized" for trial, when the state employs the less strong-arm means of a summons in lieu of arrest to secure his presence in court.
>
> *Albright v. Oliver*, 510 U.S. 266, 277–79 (1994) (Ginsburg, J., concurring) (internal citations omitted) (internal quotations omitted).

Ms. Middlekauff's unreasonable seizure was perpetuated by the persistence of a prosecution in which the State failed to articulate any basis upon which any reasonable fact-finder could have convicted Ms. Middlekauff, even when viewing the evidence in a manner most favorable to the State. Ms. Middlekauff's interests in freedom from seizure may be "subordinated to the greater needs of society" only "in circumstances where the government's interest is sufficiently weighty." *United States v. Salerno*, 481 U.S. 739, 750 (1987). This prosecution violated the Fourth Amendment and should have been dismissed.

e. Prosecuting Ms. Middlekauff for possessing medical marijuana violated her right to equal protection of the laws.

Equal protection prohibits "invidious discriminations between persons and different groups of persons" and requires that "all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.' " *Griffin v. Illinois*, 351 U.S. 12, 17 (1956).

Federal and state Due Process provisions promise equal protection to medical marijuana patients, precluding the State from exercising discretion about which controlled substances to acknowledge valid prescriptions for. The State could not validly claim that Iowa prosecutors can prosecute

medical marijuana patients whose prescriptions are issued by out-of-state doctors when those prosecutors do not also prosecute patients whose out-of-state doctors prescribe other controlled substances.

Had Ms. Middlekauff's Arizona physician prescribed an opioid painkiller – something addictive and likely deleterious to her health – for her chronic, severe pain, it is doubtful the State would have charged her under the same statute, notwithstanding that both marijuana and opioids are controlled substances subject to prosecution without prescriptions. As a marijuana prescription-holder, Ms. Middlekauff's legal position should be identical to the hypothetical opioid prescription-holder's. There is nothing in the text of Iowa's law justifying preferential treatment for one substance over the other. The woman with the marijuana prescription and the woman with the opioid prescription are situated identically under Iowa Code section 124.401(5); equal protection therefore demands that they are treated alike. *See Nguyen v. State*, 878 N.W.2d 744, 757 (Iowa 2016); *Varnum v. Brien*, 763 N.W.2d 862, 883 (Iowa 2009).

Moreover, the validity of Ms. Middlekauff's prescription is not lessened by its having been written by an Arizona physician. Not only does Iowa law explicitly recognize physicians licensed in other jurisdictions as

practitioners, but Arizona's statutory physician licensing provisions are precisely the sort of "public acts" that Iowa must afford full faith and credit to. U.S. Const. Art. 4. § 1.; A.R.S. 32-1525; Iowa Code § 155A.3(38); *Hughes v. Fetter*, 341 U.S. 609, 611 & n.5 (1951); *see also* Douglas Laycock, Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law, 92 Colum. L. Rev. 249, 290 (1992) ("It is clear that 'public Acts' means statutes. James Wilson and William Johnson said as much on the floor of the Convention, the First Congress so understood it, and the Supreme Court has so held.").

Additionally, Ms. Middlekauff was denied Equal Protection relative to Iowa cannabidiol patients. Iowa law permits Iowa patients to access components of cannabis (including THC) for medical applications under some circumstances.[7] Ms. Middlekauff should not have been prosecuted simply because her prescription medication conformed to the Arizona statutory definition of "usable marijuana" rather than to the Iowa statutory definition of cannabidiol.

[7] Iowa law does not permit doctors to recommend or Iowa dispensaries to dispense marijuana flower to be smoked. Iowa law also puts a low limit on the amount of THC that a patient can obtain in a given timeframe.

II. MS. MIDDLEKAUFF WAS DENIED A FAIR TRIAL.

a. Error Preservation and Standard of Review

The standard of review for jury instructions issues is for errors at law. *State v. Anderson*, 636 N.W.2d 26, 30 (Iowa 2001) (*citing State v. Rohm*, 609 N.W.2d 504, 509 (Iowa 2000)).

Review of evidentiary rulings is abuse of discretion. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997).

Review of constitutional claims is *de novo*. *Tague* at 201 (*citing Naujoks* at 106). The Court independently evaluates the totality of the circumstances shown in the record. *Tague* at 201 (*quoting Turner* at 606).

b. Argument

i. The trial court's refusal to issue Ms. Middlekauff's requested jury instructions pertaining to her affirmative defense and refusal to permit Ms. Middlekauff to present evidence of her defense violated Ms. Middlekauff's constitutional rights to due process, fair trial, effective assistance of counsel, and to present a defense.

The State was obligated to prove "every fact necessary to constitute the crime with which the defendant is charged." *State v. Webb*, 648 N.W.2d 72, 76 (Iowa 2002) (*citing Gibbs* at 867). Possession of a controlled substance under Iowa Code section 124.401(5) requires proof that the

defendant: (1) "exercised dominion and control . . . over the contraband," (2) knew of its presence, and (3) knew that it was marijuana. *See State v. Reeves*, 209 N.W.2d 18, 21 (Iowa 1973). After Ms. Middlekauff introduced adequate evidence of her affirmative defense, the State should thereafter have been "obligated to assume the burden to negate the exception beyond a reasonable doubt." *Gibbs* at 869.

The trial court's exclusion of evidence supporting Ms. Middlekauff's affirmative defense and the trial court's refusal to issue the relevant instructions unconstitutionally relieved the State of its burden to prove Ms. Middlekauff guilty. Ms. Middlekauff's affirmative defense was a pivotal issue.

The right to present a defense is one of the "minimum essentials of a fair trial." *United States v. Burge*, 990 F.2d 244, 248 (6th Cir. 1992) (*quoting Chambers v. Mississippi*, 410 U.S. 284, 294 (1973)). "[T]he materiality of the excluded evidence to the presentation of the defense [. . .] determines whether a defendant has been deprived of a fundamentally fair trial." *Burge* at 248 (*quoting Rosario v. Kuhlman*, 839 F.2d 918, 925 (2d Cir.1988)). "[I]f the omitted evidence creates a reasonable doubt that did

not otherwise exist, constitutional error has been committed." *Burge* at 248 (*quoting United States v. Agurs*, 427 U.S. 97, 112-13 (1976)).[8]

The trial court's refusal to allow Ms. Middlekauff "an opportunity to present competent proof in [her] defense constitutes a violation of a fair trial and of due process." *Henderson v. Fisher*, 631 F.2d 1115, 1119 (3d Cir. 1980) (*citing Clack v. Reid*, 441 F.2d 801, 804 (5th Cir. 1971)); *Grotto v. Herbert*, 316 F.3d 198, 205–06 (2d Cir. 2003) (citations omitted) ("It is, of course, well established as a fundamental matter of due process that the defendant in a criminal case has the right to present a defense, that is, to present to the jury admissible evidence that might influence the determination of guilt.")

Ms. Middlekauff requested jury instructions requiring the State to disprove her affirmative defense:

> If Pamela Middlekauff presents substantial evidence that she obtained marijuana directly from or pursuant to a valid prescription or order of a practitioner, then the State must also prove the following elements of Possession of Marijuana beyond a reasonable doubt: [t]he marijuana was not

[8] *Burge* concerns "materiality" in a *Brady* context, however, the *Brady* materiality standard translates well for present purposes and does not appear to be contradicted by other authority.

> obtained directly from, or pursuant to, a valid prescription or a practitioner's order.
>
> (Defendant's Amended Proposed Jury Instructions, May 12, 2021, p. 16) (App. 153).

Ms. Middlekauff also requested instructions defining "prescription" and "practitioner," along with jury interrogatories on her affirmative defense and on whether Iowa Code Section 124.401(5) "[ga]ve Ms. Middlekauff fair notice that it would be unlawful in Iowa to possess marijuana that was obtained pursuant to an Arizona medical marijuana card." (Defendant's Amended Proposed Jury Instructions, May 12, 2021, p. 21-22; 32-33) (App. 158-159; 169-170).

The Court refused to issue Ms. Middlekauff's requested instructions and interrogatories, asserting that "the current law in Iowa does not provide for legalized marijuana" and "the vagueness argument isn't part of a current Iowa law either." (Trial Transcript 151:24-152:1) (App. 371-372).

"The rules governing jury instructions in civil cases apply to trials in criminal cases." *State v. Bynum*, 937 N.W.2d 319, 327 (Iowa 2020) (*citing* Iowa R. Crim. P. 2.19(5)(f); *State v. Marin*, 788 N.W.2d 833, 837 (Iowa 2010)). "Consequently, the court is required to 'instruct the jury as to the law applicable to all material issues in the case....' " *State v. Bynum*, 937

N.W.2d 319, 327 (Iowa 2020) (citations omitted). "While the instruction given need not 'contain or mirror the precise language of the applicable statute, [the instruction] must be a correct statement of the law.' " *Bynum* at 327 (*quoting State v. Schuler*, 774 N.W.2d 294, 298 (Iowa 2009)); *United States v. Garner*, 529 F.2d 962, 970 (6th Cir. 1976) (citations omitted). "[A] defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States*, 485 U.S. 58, 63 (1988) (internal citations omitted).

Ms. Middlekauff needed to show that any marijuana in her possession was obtained pursuant to a valid prescription or practitioner's order. Because Ms. Middlekauff obtained the marijuana in Arizona, pursuant to an Arizona prescription, Arizona law governed the validity of the prescription and was relevant to Ms. Middlekauff's defense. The trial court, in prohibiting any reference to Arizona law, to Ms. Middlekauff's Arizona medical marijuana identification card, to Ms. Middlekauff's prescription, and to Ms. Middlekauff's medical condition violated Ms. Middlekauff's constitutional right to present her defense.

ii. The trial court erred in permitting the State to introduce the DCI criminalist's testimony without

providing a minute of the witness's testimony.

The State furnished a Minute of Testimony for "Unknown Criminalist or Designee, Iowa Division of Criminal Investigation, Criminalistics Laboratory." (Minutes of Testimony) (App. 10). The State did not provide the criminalist's name.

> The prosecuting attorney shall, at the time of filing such information, also file the minutes of evidence of the witnesses which shall consist of **a notice in writing stating the name and occupation of each witness** upon whose expected testimony the information is based, and a full and fair statement of the witness' expected testimony.
>
> Iowa R. Crim. P. 2.5(3) (emphasis added).
>
> **The prosecuting attorney [. . .] shall not be permitted to introduce any witness the minutes of whose testimony was not presented** with the indictment to the court; in the case of informations, a witness may testify in support thereof if the witness's identity and a minute of the witness's evidence has been given pursuant to these rules.
>
> Iowa R. Crim. P. 2.19(2) (emphasis added).

Ms. Middlekauff objected at trial to the introduction of Megan Reedy's testimony because the State had not properly filed a minute of evidence:

> A minute of evidence must include a witness's name and occupation, not simply their occupation.

> The minute that the State provided said, unknown criminalist or designee. It did not say Megan Reedy. The State, therefore, did not provide a valid minute of evidence that complied with Rule 2.5(3). Under Iowa Rule of Criminal Procedure 2.19(2), the prosecuting attorney cannot introduce a witness without having provided the correct minute of evidence at least ten days before trial. So because they didn't do the minute of evidence correctly, they should not have been able to introduce the witness.
>
> (Trial Transcript 139:18-140:4) (App. 359-360)

The record on the objection was made outside the presence of the jury after Ms. Reedy testified but the trial court stated that "we will consider it taking place prior to Ms. Reedy testifying." (Trial Transcript 139:3-139:13) (App. 359).

The rules are clear: the State did not provide a minute of testimony for Ms. Reedy that complied with the rules, so Ms. Reedy should not have been allowed to testify. The State's failure to furnish a correct minute of testimony for Ms. Reedy prejudiced Ms. Middlekauff by preventing her from being able to research Ms. Reedy's qualifications, prior testimony, etc. Ms. Middlekauff was thus deprived of her right to prepare for and execute competent cross-examination.

Without Ms. Reedy's testimony and purported ability to discern between marijuana and hemp, the State could not possibly have proven their

case. Hemp products are not controlled substances under Iowa Code Chapter 124. Iowa Code Section 204.7(7)(c). Hemp and marijuana both come from the cannabis plant:

> 'Hemp' means the plant cannabis sativa L. and any part of that plant, including the seeds thereof, and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a maximum delta-9 tetrahydrocannabinol concentration of not more than three-tenths of one percent on a dry weight basis as calculated pursuant to an official test [. . .].
>
> 'Hemp' also means a plant of the genus cannabis other than cannabis sativa L., with a maximum delta-9 tetrahydrocannabinol concentration of not more than three-tenths of one percent on a dry weight basis [. . .].
>
> Iowa Code Section 204.2(9).

> "Marijuana" means all parts of the plants of the genus Cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture or preparation of the plant, its seeds or resin, including tetrahydrocannabinols. It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil or cake or the sterilized seed of the plant which is incapable of germination.

Iowa Code Section 124.101(19).

The code section under which Defendant is charged specifically excludes hemp from its definition of a controlled substance:

> It is unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, **or except as otherwise authorized by this chapter**.
>
> Iowa Code Section 124.401(5) (emphasis added).

> Notwithstanding any other provision in this section to the contrary, a person may produce, possess, use, harvest, handle, manufacture, market, transport, deliver, or distribute any of the following:
>
> a. Hemp that is hemp seed delivered for planting at a licensed crop site, or hemp that is or was produced at the site, by a person operating under a hemp license issued by the department of agriculture and land stewardship in accordance with the provisions of chapter 204.
>
> b. Hemp that was produced in another state in accordance with the federal hemp law and other applicable law.
>
> c. A hemp product as provided in chapter 204.
>
> Iowa Code Section 124.401(6).

Laboratory testing is not required to prove the identity of a controlled substance, however, the State did not furnish a valid minute of testimony for

any witness qualified to discern and opine on the difference between marijuana and hemp. The State's minute of testimony for Agent Valenta, while a valid minute of testimony, would not have permitted Agent Valenta to testify on the differentiation of hemp and marijuana. *See* Iowa R. Crim. P. 2.19(2) (prosecutor must provide defense counsel with a minute of each witness's evidence at least 10 days before trial begins); Iowa R. Crim. P. 2.5(3) (prosecutor must provide minutes that contain "a full and fair statement of the witness[es]' expected testimony.")

Because the State did not furnish a valid minute of testimony for a witness who could differentiate between marijuana and hemp, the State should not have been able to present any evidence on this subject. While the State could introduce Ms. Middlekauff's statements, they had no evidence that Ms. Middlekauff knew the legal difference between marijuana and hemp or that Ms. Middlekauff was in the habit of syntactically differentiating between the substances. While Ms. Middlekauff referred to the seized substance as her "medication," the trial court refused to allow evidence regarding Ms. Middlekauff's prescription medication and the State did not furnish a minute of testimony for any witness expected to testify that

hemp is not sold at marijuana dispensaries,[9] that medical marijuana patients would not refer to "hemp" and "marijuana" interchangeably, or that hemp does not have medicinal compounds that would lead someone to refer to hemp as "medicine." Agent Valenta specifically testified that Ms. Middlekauff "showed no signs of impairment at all," which could permit the inference that Ms. Middlekauff's medicine was medicinal by virtue of some

[9] Hemp *is* sold in some places. *Compare, e.g.*, https://organiccbdnugs.com/collections/cbd-hemp-flower, displaying hemp products that are "Federal Farm Bill Compliant - Less Than 0.3% Delta-9 THC." and https://givingtreeaz.treez.io/onlinemenu/?customerType=MEDICAL displaying marijuana flower for sale.

[Image of Giving Tree Dispensary's "White Widow" **marijuana** flower (https://givingtreeaz.treez.io/onlinemenu/category/flower/item/63a97f6f-52d5-430b-96dc-b75b0210bf9d?customerType=MEDICAL) (LEFT) juxtaposed with Organic CBD Nugs's "Sour Diesel" CBD **Hemp** Flower (RIGHT) (https://organiccbdnugs.com/collections/cbd-hemp-flower/products/sour-diesel-cbd-hemp-flower)].

compound other than THC. (Trial Transcript 114:22-114:23); (App. 334). "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).

Introducing a witness who should not, per the rules, have been permitted to testify violated Ms. Middlekauff's constitutional right to fair trial, as did depriving Ms. Middlekauff of ample time before trial to learn about Ms. Reedy's prior testimony.

iii. The trial court erred in permitting the State to introduce the laboratory report.

The State offered exhibit T1, the DCI lab report, after Megan Reedy's testimony. (Trial Transcript 104:18-104:24) (App. 324). Ms. Middlekauff objected, arguing that the State hadn't shown that the DCI lab report reflected testing of the specific evidence seized from her. The State had not suitably established the chain of custody. For the test results to be relevant, the State had to show that the test results reflected testing both of the specific evidence seized from Ms. Middlekauff and that the evidence was in the same condition at the time it was tested as when it was taken from Ms. Middlekauff. (Trial Transcript 105:17-106:2) (App. 325-326); *State v. Jeffs*, 246 N.W.2d 913, 915 (Iowa 1976) ("In establishing a chain of custody

adequate to justify the admission of physical evidence, the State need only show circumstances making it reasonably probable that tampering, substitution or alteration did not occur."); *State v. Smith*, 272 N.W.2d 859, 861 (Iowa 1978) (internal citations omitted) ("For the test results to have any relevancy, it should be shown that the specimen which was tested was in the same condition as when it was taken from defendant.")

The Court admitted the evidence over Ms. Middlekauff's objection. (Trial Transcript 104:18-106:14) (App. 324-326). Agent Valenta's testimony thereafter demonstrated why the trial court should have insisted the State properly establish chain of custody prior to introducing the evidence.

Agent Valenta's testimony, juxtaposed with the balance of the record, shows an apparent chain of custody issue. Agent Valenta testified that the marijuana was in the Post 2 evidence locker from the time he seized it in December of 2019 until the time he took it to the DCI lab in May of 2021. (Trial Transcript 116:13-116:16) (App. 336); (Exhibit T2, Lab Submission Slip) (App. 212). Agent Valenta's police report, written in 2019, showed that no photos were taken. (Valenta Report, Min. of Test. Attachment p. 2)

(App. 14). Agent Valenta testified at trial that if his report showed that no photos were taken of the substance, then no photos were taken. (Trial Transcript 127:23-128:3) (App. 347-348). If photos had been taken, their existence would have been noted in a database that holds all of the police evidence photos. (Trial Transcript 128:4-128:12) (App. 348). The State nonetheless filed photos of what was alleged to be the marijuana in this matter on March 3, 2020. (State's Exhibits 3, 4, and 5) (App. 28-30). If those photos were genuine, the marijuana must have been removed from the Post 2 evidence locker at some point between seizure and testing, which tends to impugn Agent Valenta's chain of custody.

Additionally, the packages Ms. Reedy testified at trial that she had tested did not align with Agent Valenta's description of the packages he had seized from Ms. Middlekauff. "[M]arijuana is peculiarly susceptible to tampering, and the facts surrounding custody of such a substance must be closely examined with that in mind." *Jeffs* at 915. Agent Valenta reported in 2019 that he seized 10 pouches of Blueberry Jack strain marijuana from Ms. Middlekauff. (Trial Transcript 120:12-120:14) (App. 340). The pouches that Ms. Reedy tested were labeled as various strains, including "a Sour Plum, a GC, a You Ride Train Haze (phonetic), [and] a

Platinum Purple Kush." (Trial Transcript 103:5-103:12) (App. 323).

By the time these irregularities came to light, however, the trial court had already accepted Ms. Reedy's testimony and lab report into evidence. The inconsistencies were not accounted for in the trial court's decision to admit the evidence. Because the State had not adequately established either chain of custody or that the substance tested was the substance seized at the time they offered the evidence, Ms. Reedy's report was not relevant and should have been excluded.

iv. The trial court erred in permitting the State to introduce the marijuana.

Ms. Middlekauff raised the same objections to the introduction of exhibit T3, the marijuana, that applied to the lab report: the State did not show that the marijuana they brought into trial was the same marijuana they seized from Ms. Middlekauff. (Trial Transcript 137:7-137:17) (App. 357). The State failed to show circumstances making it reasonably probable that tampering, substitution or alteration did not occur and the admission of exhibit T3 was therefore an abuse of discretion.

CONCLUSION

If this conviction stands, Ms. Middlekauff will be placed on probation and "required to abstain from all controlled substances." (Judgment and Sentence p. 3) (App. 218). The State of Iowa will have effectively denied Ms. Middlekauff the ability to treat her chronic, debilitating pain with medication lawfully obtained and prescribed by her physician.

The trial court erred in refusing to dismiss this case, in preventing Ms. Middlekauff from presenting her defense, and in admitting and excluding the above-specified evidence. For the reasons discussed above, Ms. Middlekauff respectfully requests this Court vacate her conviction, sentence, and judgment and remand her case for dismissal.

CONDITIONAL REQUEST FOR ORAL ARGUMENT

Due to the ongoing COVID pandemic, Appellant requests oral argument if and only if oral argument can be conducted remotely.

ATTORNEY'S COST CERTIFICATE

I certify that the true cost of producing the required copies of this brief was $6.40. I paid that amount in full.

/s/ *Katherine Sears*
AT0013374

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R.App.P. 6.903(1)(g)(1) or (2) because this brief contains 10,281 words excluding the parts of the brief exempted by Iowa R.App.P. 6.903(g)(1).
2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirement of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF FILING AND SERVICE

I, Katherine R. Sears, hereby certify that I have filed this Brief by the EDMS filing system on December 8, 2021.

I further certify that I served a copy of this brief upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Defendant-Appellant.

/s/ *Katherine Sears*
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