IN THE SUPREME COURT OF IOWA
Supreme Court No. 21-0664

STATE OF IOWA,
Plaintiff-Appellee,

vs.

PAMELA M. MIDDLEKAUFF,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR WARREN COUNTY
THE HONORABLE KEVIN PARKER, JUDGE

APPELLEE'S BRIEF

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AMENDED FINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Federal Statutes

State Statutes

State Rules

Other Authorities

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the district court correctly denied Middlekauff's third motion to dismiss.

Authorities

Albright v. Oliver, 510 U.S. 266 (1994)
Bd. of Trs. v. Garrett, 531 U.S. 356 (2001)
Carnohan v. United States, 616 F.2d 1120 (9th Cir.1980)
Franchise Tax Bd. of Cal. v. Hyatt, 538 U.S. 488 (2003)
Gerstein v. Pugh, 420 U.S. 103 (1975)
Gonzales v. Oregon, 546 U.S. 243 (2006)
Hill v. Colorado, 530 U.S. 730 (2000)
Hudson v. Michigan, 547 U.S. 586 (2006)
Raich v. Gonzales, 500 F.3d 850 (9th Cir. 2007)
United States v. Bey, 341 F.Supp.3d 528 (E.D. Pa. 2018)
United States v. Brunette, 256 F.3d 14 (1st Cir. 2001)
United States v. Crews, 445 U.S. 463 (1980)
United States v. Feingold, 454 F.3d 1001 (9th Cir. 2006)
United States v. Fogarty, 692 F.2d 542 (8th Cir. 1982)
United States v. Harvey, 794 F. Supp. 2d 1103 (S.D. Cal. 2011)
United States v. Johnson, 228 F. Supp. 3d 57 (D.D.C. 2017)
United States v. McIntosh, 833 F.3d 1163 (9th Cir. 2016)
United States v. Morrison, 449 U.S. 361 (1981)
United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483 (2001)
United States v. Salerno, 481 U.S. 739 (1987)
United States v. White Plume, 447 F.3d 1067 (8th Cir. 2006)
Dobson v. McClennan, 361 P.3d 374 (Ariz. 2015)
State v. Biddle, 652 N.W.2d 191 (Iowa 2002)
Bierkamp v. Rogers, 293 N.W.2d 577 (Iowa 1980)
Bowers v. Polk County Bd. of Supervisors, 638 N.W.2d 682 (Iowa 2002)
Bruyette v. State, 253 P.3d 512 (Wy. 2011)
Burns v. State, 246 P.3d 283 (Wy. 2011)
Cassady v. Wheeler, 224 N.W.2d 649 (Iowa 1974)
Commonwealth v. Jezzi, 208 A.3d 1105 (Pa. Super. Ct. 2019)
Commonwealth v. Leis, 243 N.E.2d 898 (Mass. 1969)

Fowler v. State, 382 N.W.2d 476 (Iowa Ct. App. 1985)
Hager v. M&K Constr., 247 A.3d 864 (N.J. 2021)
State v. Hernandez-Lopez, 639 N.W.2d 226 (Iowa 2002)
In re Det. of Williams, 628 N.W.2d 447 (Iowa 2001)
In re Morrow, 616 N.W.2d 544 (Iowa 2000)
Iowa Dist. Ct. Linn Cty., 271 N.W.2d 704 (Iowa 1978)
Kreisher v. State, 319 A.2d 31 (Del. Super. Ct. 1974)
Lunday v. Vogelmann, 213 N.W.2d 904 (Iowa 1973)
McLeod & Swinomish Tribal Cmty., 15 Am. Tribal Law 368 (Swinomish Tribal C.A. 2013)
Nguyen v. State, 878 N.W.2d 744 (Iowa 2016)
People v. Alexander, 223 N.W.2d 750 (Mich. Ct. App. 1974)
Seeley v. State, 940 P.2d 604 (Wash. 1997)
State v. Berringer, 229 P.3d 615 (Or. Ct. App. 2010)
State v. Bonjour, 694 N.W.2d 511 (Iowa 2005)
State v. Broughton, 425 N.W.2d 48 (Iowa 1988)
State v. Gibbs, 239 N.W.2d 866 (Iowa 1976)
State v. Gonzalez, 718 N.W.2d 304 (Iowa 2006)
State v. Graham, 291 N.W.2d 345 (Iowa 1980)
State v. Grice, 515 N.W.2d 20 (Iowa 1994)
State v. Hall, 235 N.W.2d 702 (Iowa 1975)
State v. Heinrichs, 845 N.W.2d 450 (Iowa Ct. App. 2013)
State v. Henderson, 478 N.W.2d 626 (Iowa 1991)
State v. Hunley, 167 N.W.2d 645 (Iowa 1969)
State v. Kuruc, 846 N.W.2d 314 (N.D. 2014)
State v. Leins, 234 N.W.2d 645 (Iowa 1975)
State v. Marti, 290 N.W.2d 570 (Iowa 1980)
State v. McManus, 718 S.W.2d 130 (Mo. 1986)
State v. Mitchell, 757 N.W.2d 431 (Iowa 2008)
State v. Moorhead, 308 N.W.2d 60 (Iowa 1981)
State v. Musser, 721 N.W.2d 734 (Iowa 2006)
State v. Nail, 743 N.W.2d 535 (Iowa 2007)
State v. Newton, 929 N.W.2d 250 (Iowa 2019)
State v. Olson, 380 N.W.2d 375 (Wis. Ct. App. 1985)
State v. Petersen, 678 N.W.2d 611 (Iowa 2004)
State v. Rasmussen, 213 N.W.2d 661 (Iowa 1970)
State v. Seering, 701 N.W.2d 655 (Iowa 2005)
State v. Stump, 119 N.W.2d 210 (Iowa 1963)
State v. Thiel, 846 N.W.2d 605 (Minn. Ct. App. 2014)

State v. Vornbrock, No. 06-0770, 2006 WL 3615010 (Iowa Ct. App. Dec. 13, 2006)
State v. Wells, 629 N.W.2d 346 (Iowa 2001)
State v. Wilson, 941 N.W.2d 579 (Iowa 2020)
Timberland Partners XXI, LLP v. Iowa Dept. of Revenue, 757 N.W.2d 172 (Iowa 2008)
Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009)
21 U.S.C. § 812(c)
21 U.S.C. § 829
21 U.S.C. §§ 812, 812(b)(1)
21 U.S.C. §§ 844, 829
42 U.S.C. § 1983
21 U.S.C. § 844(a)
Ariz. Rev. Stat. § 13-3412(A)(7)
Ariz. Rev. Stat. § 28-1381(D)
Ariz. Rev. Stat. § 36-2806.02
Ariz. Rev. Stat. § 36-2801(20)
Ariz. Rev. Stat. §§ 32-1961, 32-1968; 36-2525
Ariz. Rev. Stat. §§ 36-2804.02;36-2804.03; 36-2804.05
Ariz. Rev. Stat. §§ 36-2801(18); 36-2804.02l; 36-2804.03
Iowa Const. Art. I, § 9
Colo. Const. art. XVIII, § 14(3)
Colo. Const. art. XVIII, § 14(4)-(5)
Colo. Rev. Stat. Ann. § 44-10-501
Iowa Code § 124.401(5)
Iowa Code § 155A.3
Iowa Code § 321J.2(1)(c)
Iowa Code § 423.3(60)
Iowa Code § 124E.1
Iowa Code § 124E.2(9), (10)
Iowa Code § 124.204(4)(m), (7)
Iowa Code § 155A.27(1), (4)
Iowa Code § 155A.27(4)
Iowa Code § 155A.3(40)
Iowa Code § 155A.3(41)
Iowa Code § 423.3
Iowa Code § 423.3(60)(e)
Iowa Code § 423.3(60)(f)
Iowa Code § 423.3(60)(g)
Iowa Code § 701.6

Iowa Code §§ 124E.2-.4, 124E.12; 124E.25
Iowa Code §§ 124E.2(2), .3, .17
Iowa Code §§ 124.203(1), 124.204(4)(m)
Iowa Code §§ 124.203, 124.205, 124.207, 124.209, 124.211, 124.401(5)
Iowa Code §§ 124.203, 124.204(4)(m), 124.205(1), 124.206(2)(a)(7), (10), (14)
Iowa Code §§ 124.203, 124.204, 124.308, 124.401(5)
Iowa Code §§ 124.308(1), (5), (6); 124.204(4)(m)
Iowa Code §§ 155A.3(38); 155A.30
Iowa Code § 124.401
Iowa Code § 155A.27
Iowa Code §§ 155A.3; 155A.27; 124.308; 423.3(60)(f)
Wyo. Stat. Ann. § 35-7-1031(c)
Ariz. Rev. Stat. § 36–2801(12)
Ariz. Rev. Stat. §§ 32-1968, 36-2525
Iowa R. App. P. 6.903(2)(g)(3)
Iowa R. Crim. P. 2.11(4)
Iowa R. Crim. P. 2.11(6)(a)
Iowa R. Crim. P.2.11(6)(a), (c)
Iowa R. Crim. P. 2.11
4 Robert R. Rigg, *Iowa Practice Series: Criminal Law*, § 2.6 (2015)

II. Whether the district court erred when it denied Middlekauff's request to present evidence and instruct on a prescription justification and her evidentiary objections.

Authorities

Chambers v. Mississippi, 410 U.S. 284 (1973)
Franchise Tax Bd. of Cal. v. Hyatt, 538 U.S. 488 (2003)
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Washington v. Texas, 388 U.S. 14 (1967)
Alcala v. Marriott Intern., Inc., 880 N.W.2d 699 (Iowa 2016)
State v. Biddle, 652 N.W.2d 191 (Iowa 2002)
Bruyette v. State, 253 P.3d 512 (Wy. 2011)

Iowa Supreme Ct. Att'y Disciplinary Bd. v. McGrath, 713 N.W.2d 682 (Iowa 2006)
State v. Shorter, 893 N.W.2d 65 (Iowa 2017)
State v. Bakker, 262 N.W.2d 538 (Iowa 1978)
State v. Ball, No. 17-1332, 2018 WL 3471604 (Iowa Ct. App. July 18, 2018)
State v. Bonjour, 694 N.W.2d 511 (Iowa 2005)
State v. Brubaker, 805 N.W.2d 164 (Iowa 2011)
State v. Clark, 814 N.W.2d 551 (Iowa 2012)
State v. Clarke, 343 N.W.2d 158 (Iowa 1984)
State v. Edwards, 571 N.W.2d 497 (Iowa 1997)
State v. Folck, 325 N.W.2d 368 (Iowa 1982)
State v. Gibb, 303 N.W.2d 673 (Iowa 1981)
State v. Guerrero Cordero, 861 N.W.2d 253 (Iowa 2015)
State v. Haas, 930 N.W.2d 699 (Iowa 2019)
State v. Hanes, 790 N.W.2d 545 (Iowa 2010)
State v. Hendrickson, 444 N.W.2d 468 (Iowa 1989)
State v. Hutchison, 341 N.W.2d 33 (Iowa 1983)
State v. Kehr, 110 N.W. 149 (Iowa 1907)
State v. Knox, 536 N.W.2d 735 (Iowa 1995)
State v. Leedom, 938 N.W.2d 177 (Iowa 2020)
State v. LeGrand, 501 N.W.2d 59 (Iowa Ct. App. 1993)
State v. Lloyd, No. 08-1171, 2009 WL 1212751 (Iowa Ct. App. May 6, 2009)
State v. Mehner, 480 N.W.2d 872 (Iowa 1992)
State v. Musso, 398 N.W.2d 866 (Iowa 1987)
State v. Piper, 663 N.W.2d 894 (Iowa 2003)
State v. Richards, 809 N.W.2d 80 (Iowa 2012)
State v. Simpson, 587 N.W.2d 770 (Iowa 1998)
State v. Thiel, 846 N.W.2d 605 (Minn. Ct. App. 2014)
State v. Thompson, 836 N.W.2d 470 (Iowa 2013)
State v. Walton, 311 N.W.2d 113 (Iowa 1981)
State v. Willis, 218 N.W.2d 921 (Iowa 1974)
Iowa Code § 124.401(5)
Iowa Code § 124.401(6)
Iowa R. App. P. 6.903(2)(g)(3)
Iowa R. Crim. P. 2.19(3)
Iowa R. Crim. P 2.19(2)
Iowa R. Evid. 5.103(a)
Iowa R. Evid. 5.402

ROUTING STATEMENT

The State acknowledges no prior Iowa case addresses whether Iowa Code section 124.401(5)'s prescription drug justification applies to a marijuana possession charge against a defendant with an out-of-state medical marijuana card. *See* Appellant's Br.15; Iowa R. App. P. 6.1101(2)(c). But other states' courts have confronted exactly this issue. *See McLeod & Swinomish Tribal Cmty.*, 15 Am. Tribal Law 368, 370 (Swinomish Tribal C.A. 2013); *Bruyette v. State*, 253 P.3d 512, 515 (Wy. 2011); *State v. Thiel*, 846 N.W.2d 605, 614–15, 613 n.2 (Minn. Ct. App. 2014). When read *in pari materia* and alongside parallel provisions of federal law, the Iowa Code makes clear what items can and cannot be prescribed. *See* Iowa Code §§ 124.203, 124.204, 124.308, 124.401(5); *see also* 21 U.S.C. §§ 844, 829; *Gonzales v. Oregon*, 546 U.S. 243, 269 (2006); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 486 (2001). Our law explains the substances to which the defense applies. This case can be decided based on existing legal principles and transferred to the Iowa Court of Appeals. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

Following her trial and conviction for possession of marijuana, Pamela Middlekauff appeals. She presents numerous claims revolving around a core argument that a medical marijuana card issued by the state of Arizona was a "prescription or order of a practitioner while acting in the course of the practitioner's professional practice" under Iowa Code section 124.401(5). The Honorable Kevin Parker presided over the relevant proceedings.

Course of Proceedings

The State generally accepts the Middlekauff's course of proceedings as adequate and essentially correct. Appellant's Br. 16; Iowa R. App. P. 6.903(3). Some additional procedural facts bear mention. After the State filed its January 20, 2020 trial information and minutes of testimony, Middlekauff filed her first motion to dismiss on February 7. 2/7/2020 Motion to Dismiss. The motion urged the district court to dismiss the charges on multiple grounds, including reliance on Iowa Code section 124.401(5) and chapter 124E—Iowa's Medical Cannabidiol Act. *Id*. As the matter was pending hearing, Middlekauff filed a second motion to dismiss, this time pursuant to chapter 124E.12(4)(c). 2/12/2020 Motion to Dismiss

(Second). The matter went to hearing on March 3, and the next day Middlekauff filed a motion to suppress. 3/4/2020 Motion to Suppress; *see generally* 3/3/2020 Hearing Tr. The district court denied all these pending motions on May 4. 5/4/2020 Order. She requested the court reconsider its rulings and when it declined to do so, sought an interlocutory appeal which was denied. 5/28/2020 Motion; 5/29/2020 Order; 7/8/2020 S.Ct.Order. Middlekauff does not challenge these rulings on appeal.

On July 11, five days after the Supreme Court denied her request for interlocutory appeal—and one-hundred seventy-three days after the State filed the trial information and minutes—Middlekauff filed her third motion to dismiss. 7/11/2020 Motion to Dismiss (Third); App. 55. The matter was set for hearing and was denied by the district court after the same. 11/9/2020 Order; *see generally* 8/18/2020 Hearing Tr. Middlekauff sought another interlocutory appeal and when this was denied, returned to the district court requesting it to enlarge its ruling and address her unpreserved claims. 2/8/2021 Motion to Enlarge; App. 85. The district court denied her request. 2/9/2021 Order; App. 90.

Prior to trial the State filed a motion in limine to exclude any evidence or reference to Arizona law, Middlekauff's medical marijuana card, and her medical conditions. 5/3/2021 Motion in Limine p.2–3; App. 121–22. Middlekauff resisted and requested jury instructions on Iowa Code section 124.401(5)'s justification defense, Arizona law, on the distinction between marijuana and hemp, and a special interrogatory on whether section 124.401(5) gave "Middlekauff fair notice that it would be unlawful in Iowa to possess marijuana that was obtained pursuant to an Arizona medical marijuana card." 5/12/2021 Proposed Jury Instrs. p.16, 19–24; App. 153, 156–61. The district court granted the State's motion in part—excluding reference to Middlekauff's medical marijuana card and Arizona law—and rejected Middlekauff's proposed instructions. 5/12/2021 Hearing Tr. p.10 line 23–p.15 line 6; *see generally* 5/13/2021 Jury Instrs. The matter proceeded to trial. Following trial, Middlekauff was convicted as charged. 5/13/2021 Verdict; App. 211.

Facts

On December 23, 2019, then Iowa State Patrol Trooper Valenta was patrolling Interstate 35. Trial Tr. p.108 line 1–p.109 line 11. Valenta observed a silver SUV traveling 82 miles per hour when the

posted speed limit was 70 miles per hour. Trial Tr. p.109 line 11–15. He initiated a traffic stop of the vehicle and upon reaching the window of her vehicle smelled marijuana. Trial Tr. p.110 line 10–18. He asked Middlekauff "hey, have you smoked marijuana in this vehicle?" to which she responded that she did not smoke marijuana in the vehicle, but did possess it. Trial Tr. p.110 line 13–23. He asked how much she possessed, her answer was "quite a bit" because she was traveling. Trial Tr. p.111 line 1–4. The officer requested the marijuana, and Middlekauff complied. Trial Tr. p.111 line 5–p.112 line 4; p.115 line 1–13. In total, there were ten pouches of marijuana. *Id.* Middlekauff was given written citations for speeding and marijuana possession and was permitted to go on her way. Trial Tr. p.112 line 8–10; p.113 line 18–p.115 line 13. Subsequent DCI laboratory testing confirmed Middlekauff's admissions to Valenta that the substance was marijuana. Trial Tr. p.93 line 4–p.101 line 25. And Middlekauff testified and again acknowledged that she knowingly possessed marijuana. Trial Tr. p.146 line 10-18.

ARGUMENT

I. The district court correctly denied Middlekauff's third motion to dismiss because Iowa's prescription drug defense cannot justify marijuana possession within our borders.

Preservation of Error

The State does not contest error preservation. Each of Middlekauff's arguments in the first subdivision of her brief were presented to the district court in her third motion to dismiss. *See* 7/11/2020 Motion to Dismiss (Third). Although the motion was untimely, the district court denied it. Iowa R. Crim. P. 2.11(4) (requiring motions under rule 2.11 to be filed "no later than 40 days after arraignment"). This initial ruling did not address each ground Middlekauff had raised, but Middlekauff later requested the district to consider and rule on the remaining issues in a motion to enlarge. 11/9/2020 Order; 2/8/2021 Motion to Enlarge; App. 81–89. The district court denied this motion as well. 2/9/2021 Order; App. 90. This was sufficient to preserve error.

Standard of Review

Questions of statutory interpretation addressed in Subdivision I(A) and (B) are reviewed for corrections of error at law. *See State v. Wilson*, 941 N.W.2d 579, 584 (Iowa 2020).

Discussed in Subdivision I(C) and (D), a motion to dismiss a trial information is reviewed for correction of errors at law. *See, e.g.*, *State v. Wells*, 629 N.W.2d 346, 351 (Iowa 2001).

Constitutional claims, like those addressed in in Subdivision I(D) and (E) are reviewed de novo. *Wilson*, 941 N.W.2d at 585.

Merits

In the first division of her brief, Middlekauff attack's the district court's denial of her third motion to dismiss. She sorts her arguments into five rough claims: (A) that her Arizona medical marijuana card was a prescription that satisfied Iowa Code section 124.401(5)'s terms; (B) in the alternative, section 124.401(5) is unconstitutionally vague; (C) the minutes of testimony lacked sufficient probable cause to permit the prosecution to proceed; (D) the same defect in the trial information resulted in her being unconstitutionally seized under the Federal and Iowa Constitutions; and (E) that Iowa Code section 124.401(5)'s inapplicability to her conduct violates equal protection. Appellant's Br.22–37; 37–40; 40–41; 41–43; 43–45. Each of the claims are without merit.

A. Arizona's medical marijuana laws have no impact on Iowa's prohibition on the possession of marijuana. The affirmative defense Iowa Code section 124.401(5) authorizes was not available to Middlekauff.

Middlekauff first renews her claim she was entitled to dismissal based upon Iowa's prescription justification defense to drug possession pursuant to Iowa Code section 124.401(5). Appellant's Br.22–37. The district court was correct to deny the motion for several reasons, roughly broken down into two classes. First, despite her attempt to conflate the relevant terms, review of the Iowa Code demonstrates our law does not recognize any prescriptions for marijuana, and by necessity precludes the defense. Second, Middlekauff has never had a "prescription" for marijuana even under Arizona law.

1. Mirroring federal law, Iowa has a uniform prohibition on the possession of marijuana and under no circumstances may a person obtain a prescription for it.

Iowa Code section 124.401(5) prohibits any person from possessing a controlled substance, including marijuana. Iowa Code § 124.401(5). The statute also contains an affirmative justification defense excepting those who possess controlled substances from punishment where the establish "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." *Id.*; *see State v. Gibbs*, 239 N.W.2d 866, 868 (Iowa 1976). Middlekauff asserts her possession of marijuana was "pursuant to a prescription written by her doctor and authorized by Arizona law." Appellant's Br.34. The State disagrees. She has not and cannot satisfy the terms of the defense.

Contrary to her advocacy, resort to a dictionary to define the relevant terms is unnecessary. *See* Appellant's Br.23–24, 29–32, 34–37. The terms at issue—"prescription or order of a practitioner"—are defined directly and by reference throughout the Iowa Code. Middlekauff's marijuana registry card was not a prescription under Iowa law.[1] As will be discussed throughout, parallel provisions of federal law are informative—Iowa's controlled substance regime was based on a uniform act and intended to "come within the scheme of complementary federal-state control of the distribution of drugs and to create an 'interlocking trellis' to assure effectiveness of the Act."

[1] The State also address why it is not a prescription under Arizona law in subdivision I(A)(2).

State v. Rasmussen, 213 N.W.2d 661, 665 (Iowa 1970); *see also Cassady v. Wheeler*, 224 N.W.2d 649, 651–55 (Iowa 1974) ("Iowa's legislative history demonstrates a pattern of statutory changes to keep the Iowa drug abuse statutes in harmony with model acts and federal statutes.").

Although Iowa Code chapter 124 does not define "prescription," the code furnishes a definition of the term. Oddly, the legislature's most direct definition is contained within Iowa Code section 423.3(60) which excludes "prescription drugs" from Iowa's sales tax. *See* Iowa Code § 423.3 ("[E]xempted from the provisions of this subchapter and from the computation of the amount of tax imposed by it [is] the following . . . ."). There, the legislature defined "prescription" as "an order, formula, or recipe issued in any form of oral written, electronic, or other means of transmission by a practitioner." Iowa Code § 423.3(60)(f). It further defines "prescription drug" in part as "a drug intended to be dispensed to an ultimate user pursuant to a prescription drug order, formula, or recipe issued in any form of oral, written, electronic, or other means of transmission by a duly licensed practitioner." Iowa Code § 423.3(60)(g). This subsection adopts the definition of "practitioner"

from Iowa Code section 155A.3 and offers as an alternative definition, "a person licensed to prescribe drugs." Iowa Code § 423.3(60)(e).

Other references to "prescription" within the code outline the term's contours as well. Iowa Code chapter 155A—controlling Iowa's pharmacies—defines the term "prescription drug" as "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(40). Of course, federal law does not recognize marijuana as medical treatment and prohibits the possession of the drug—even when pursuant to a state-sanctioned medical marijuana program.[2] *See* 21 U.S.C. § 812(c) (classifying

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[2] Middlekauff's assertion that "Federal law does not explicitly prohibit prescribing marijuana" is irrelevant to the question of whether she may possess marijuana. Appellant's Br.35–36 n.5. Her offered authority for this proposition is inapposite. *United States v. Feingold*, 454 F.3d 1001 (9th Cir. 2006) is facially distinguishable. It addressed—and affirmed—the conviction of a physician for distributing high levels of opioid medication where the defendant admitted "he was an incompetent doctor who was honestly trying to help his patients manage pain." *Id.* at 1012–13. Her reliance on *Hager v. M&K Constr.*, 247 A.3d 864, 882 (N.J. 2021) is also perplexing, the opinion expressly noted "The 'valid prescription' language contained in § 844(a) cannot, however, apply to marijuana because the [Federal Controlled Substances Act] prevents marijuana from being validly prescribed. . . . Thus, marijuana is not included in the CSA's

marijuana as a Schedule I drug without acceptable medical use); § 844(a) (criminalizing possession); *see also United States v. Bey*, 341 F.Supp.3d 528, 530 (E.D. Pa. 2018) ("The Controlled Substances Act contains no exception—express or implied—for medically-prescribed marijuana.").

The procedural mechanisms of prescriptions are further defined and controlled by chapter 155A as well. The code defines a "prescription drug order" as a "written, electronic, or facsimile order from a practitioner or an oral order from a practitioner or the

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prescription requirements . . . because 'for purposes of the [CSA], marijuana has no currently accepted medical use at all.'" (cleaned up) (citing 21 U.S.C. § 829 to demonstrate schedule I substances cannot be prescribed)). It is unquestionably illegal to possess marijuana under federal law and no federal court has recognized a prescription exception for marijuana possession under 21 U.S.C. § 844—a substantially similar statutory provision to Iowa Code section 124.401(5). *Compare* 21 U.S.C. § 844 ("It shall be unlawful for any person knowingly or intentionally to possess a controlled substance *unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice*." (emphasis added)) *with* Iowa Code § 124.401(5) ("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."(emphasis added)); *see, e.g, United States v. Johnson*, 228 F. Supp. 3d 57, 62 (D.D.C. 2017) (collecting cases); *United States v. Harvey*, 794 F. Supp. 2d 1103, 1106 (S.D. Cal. 2011), *aff'd*, 659 F.3d 1272 (9th Cir. 2011).

practitioner's authorized agent who communicates the practitioner's instructions for a prescription drug or device to be dispensed." Iowa Code § 155A.3(41). And section 155A.27—titled "requirements for prescription"—outlines that a "prescription drug shall not be dispensed without a prescription that is authorized by a prescriber and based on a valid patient-prescriber relationship" and further outlines items of information the prescription must contain; including "the name, strength, and quality of the drug prescribed." Iowa Code § 155A.27(1), (4).

Aside from chapter 155A, section 124.308 establishes yet additional requirements. It authorizes prescriptions to be filled for schedule II–V controlled substances *only*—not schedule I substances such as marijuana. *See* Iowa Code §§ 124.308(1), (5), (6); 124.204(4)(m). This language again parallels the federal marijuana scheme. *See* 21 U.S.C. §§ 844, 829; *see also Gonzales v. Oregon*, 546 U.S. 243, 269 (2006) ("Congress' express determination that marijuana had no accepted medical use foreclosed any argument about statutory coverage of drugs available by a doctor's prescription"); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 486 (2001) ("Whereas some other drugs can be

dispensed and prescribed for medical use, the same is not true for marijuana. Indeed, for purposes of the Controlled Substances Act, marijuana has 'no currently accepted medical use' at all."); 21 U.S.C. § 829 (establishing rules for Schedule II, III, IV, and V controlled substance prescriptions).

When read together alongside chapter 124's legislative history, these various definitions and mechanisms lead to the inescapable conclusion Schedule I substances like marijuana cannot be "prescribed." And as will be further developed in Subdivision I(A)(2), Arizona's registry scheme is incompatible with Iowa's requirements for prescriptions. Accordingly, section 124.401(5)'s defense was always inapplicable. *See* 21 U.S.C. §§ 812, 812(b)(1); *see generally United States v. Harvey*, 794 F.Supp.2d 1103, 1105–06 (S.D. Ca. 2011) (finding that marijuana's placement as a schedule I drug federally precluded a valid prescription); *United States v. McIntosh*, 833 F.3d 1163, n.5 (9th Cir. 2016) (noting that all who possess medical marijuana remain in violation of the Federal Controlled Substances Act).

This interpretation makes sense and serves our legislature's intent. Marijuana cannot be "prescribed" because schedule I

substances are those which the legislature has determined are without accepted medical use or have such a high risk of abuse as to make public use unacceptable. Iowa Code §§ 124.203; 124.204(4)(m); *see also Oakland Cannabis Buyers' Coop.*, 532 U.S. at 486; *Harvey*, 794 F.Supp. at 1106; *State v. Kuruc*, 846 N.W.2d 314, 324 (N.D. 2014). Our legislature has also decided to mirror federal law on this issue. *Rasmussen*, 213 N.W.2d at 665; *Cassady*, 224 N.W.2d at 651–55. Middlekauff appears to disagree with these legislative determinations—*see* Appellant's Br.32–33 n.3, n.4—but such policy decisions are vested in the legislature, not courts construing that body's selected language. *See, e.g., State v. Bonjour*, 694 N.W.2d 511, 514 (Iowa 2005) ("Use of marijuana is a public-policy issue best suited for the legislature because it is driven by legal, moral, philosophical, and medical concerns that are ill-suited for resolution by this court.").

Even if this Court were to disagree with the State's legal analysis, the district court still correctly declined to find the defense applicable because Middlekauff failed provide sufficient evidence to support the defense. None of her offered exhibits comply with the Iowa Code's requirements for a prescription. *See* 2/7/2020 Attchs.1,

2; App. 22–27. She presented certifications from her physicians which did not instruct she be dispensed marijuana. The documents simply averred she would "likely [] receive therapeutic or palliative benefit from the . . . use of marijuana to treat or alleviate the [her] debilitating medical condition." 2/7/2020 Attch.2 p.2, 3; App. 26, 27; Iowa Code § 155A.3(41). Nor did they satisfy section 155A.27's directives as to the form of a prescription. Because they are merely attestations that Middlekauff could "benefit" from using marijuana, they did not include directions for use, the strength, nor quantity of the drug. *Compare* Iowa Code § 155A.27(4) *with* 2/7/2020 Attchs.1, 2; App. 22–27. Her suggestion that either of her exhibits provided "proof of a valid 'prescription'" flies in the face of our statutes and the very text of the documents. *Compare* 2/7/2020 Attch.1, 2; App. 22–27 *with* Iowa Code §§ 155A.3; 155A.27; 124.308; 423.3(60)(f); Appellant's Br.24–25.

Additionally, Middlekauff failed to provide sufficient evidence establishing the credentials of the persons who signed her Arizona "Medical Marijuana Physician Certifications." *See* 3/3/2020 Hearing Tr. p.9 line 12–p.10 line 8; 8/18/2020 Hearing Tr. p.9 line 9–12; Trial Tr. p.67 line 8–p.71 line 4. While there is no need to quibble over

whether a bona fide out-of-state practitioner's prescription for a non-schedule I substance may be recognized in Iowa, a defendant must bring forward sufficient evidence in order to rely upon an affirmative defense. *See Gibbs*, 239 N.W.2d at 867–68 (finding that "prescription exception" to crime of controlled substance possession was a defense, not an element of the crime); *State v. Moorhead*, 308 N.W.2d 60, 62–63 (Iowa 1981) (reapplying holding that State has no burden to go forward with evidence to negate an affirmative defense until the defendants introduced sufficient evidence to establish the defense is applicable); *see also* Iowa Code §§ 155A.3(38); 155A.30; Appellant's Br.28, 29. The names and letters "NMD" told the court little. 2/7/2020 Attch.2 p.2, 3; App. 26–27. Aside from her subsequent testimony at trial she received these from her doctors, no other credentials were ever produced. *See* 3/3/2020 Hearing Tr. p.9 line 12–p.10 line 8; 8/18/2020 Hearing Tr. p.9 line 9–12; Trial Tr. p.67 line 8–p.71 line 4. Middlekauff's showing on this portion was deficient. The district court did not err in declining to terminate this prosecution where the defendant failed to even establish her entitlement to the defense.

As for her remaining proposals to rely on dictionary definitions to establish the meaning of "prescription," there remains no need to look beyond the legislature's chosen terms. To the degree the Court is inclined to look further, the State believes these generalized definitions favor its interpretation set out above, not hers. Appellants' Br.23–24. And as will be discussed in the next subdivision, Arizona law distinguishes prescriptions from its medical marijuana program.

2. Even under Arizona law, Middlekauff's claim fails.

To be clear from the start, Iowa is an independent sovereign and is not required to credit Arizona law on this issue. *See, e.g., Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 494 (2003) (the Federal Constitution's full faith and credit clause "does not compel a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate"); Appellant's Br.44–45; 8/18/2020 Hearing Tr. p.3 line 15–p.5 line 9. Even if this Court entertained Middlekauff's request to supplant her home state's law within Iowa Code section 124.401(5), it would fail. An argument the marijuana registry scheme or a registry card are a "prescription" have already been rejected in Arizona. *See* Appellant's Br.30–31, 34–37.

Like Iowa and many other jurisdictions, Arizona adopted a modified version of the uniform controlled substances act, with similar statutes governing "prescriptions." *Compare* Iowa Code Ch.124 *with* 36 Ariz. Rev. Stat. Ch.27; *see also* Ariz. Rev. Stat. §§ 32-1961, 32-1968; 36-2525. It also created a prescription drug defense analogous to Iowa's. *See* Ariz. Rev. Stat. § 13-3412(A)(7). But Arizona's Medical Marijuana Act was adopted in 2010 and created a distinct statutory framework from its preexisting prescription and controlled substance statutes. *Compare* 36 Ariz. Rev. Stat. Ch.28.1 *with* 36 Ariz. Rev. Stat. Ch.27.

A comparison of the Arizona's controlled substances chapter to its medical marijuana act makes the difference clear. Like Iowa, Arizona law provides mechanisms to effect and police prescriptions. *See* Ariz. Stat. Rev. §§ 32-1968, 36-2525. Arizona's medical marijuana statutes do not use the term "prescription," and create a distinct means of obtaining marijuana. Instead of utilizing its existing prescription framework, under Arizona's medical marijuana chapter "qualifying patients" must obtain preliminarily a "written certification" from a physician. The certification is just a written recognition that "in physician's professional opinion the patient is

likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the patient's debilitating medical condition or symptoms associated with the debilitating medical condition." Ariz. Rev. Stat. § 36-2801(20); 2/7/2020 Attch.2; App. 25–27.

They then furnish the certification to the state when applying for a "registry identification card." Once the materials are advanced to the State, reviewed, and approved, the patient is issued a card that allows them to go to various registered dispensaries and purchase marijuana. *See* Ariz. Rev. Stat. §§ 36-2801(18); 36-2804.02; 36-2804.03. The state's role as an intermediary differentiates this scheme from prescriptions—it is the State's authorization which permits the individual to go to registered dispensaries and be issued no more than 2.5 ounces of marijuana, not the physician's. This is not a "prescription," and the Arizona Supreme Court has held just that.

In *Dobson v. McClennan*, the Arizona Supreme Court considered two defendants' claims that they were immune from conviction for driving under the influence because they were in possession of state-issued medical marijuana cards. 361 P.3d 374, 375 (Ariz. 2015). Relevant here, each defendant relied in part on Arizona's

prescription drug defense for DUI where a "drug . . . or its metabolite [is] in the person's body." *Id.* at 375–76. Individuals could rely upon the affirmative defense where the person was "using a drug as prescribed by a medical practitioner who is licensed pursuant to title 321 and who is authorized to prescribe the drug." Ariz. Rev. Stat. § 28-1381(D). The Arizona Supreme Court noted the defense was inapplicable because under Arizona's statutes, marijuana is not "prescribed:"

> Medical marijuana used pursuant to "written certifications" under the AMMA is not "prescribed," *see* A.R.S. §§ 36–2801(18), –2804.02(A)(1); and the § 28–1381(D) defense applies to drugs prescribed by a different class of licensed "medical providers" than those who may issue medical marijuana certifications. Compare A.R.S. § 28–1381(D) (defining "medical providers" as including licensed podiatrists, dentists, medical doctors, and osteopathic physicians) with § 36–2801(12) (defining "physician" as including licensed medical doctors and osteopathic, naturopathic, and homeopathic physicians).

Id. at 377–78. This distinction puts to rest any other reliance on dictionary definitions to clarify the term "prescription." Appellant's Br.23.

And Arizona is not alone. Other jurisdictions recognize having access to medical marijuana through a registry scheme like Arizona's

is distinct from a doctor's "prescription." *See McLeod & Swinomish Tribal Cmty.*, 15 Am. Tribal Law 368, 370 (Swinomish Tribal C.A. 2013) (rejecting claim Washington's authorization for medical marijuana use was the equivalent of a "valid prescription," noting Washington's statutes "clearly and purposefully never calls the Green Card a 'prescription'; it is merely a document necessary to avoid State prosecution of an otherwise illegal drug"); *Bruyette v. State*, 253 P.3d 512, 515 (Wy. 2011); *State v. Thiel*, 846 N.W.2d 605, 613 n.2 (Minn. Ct. App. 2014) ("[M]edical cannabis is not prescribed by health care practitioners. Rather, a practitioner may provide a patient with a 'certification of diagnosis' of a qualifying medical condition, which the patient then includes as part of an application to become part of the patient registry program"); *see generally See Kuruc*, 846 N.W.2d at 324 (concluding that because schedule I drugs could not be prescribed in North Dakota, defendant could not rely on prescription drug defense where prescription for marijuana was obtained in Washington).

As an additional example, in a case substantially similar to this one, the Wyoming Supreme Court considered whether a defendant could rely on Wyoming's prescription defense for marijuana

possession where the defendant's marijuana was obtained pursuant to Colorado medical marijuana laws. *Burns v. State*, 246 P.3d 283 (Wy. 2011). The defendant in the case asserted this was a "valid prescription or order of a practitioner" just as Middlekauff does. *Id.* at 284–85. The Wyoming Supreme Court made short work of the argument:

> Generally, our first step would be to analyze the definitions of "prescription" and "order" as used in the statute. However, in this case there is no need to engage in that analysis. The possession of marijuana, even for medical purposes, remains illegal. Therefore, it would be illegal for a physician to prescribe or order, in any sense, the possession of marijuana. *Indeed, the Colorado law simply allows for a physician to certify that a patient might benefit from the use of marijuana as a medical treatment. It is then left entirely up to the patient whether to apply for a medical marijuana registry card from the State of Colorado.* It is the State of Colorado that makes the final determination whether the patient qualifies for the registry card, thereby exempting the patient from criminal liability for possessing amounts of marijuana necessary for medicinal purposes. *Importantly, it is not the action of the physician that determines any potential possession of marijuana by the patient. Clearly, therefore, the physician is not prescribing or ordering the possession of marijuana as contemplated by the language of § 35–7–1031(c).* The exception found in § 35–7–1031(c) simply does not apply in this case.

Id. at 286 (emphasis added) (citations omitted).

Although not controlling precedent, the case is persuasive authority here. Wyoming's prescription defense is practically identical to Iowa's. *Compare* Wyo. Stat. Ann. § 35-7-1031(c) ("It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this act.") *with* Iowa Code § 124.401(5). Colorado's medical marijuana act functions like Arizona's, with doctors providing medical certifications that in turn leave the issuance of a registry card to state officials. *Compare* Ariz. Rev. Stat. §§ 36-2804.02; 36-2804.03; 36-2804.05 *with* Colo. Const. art. XVIII, § 14(3). Only once approved by the state may the "qualifying patient" obtain marijuana from an approved dispensary. *See* Ariz. Rev. Stat. § 36-2806.02; Colo. Const. art. XVIII, § 14(4)-(5); Colo. Rev. Stat. Ann. § 44-10-501.

And though it does not authorize the possession of marijuana and is not appliable in this case, the State notes a brief examination of Iowa's cannabidiol statutes show a comparable intent to avoid the

term "prescription." *See* Iowa Code §§ 124E.2–.4, 124E.12; 124E.25. This form of registry system is equally distinct from Iowa's prescription framework. In light of these various textual and functional similarities, this Court should reject Middlekauff's attempts to equate Arizona's medical marijuana card and registry system with prescription.

This is not unjust or surprising. Iowa may police its territory as an independent sovereign. Middlekauff cannot claim any reliance on Arizona's medical marijuana law to protect her conduct in other jurisdictions. She was forewarned that "Possessing marijuana may violate local, *state*, and federal laws *and this card may not provide legal protection*." 2/7/2020 Attch.1 p.2 (emphasis added); App. 23; Trial Tr. p.74 line 12–20 (offer of proof). Under Iowa law, Middlekauff's possession was criminal and Arizona law provided no shield. The district court was correct to deny her third motion to dismiss.

B. Iowa's prohibition on the possession of marijuana is not unconstitutionally vague; the fact that Middlekauff could not possess marijuana in this state or rely on the defense could be discerned from Iowa's statutory framework.

As an alternative grounds for reversal, Middlekauff attacks Iowa Code section 124.401(5)'s justification *defense* as unconstitutionally vague as applied to her. Appellant's Br.37–40. This Court should reject that challenge as well.

Article I, Section 9 of the Iowa Constitution and the Fourteenth Amendment to the United States Constitution prohibit the enforcement of vague statutes. "The clause is broad and captures the common concept that all laws are required to give people of ordinary intelligence fair warning of the prohibited conduct so they will have a reasonable opportunity to navigate through life by engaging in lawful conduct and spurning unlawful conduct." *State v. Newton*, 929 N.W.2d 250, 255 (Iowa 2019). The Iowa Supreme Court has historically interpreted due process guarantees of Iowa and the Federal Constitutions to be co-extensive—Middlekauff makes no argument to the contrary—and this Court should continue to do so. *Nguyen v. State*, 878 N.W.2d 744, 755 (Iowa 2016); *State v. Nail*, 743 N.W.2d 535, 539 (Iowa 2007). Under both constitutional provisions,

a statute is impermissibly vague where it "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." *Hill v. Colorado*, 530 U.S. 730, 732 (2000). In addition to this notice interest, the clause exists to "prevent arbitrary or discriminatory law enforcement and prohibits statutes that threaten substantial amounts of constitutionally protected activities." *Newton*, 929 N.W.2d at 255 (citing *Nail*, 743 N.W.2d at 539).

When considering vagueness challenges, Iowa courts apply an "avoidance theory"—the Court is to presume that the statute is constitutional and utilize "any reasonable construction" to uphold it. *Nail*, 743 N.W.2d at 539–40. This has been reformulated as requiring a defendant challenging the vagueness of a statute to "refute 'every reasonable basis' upon which a statute might be upheld." *Id.* (quoting *State v. Seering*, 701 N.W.2d 655, 661 (Iowa 2005)). Vagueness challenges are determined on the basis of existing law and not the subjective expectations of a particular defendant. *See id.*

Likewise, when considering a "vague-as-applied" challenge, the Court is to consider whether a defendant's conduct "clearly falls 'within the proscription of the statute under any construction.'" *State v. Musser*, 721 N.W.2d 734, 745 (Iowa 2006). If a standard of conduct

can be reasonably ascertained by reference to prior judicial decisions, statutes, the dictionary, or other common generally accepted usage, then the statute satisfies constitutional due process requirements. *State v. Gonzalez*, 718 N.W.2d 304, 310 (Iowa 2006). A challenged statutory provision must be read *in pari materia* with other relevant statutes—Iowa courts assume "the legislature strives to create a symmetrical and harmonious system of laws." *Nail*, 743 N.W.2d at 541.

The parties do not agree as to the standard of review. When examining a vagueness challenge, this court inquires whether the law infringes on "rights 'implicit in the concept of ordered liberty.'" *See State v. Hernandez-Lopez*, 639 N.W.2d 226, 237 (Iowa 2002) (quoting *United States v. Salerno*, 481 U.S. 739, 746 (1987)). Middlekauff widely frames the inquiry as her "fundamental right to live unmolested by prosecution under vague criminal statutes" and suggests strict scrutiny is appropriate. Appellant's Br.38. The State disagrees. No fundamental rights are involved, rather, the statute addresses the non-fundamental right to possess contraband. *See generally Fowler v. State*, 382 N.W.2d 476, 478–79 (Iowa Ct. App. 1985) (rejecting equal protection challenge to arson statute, "While

appellant tries to distinguish between the threat of criminal sanctions and the rights to travel and of liberty, we find this to be a distinction without a difference. Each time criminal sanctions are threatened, the right to travel and of liberty are also threatened. We find the rational basis analysis is the appropriate test to use"); *see also United States v. Fogarty*, 692 F.2d 542, 547 (8th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983) (applying rational basis because "there is no fundamental constitutional right to import, sell, or possess marijuana"). As she acknowledges, in this void-for-vagueness challenge she bears the burden to "refute 'every reasonable basis' upon which a statute might be upheld." *Nail*, 743 N.W.2d at 539–40; Appellant's Br.38–39. This is another signal that rational basis review applies. She cannot and has not satisfied her high burden.

Iowa Code section 124.401(5) criminalizes the possession of a controlled substance unless it "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." Middlekauff's possession of marijuana clearly fell within section 124.401(5)'s prohibition. For the reasons set out in subdivision I(A), her medical marijuana card was not a "prescription or order of a

practitioner" for purposes of the section's justification defense. This was true under either Iowa law or Arizona's. Any subjective belief that her conduct would be exempted from prosecution based on her possession of the card is immaterial—aside from the general imputation of knowledge of the law to each individual, Middlekauff's registry card cautioned possession of marijuana may run afoul of other state's laws. 2/7/2020 Attch.1 p.2; App. 23. Iowa's statute provided sufficient notice as applied to her conduct. *See generally Newton*, 929 N.W.2d at 256–58 (rejecting vagueness challenge to Iowa Code section 321J.2(1)(c)).

Nor is there a risk of arbitrary enforcement if section 124.401(5) prescription defense is permitted to stand. Prosecutors and law enforcement officers currently operate under a single unified standard—marijuana intended for consumption cannot be possessed in Iowa. *See* Iowa Code § 124.204(4)(m), (7). The meaning of the term "prescription" and whether a Schedule I substance like marijuana may be prescribed is found by review of Iowa's controlled substance chapters alongside its statutes controlling pharmacies and prescriptions. This advances uniform application of Iowa's prohibition and prevents arbitrary application of the defense.

Although she may disagree with its decisions, our legislature has been confronted with question of whether to legalize marijuana possession for medical purposes. Given ongoing scientific developments, moral disputes, and the attendant risks of expanding market sales and the additional drugged driving legalization might bring, the legislature has not adopted medical marijuana systems such as those in Arizona. Instead, it has decided upon a cautious policy. One which permits only the use of cannabidiol products to treat specified conditions through a registry mechanism distinct from prescription. Iowa Code § 124E.1 et seq. It is of course true the legislature could change course, but the law as it stands is supported by a reasonable, rational basis. *See generally United States v. White Plume*, 447 F.3d 1067, 1075–76 (8th Cir. 2006) (classification of Marijuana as Schedule I substance under the Federal CSA continues to survive rational basis test). It provided constitutionally sufficient notice to guide conduct. Iowa Code § 701.6; *see State v. Heinrichs*, 845 N.W.2d 450, 456–57 (Iowa Ct. App. 2013) (rejecting vagueness challenge where defendant purchased a "K-2" substance labeled "100% Pure Evil"); *see also State v. Henderson*, 478 N.W.2d 626, 629

(Iowa 1991) (rejecting vagueness challenge to Iowa's prohibition on "simulated controlled substances").

While she may have erroneously believed her conduct was protected from sanction, Iowa law is clear and survives this vagueness challenge.

C. The minutes of testimony were sufficient to permit this prosecution to proceed.

Middlekauff next asserts that because the minutes of testimony "acknowledged" her medical marijuana card without rebutting its validity, the minutes did not provide probable cause to permit the prosecution to proceed and were "improperly filed under the Iowa Rules of Criminal Procedure." Appellant's Br.40–41. This Court should reject the assertion outright.

It is of course true that Iowa's rules of criminal procedure permit a defendant to attack a trial information where

> it appears from the indictment or information and the minutes of evidence that the particulars stated do not constitute the offense charged in the indictment or information, or that the defendant did not commit that offense or that a prosecution for that offense is barred by the statute of limitations, the court may and on motion of the defendant shall dismiss the indictment or information unless the prosecuting attorney shall furnish a bill of

> particulars which so states the particulars as to cure the defect.

Iowa R. Crim. P. 2.11(6)(a). But when a defendant moves to dismiss a trial information pursuant to the rule, the court considering the motion accepts as true the facts set out in the information and the minutes of testimony. *See State v. Marti*, 290 N.W.2d 570, 578 (Iowa 1980). The State need not establish the crime beyond a reasonable doubt, only probable cause is required. *See generally State v. Vornbrock*, No. 06-0770, 2006 WL 3615010, at *1–*2 (Iowa Ct. App. Dec. 13, 2006) (reversing grant of motion to dismiss where district court found insufficient evidence to support knowing element of possession of marijuana).

When reviewing the trial information and minutes of testimony, it is essential to keep their function in mind—they are intended to apprise the defendant of the crime charged so that the defendant may have the opportunity to prepare the defense. *See State v. Grice*, 515 N.W.2d 20, 22 (Iowa 1994). They are not subject to challenge because facts within the minutes could support a particular defense. *See State v. Doss*, 355 N.W.2d 874, 880 (Iowa 1984) (noting that a motion to dismiss an information that merely challenges the sufficiency of the evidence supporting it is not ground for setting aside the

information); *State v. Graham*, 291 N.W.2d 345, 349–50 (Iowa 1980) (finding that sufficiency of the minutes of testimony was not ground for dismissal) (superseded on other grounds as recognized in *Wells*, 629 N.W.2d at 352–53). Rather than challenging an information, it is the defendant who possesses the burden of establishing the applicability of a defense *at trial*. *See, e.g., State v. Stump*, 119 N.W.2d 210, 218 (Iowa 1963) ("The issue of alibi is an affirmative defense and when asserted the burden of proof by a preponderance of the evidence rests upon the defendant."); *see also State v. Broughton*, 425 N.W.2d 48, 51 (Iowa 1988) (opining a defendant must produce substantial evidence to support an instruction, and that "'Substantial' evidence means evidence which could convince a rational trier of fact that the defendant has established his affirmative defense."); 4 Robert R. Rigg, *Iowa Practice Series: Criminal Law*, § 2.6 (2015).

The minutes of testimony attached to the trial information were sufficient to permit this prosecution to proceed. The State described how Valenta would testify to his observations of the "facts and circumstances surrounding the case" and "any statements or admissions made by the Defendant." 1/20/2020 Mins. of Test. p.1; App. 10. The secure attachment included his notes that he smelled

marijuana coming from Middlekauff's vehicle, his actual observations of ten bags of the substance, and her admissions to possessing "quite a bit" because she was traveling. 1/20/2020 Sec.Attch. p.1–2; App. 13–14. This established probable cause. *See* Iowa Code § 124.401(5). Of course, "When the court approves the trial information, it determines whether there is probable cause to detain the defendant to answer the charge." *State v. Petersen*, 678 N.W.2d 611, 614 (Iowa 2004); 1/20/2020 Trial Inf.; 1/20/2020 Mins. of Test.; 1/20/2020 Sec.Attch.; App. 13–18.

The reference to Middlekauff's medical marijuana card did not disprove the probable cause supporting the State's prosecution for three reasons. First, as discussed above in Subdivision I(A), Iowa law provides no prescription justification for her crime. Middlekauff's entire claim is premised on the incorrect assumption it does. The card's existence did not dispel Valenta's probable cause to believe a violation of Iowa law was occurring in his presence, nor could it disprove the probable cause to support the trial information. *See generally State v. Berringer*, 229 P.3d 615, 618–20 (Or. Ct. App. 2010) (rejecting defendant's claim that presentation of California

medical marijuana documentation eliminated probable cause to continue investigation).

Second, were the law as Middlekauff suggests, any prosecution where the minutes of testimony reference facts capable of supporting an affirmative defense—such as intoxication, self-defense, or alibi—could result in pre-trial dismissal. Aside from being inconsistent with the claims authorized under our rules of criminal procedure, this is not a rational or desirable result. *See* Iowa R. Crim. P.2.11(6)(a), (c). As the Iowa Supreme Court observed in *Wilson*, practical concerns caution against litigating the merits of a defense prior to trial: "Frequently, when a defendant raises justification, it becomes the focus of the entire case. Thus, having a pretrial [affirmative defense] hearing would often result in two proceedings covering the same ground." *Wilson*, 941 N.W.2d at 589; *see also Iowa Dist. Ct. Linn Cty.*, 271 N.W.2d 704, 706 (Iowa 1978) ("A jury is the appropriate body to resolve factual issues. Facts should be established by a jury before a court is called upon to rule upon the governing legal principles. To hold otherwise would, to some extent, transfer the fact-finding function from juries to trial judges.").

Wilson provided sage warning. Here, after having repeatedly attempting to cut off the prosecution, Middlekauff was then equally ready to assert the issue once more at trial. 5/12/2021 Hearing p.7 line 5–p.10 line 24; p.11 line 16–p.13 line 7; p.13 line 23–p.14 line 5; 2/28/2021 Proposed Inst. P.15, 18–24; 5/12/2021 Proposed Inst. P.16, 21–24. This Court should not encourage this sort of time-consuming and reiterative process when the matter can be resolved by proper notice and presentation to the factfinder at trial.

Third and again, it was Middlekauff's burden to present evidence to support the defense she sought. *See, e.g., State v. Hunley*, 167 N.W.2d 645, 649 (Iowa 1969) ("Even where intent is an essential element intoxication is an affirmative defense with the burden resting on defendant to establish it by a preponderance of the evidence."); *Stump*, 119 N.W.2d at 218. During the hearing on her motion, she furnished her card and the two certifications of eligibility, but there was no testimony about her condition, nor credentials for her "physicians" or "practitioners" offered at the hearing. *See* 3/30/2020 Hearing p.8 line 23–p.10 line 8; *see generally* 8/20/2020 Hearing Tr. *But see* Trial Tr. p.67 line 8–p.70 line 16 (providing limited discussion that medical certification was sought for osteoarthritis).

This showing was insufficient and did not require the district court to end the prosecution prior to trial. Probable cause supported the initiation of this prosecution, and the matter correctly proceeded to trial.

D. Middlekauff's claim she was seized for the entirety of this prosecution is unmeritorious and without remedy.

Following her claim that trial information failed to present facts establishing probable cause to permit the prosecution to proceed, Middlekauff presents a derivative claim that the district court's approval of the trial information resulted in a "seizure" lacking probable cause. Appellant's Br.41–43. She believes this allegedly unconstitutional seizure again requires the remedy of dismissal. *Id.*

The assertion runs headlong into existing law. The United States Supreme Court has already rejected the proposition a defective arrest or detention voids a subsequent conviction or provides a defense to the same. *See United States v. Crews*, 445 U.S. 463, 474 (1980) (illegality of detention cannot deprive prosecution the opportunity to prove defendant's guilt through the introduction of evidence untainted by the police misconduct); *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975) ("[A]lthough a suspect who is presently detained

may challenge the probable cause for that confinement, a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause."); *see also United States v. Morrison*, 449 U.S. 361, 365–66 (1981) ("[W]e have not suggested that searches and seizures contrary to the Fourth Amendment warrant dismissal of the indictment. The remedy in the criminal proceeding is limited to denying the prosecution the fruits of its transgression."); *United States v. Brunette*, 256 F.3d 14, 19 (1st Cir. 2001) ("The usual remedy for seizures made without probable cause is to exclude the evidence wrongfully seized in order to deter future violations of the Fourth Amendment."). The only recognized remedies for a Fourth Amendment violation are the suppression of evidence pursuant to the exclusionary rule or a collateral civil rights lawsuit. *See, e.g.*, 42 U.S.C. § 1983; *Hudson v. Michigan*, 547 U.S. 586, 591, 596–97 (2006) (holding that the exclusionary rule has a costly toll and "has always been our last resort, not our first impulse"). Middlekauff offers no authority establishing an unreasonable search or seizure in violation of either the Federal or Iowa Constitution's guarantees entitles a defendant to dismissal of

the prosecution; neither *State v. Hall*, 235 N.W.2d 702 (Iowa 1975)[3], *United States v. Salerno*, 481 U.S. 739 (1987), or *Albright v. Oliver*, 510 U.S. 266 (1994) offer the necessary authority for the eye-opening remedy she requests. That alone is enough to dismiss the claim out of hand. Iowa R. App. P. 6.903(2)(g)(3). As its base assertion of lack of probable cause fails, her consequent claim of ongoing illegal seizure fails too.

E. Middlekauff's equal protection argument is underdeveloped and facially unpersuasive. It is unquestionably within the purview of the Iowa Legislature to distinguish between which materials are contraband and what justification defenses it authorizes.

Middlekauff claims that the State and Federal Due Process Clauses forbids Iowa from "exercising discretion about which controlled substances to acknowledge valid prescriptions for."

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[3] *Hall* addressed the validity of a grand jury indictment in which the prosecutor "inject[ed] incompetent, irrelevant and prejudicial testimony which bore no relationship to the matter" and also "made numerous gratuitous statements attacking defendant's character and setting out irrelevant past conduct which could only be prejudicial." *Hall*, 235 N.W.2d at 711–12. Specifically, Hall claimed that the prosecutor's conduct violated equal protection and due process guarantees and required vacating his conviction. Our supreme court disagreed, noting that notwithstanding the prosecutor's improper conduct, the jury that convicted Hall heard none of that evidence and that accordingly, the conviction was not constitutionally invalid. *Id.* at 712–13.

Appellant's Br.43–44. Likening herself to those individuals with a physician's prescription for opioid pain medication, she believes the district court's interpretation of Iowa Code section 124.401(5)'s defense violated her rights to equal protection of the law. Appellant's Br.44–45. This is not so.

Iowa courts initially review equal protection challenges by examining whether the alleged classes are similarly situated: "persons who are not similarly situated need not be treated the same for equal protection purposes." *See In re Det. of Williams*, 628 N.W.2d 447, 452 (Iowa 2001) (citing *In re Morrow*, 616 N.W.2d 544, 548 (Iowa 2000)). That is to say, if a challenger "cannot show as a preliminary matter that they are similarly situated, courts do not further consider whether their different treatment under a statute is permitted under the equal protection clause." *See Varnum v. Brien*, 763 N.W.2d 862, 882 (Iowa 2009); *cf. Timberland Partners XXI, LLP v. Iowa Dept. of Revenue*, 757 N.W.2d 172, 176–77 (Iowa 2008) (rejecting an equal protection challenge to distinctions between apartments/condominiums for property tax assessment purposes because "any similarities between apartments and condominiums are

insufficient to consider them 'similarly situated' for equal protection analysis").

Determining whether two groups are similarly situated requires inquiry into the purpose animating the challenged law. "The purposes of the law must be referenced in order to meaningfully evaluate whether the law equally protects all people similarly situated with respect to those purposes." *Varnum*, 763 N.W.2d at 883. The Iowa Supreme Court has previously suggested that the purpose underlying section 124.401 was to "conform Iowa law to the uniform act and federal legislation in a common effort to fight drug abuse." *See Cassady*, 224 N.W.2d at 652. The legislature's intent in adopting a prescription drug justification is straightforward enough, it wished to limit the criminal liability of individuals who possess controlled substances deemed to have accepted medical use in treatment and lack the potential for abuse where those substances were "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." *See* Iowa Code §§ 124.203, 124.205, 124.207, 124.209, 124.211, 124.401(5).

As discussed above in Subdivision I(A)(2), Middlekauff has never been prescribed marijuana from a medical provider. Rather, she applied for and received authorization from the state of Arizona to seek out the substance from registered dispensaries. The two procedures are not the same. *Compare* Ariz. Rev. Stat. §§ 32-1961, 32-1968(A), (B), (C), (D), 36-2525(A) *with* Ariz. Rev. Stat. §§ 36-2801(18), 36-2804.02, 36-2804.03, 36-2804.04, 36-2806.02. She is certainly not similarly situated to an individual who has received a prescription for a class II opioid medication. *See* Iowa Code §§ 124.203, 124.204(4)(m), 124.205(1), 124.206(2)(a)(7), (10), (14) (opioid medications classified as Schedule II substances with a "high potential for abuse" but containing "currently accepted medical use with severe restrictions"). Iowa treats all possessors of marijuana—both medical marijuana and obtained through the black market—identically. This equal protection claim fails at the outset.

And even beyond this initial threshold test, the claim fails because Middlekauff has not met her heavy burden to establish the legislature's act was unlawful. She does not identify what standard of review of applies to the class she proposes—medical marijuana users—but the State submits no suspect class or fundamental right is

involved. *See State v. Biddle*, 652 N.W.2d 191, 202 (Iowa 2002) (citing *Bowers v. Polk County Bd. of Supervisors*, 638 N.W.2d 682, 689 (Iowa 2002)); *Fogarty*, 692 F.2d at 547–48. Because there is no impermissible classification nor fundamental right to the possession of marijuana or a particular medical treatment, rational basis review applies. *See Raich v. Gonzales*, 500 F.3d 850, 866 (9th Cir. 2007) ("[F]ederal law does not recognize a fundamental right to use medical marijuana prescribed by a licensed physician to alleviate excruciating pain and human suffering."); *Carnohan v. United States*, 616 F.2d 1120 (9th Cir.1980) (constitutional rights of privacy and personal liberty did not permit plaintiff the right to possess controlled substance Laetrile); *Commonwealth v. Leis*, 243 N.E.2d 898, 902–05 (Mass. 1969) ("The defendants have no right, fundamental or otherwise, to become intoxicated by means of the smoking of marihuana."); *People v. Alexander*, 223 N.W.2d 750, 751–52 (Mich. Ct. App. 1974) (no fundamental right to sell marijuana); *Kreisher v. State*, 319 A.2d 31, 32 (Del. Super. Ct. 1974) ("There exists no constitutional right of privacy which encompasses the right to possess and use marihuana.").

Under the claim she presents and the applicable standard of review, the burden rests with Middlekauff to prove that the unavailability of Iowa Code section 124.401(5)'s justification defense to those who possess marijuana is unconstitutional. To do so, she must again "negate every reasonable basis upon which the classification may be sustained." *Varnum*, 763 N.W.2d at 879 (quoting *Bierkamp v. Rogers*, 293 N.W.2d 577, 579–80 (Iowa 1980)).

On this record, she cannot prevail. Rational basis review is extremely deferential to the legislature.

> [T]he classification must be sustained unless it is patently arbitrary and bears no rational relationship to a legitimate governmental interest. . . . It does not deny equal protection simply because in practice it results in some inequality; practical problems of government permit rough accommodations; and the classification will be upheld if any state of facts reasonably can be conceived to justify it.

State v. Leins, 234 N.W.2d 645, 647 (Iowa 1975) (quoting *Lunday v. Vogelmann*, 213 N.W.2d 904, 907 (Iowa 1973)); *see State v. Mitchell*, 757 N.W.2d 431, 437 (Iowa 2008) (quoting *Bd. of Trs. v. Garrett*, 531 U.S. 356, 366–67 (2001)).

Our legislature could reasonably decide that marijuana should remain a schedule I substance that cannot be prescribed rendering

the defense's protection unavailable. As the Eight Circuit Court of Appeals held in rejecting an equal protection challenge to the Federal Controlled Substances Act:

> the ongoing vigorous dispute as to the physical and psychological effects of marijuana, its potential for abuse, and whether it has any medical value, supports the rationality of the continued Schedule I classification . . . even assuming, arguendo, that marijuana has some currently accepted medical uses, the Schedule I classification may nevertheless be rational in view of countervailing factors such as the current pattern, scope, and significance of marijuana abuse and the risk it poses to public health.

Fogarty, 692 F.2d at 547–48 (citations omitted). Other states have considered and rejected similar equal protection challenges to marijuana's classification as a Schedule I drug. *See Seeley v. State*, 940 P.2d 604, 613–19 (Wash. 1997) ("The challenged legislation involves conclusions concerning a myriad of complicated medical, psychological and moral issues of considerable controversy. We are not prepared on this limited record to conclude that the legislature could not reasonably conclude that marijuana should be placed in schedule I of controlled substances."); *see also Thiel*, 846 N.W.2d at 613–14; *State v. McManus*, 718 S.W.2d 130, 130–32 (Mo. 1986) (rejecting claim that legislature had no rational basis for classifying

marijuana as a Schedule I controlled substance); *Commonwealth v. Jezzi,* 208 A.3d 1105, 1115 (Pa. Super. Ct. 2019); *State v. Olson*, 380 N.W.2d 375, 380–83 (Wis. Ct. App. 1985) (collecting cases and noting defendant offered no authority holding classification of marijuana as a schedule I substance is irrational and violates equal protection).

Like those States, Iowa's legislature could validly weigh competing policy interests and determine the risk of abuse attendant to wider marijuana usage meant that it should not be prescribed, nor is entitled to the prescription defense. *See* Iowa Code §§ 124.203(1), 124.204(4)(m). Despite bearing the burden on this particular issue, Middlekauff offered the district court below nothing aside from her raw assertions in support of her challenge. *See generally* 7/11/2020 Motion to Dismiss (Third) p.16–17; App. 70–71; 8/18/2020 Hearing Tr. The district court did not err in denying it.

As a final bid, Middlekauff contends Iowa's framework unconstitutionally distinguishes between herself and those who are authorized to possess cannabidiol. Appellant's Br.45. Again the claim fails because these two groups are not similarly situated. Sufficed to say cannabidiol and the marijuana she possessed are distinct

substances. *See, e.g.,* Iowa Code § 124E.2(9), (10); Trial Exhs. T1–3; App. 188–89, 212–13. Cannabidiol's limited application and negligible psychoactive components lower the attendant risks of misuse. *See* Iowa Code §§ 124E.2(2), .3, .17. And the Iowa Supreme Court has already concluded that our legislature may permissibly distinguish between punishments for distinct substances; it was similarly within the legislature's purview to subject cannabidiol to a distinct regime. *See, e.g., Biddle*, 652 N.W.2d at 202–03 (rejecting equal protection challenge to statutes "treating methamphetamines more harshly than users of other addictive and life-threatening hard drugs"). Because the those who possess cannabidiol and marijuana are not similarly situated, the legislature may independently permit, punish, or excuse the possession of either as it sees fit.

Portions of Middlekauff's arguments under this heading are veiled challenges the legislature's continued prohibition on marijuana is poor policy. *See* Appellant's Br.32–33 n.4, 35–36. But these proposals are best presented to the body itself, not to a court through an equal protection challenge. Each of Middlekauff's equal protection claims fail and the district court was correct to permit the prosecution to proceed.

II. Middlekauff's right to fair trial was not affected by her inability to present evidence regarding Arizona's medical marijuana law; her remaining challenges to the district court's evidentiary rulings are unavailing.

Preservation of Error and Invited Error

The State does not contest error preservation on Middlekauff's challenge to the district court's rulings declining to give her proposed jury instructions and further declining to permit evidence about Arizona law. *See* Appellant's Br.46–50; Trial Tr. p.150 line 17–p.152 line 1; 5/12/2021 Hearing Tr. p.7 line 5–p.15 line 6; *see generally* 2/29/2021 Brief in Support of Jury Instructions; 5/12/2021 Defendant's Trial Brief.

Nor does the State does not contest preservation for her remaining claims. The State believes the district court's ruling was sufficient to preserve Middlekauff's challenge to Megan Reedy's testimony as being outside the minutes of testimony. *See* Trial Tr. p.86 line 10–24; p.139 line 3–p.140 line 23; Appellant's Br.51–5. Middlekauff objected to the State's Exhibits T1, T2, and T3 on chain-of-custody grounds and the district court overruled the same, preserving error. Trial Tr. p.104 line 18–p.106 line 13; p.119 line 12–p.120 line 22; p.137 line 7–16; Appellant's Br.57–60.

Standard of Review

Iowa courts review de novo claims the constitutional right to present a defense was violated. *State v. Leedom*, 938 N.W.2d 177, 185 (Iowa 2020). Claims the constitutional right to effective assistance of counsel, fair trial, and due process were denied are also reviewed de novo. *See, e.g., State v. Haas*, 930 N.W.2d 699, 703 (Iowa 2019) (right to counsel); *State v. Clark*, 814 N.W.2d 551, 560 (Iowa 2012) (right to present defense and fair trial); *State v. Edwards*, 571 N.W.2d 497, 501 (Iowa 1997) (due process).

Appellate courts review the district court's refusal to submit a requested jury instruction for correction of errors at law. *See State v. Thompson*, 836 N.W.2d 470, 476 (Iowa 2013).

Challenges to the admission of a witness's testimony as outside the minutes of testimony is reviewed for abuse of discretion. *See State v. Ball*, No. 17-1332, 2018 WL 3471604, at *4, *6 (Iowa Ct. App. July 18, 2018) (citing *State v. Richards*, 809 N.W.2d 80, 89 (Iowa 2012)). *But see State v. Lloyd*, No. 08-1171, 2009 WL 1212751, *2 (Iowa Ct. App. May 6, 2009) ("The parties agree appellate review of a ruling allowing amendment of minutes of evidence is for correction of errors at law.").

Our appellate courts also review the admission of evidence over a chain-of-custody objection for abuse of discretion. *See Biddle*, 652 N.W.2d at 197. In both instances, "Unless there is a clear abuse of discretion in such a ruling, we will not overturn it." *Id.* at 196 (citation omitted).

Merits

Middlekauff raises a number of challenges to the district court's rulings at trial. She alleges the district court denied her the ability to present a defense when it denied her from offering evidence or instructing the jury on Arizona law, that the district court abused its discretion in permitting the State to present evidence from a DCI technician who was not named in the initial minutes of testimony, and abused its discretion in permitting the State to admit its exhibits over her chain-of-custody objections. None of these claims entitle her to a new trial and the State addresses them in turn.

A. Having litigated the application of the defense prior to trial, the district court did not err in excluding irrelevant evidence regarding Arizona law.

In a flurry of claims under a single heading, Middlekauff claims that the district court's decisions to exclude evidence regarding Arizona law and reject her offered jury instructions denied her due

process, a fair trial, the effective assistance of counsel, and the right to present a defense. Appellant's Br.46–47, 50. These can be quickly consolidated. Middlekauff's discussion under this heading does not address her alleged deprivation of the right to effective assistance, and this claim is waived. Iowa R. App. P. 6.903(2)(g)(3); *see, e.g., Iowa Supreme Ct. Att'y Disciplinary Bd. v. McGrath*, 713 N.W.2d 682, 693 n.3 (Iowa 2006) (considering an issue waived when issue is raised in an introductory heading, but no argument or authority cited in support). The right to present a defense and the right to a fair trial both derive from the right to due process. *See generally State v. Simpson*, 587 N.W.2d 770, 771–72 (Iowa 1998) (quoting *Washington v. Texas*, 388 U.S. 14, 18–19 (1967)). The State addresses the two together.

It is of course true that Middlekauff, like any other criminal defendant, had the right to present a defense. But this right is not absolute. The Constitution only requires defendants be permitted to introduce otherwise relevant and admissible evidence. *See State v. Clarke*, 343 N.W.2d 158, 161 (Iowa 1984) (citing *United States v. Nixon*, 418 U.S. 683, (1974)); *State v. Folck*, 325 N.W.2d 368, 374 (Iowa 1982). Where the defendant's desired evidence is irrelevant, its

exclusion remains proper and does not violate the defendant's right to present a defense. *State v. Knox*, 536 N.W.2d 735, 741 (Iowa 1995). Nor is admission of a defendant's evidence required where its prejudicial effect will outweigh its probative value. *Clarke*, 343 N.W.2d at 161 (citing *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) ("[T]he right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.")).

Middlekauff exhaustively litigated the applicability of the prescription justification defense in her attempt to terminate this prosecution. But the district court correctly ruled it was inapplicable. Once this legal issue was resolved, any evidence regarding Arizona law or her medical condition was irrelevant and subject to exclusion. *See Bruyette*, 253 P.3d at 514–15 ("The question of whether or not Mr. Bruyette had a medical marijuana card from a California physician was irrelevant. Because it was irrelevant, the district court properly excluded it."); Iowa R. Evid. 5.402 ("Irrelevant evidence is not admissible.").

And in addition to the reasons discussed in Subdivision I, Iowa is competent to legislate on the question of contraband and need not

credit Arizona's law on this issue. *See, e.g., Hyatt*, 538 U.S. at 494. Nor do we have a medical necessity defense. *See Bonjour*, 694 N.W.2d at 513–14 (deferring to "the Board of Pharmacy Examiners, which is far better equipped than this court—and the legislature, for that matter—to make critical decisions regarding the medical effectiveness of marijuana use and the conditions, if any, it may be used to treat. The board has not done so, and we, by legislative directive, must wait until it does."). And our state does not recognize jury nullification as a valid defense strategy. *See, e.g., State v. Willis*, 218 N.W.2d 921, 925 (Iowa 1974) ("Jury nullification exalts the goal of particularized justice above the ideal of the rule of law. We are persuaded the rule of law should not be subverted."); *State v. Hendrickson*, 444 N.W.2d 468, 472–73 (Iowa 1989) (same). Middlekauff's proposed evidence would not have excused her conduct and could have confused and misled the jury—it was irrelevant.

Because the district court had already determined that Iowa Code section 124.401(5) offered no defense, it did not abuse its discretion in declining to instruct the jury on the matter nor in excluding Middlekauff's evidence in support of the same. *See State v. Walton*, 311 N.W.2d 113, 115 (Iowa 1981) (district court did not err in

refusing to instruct on necessity defense that was inapplicable); *see also Thiel*, 846 N.W.2d at 614–16 (district court did not err in excluding defendant's offered evidence of California medical marijuana card).

B. Middlekauff was not prejudiced by the district court's decision to permit the State to present a DCI criminalist's testimony.

Middlekauff next alleges the district court should not have permitted the State to present DCI criminalist's testimony because her name was not included in the minutes of testimony prior to trial and that the State's failure to provide proper notice prejudiced her. Appellant's Br.51–52, 55–57. The State disagrees.

The State may offer a witness's testimony where "the prosecuting attorney has given the defendant's attorney of record . . . a minute of such witness's evidence . . . at least ten days before the commencement of the trial." Iowa R. Crim. P 2.19(2). Where the State does not provide notice of the witness at least ten days before trial, the court may enter an "order as it deems just under the circumstances," this includes permitting discovery or granting a continuance. Iowa R. Crim. P. 2.19(3). Under the rule, the district court may exclude the testimony of the witness only "if it finds that no

less severe remedy is adequate to protect the defendant from undue prejudice." *Id.*

Although the minutes of testimony must provide a "full and fair statement" of a witness's expected testimony, they need not be exhaustive; only "sufficient to alert the defendant generally to the source and nature of the evidence against him." *State v. Mehner*, 480 N.W.2d 872, 877 (Iowa 1992). "[W]hen the challenged minutes, though incomplete, put defendant 'on notice of the necessity of further investigation of the witness'[s] probable testimony,' reversal need not follow admission of matters they do not disclose." *State v. Musso*, 398 N.W.2d 866, 868 (Iowa 1987) (citation omitted).

Middlekauff's challenge to the district court's decision to admit Reedy's testimony is without merit. Rule 2.19(3) confers the district court wide discretion in regard to the available remedies for a late disclosure. When Middlekauff initially challenged the State's failure to comply with the minutes of testimony, the district court acted appropriately and afforded her reasonable time to conduct discovery of the witness and offered a continuance if she desired. *See* 5/12/2021 Hearing Tr. p.18 line 25–p.19 line 17; Trial Tr. p.140 line 9–23.

Her claim of prejudice is unconvincing. Appellant's Br.52. The State gave notice it would be calling a criminalist from the DCI laboratory to testify regarding the report. 1/20/2020 Mins. of Test p.1–2; App. 10–11. It also gave notice that it would be admitting the ultimate report pursuant to Iowa Code section 691.2(1). *Id.* Although Middlekauff did not have the criminalist's name until the day prior to trial, she was given a copy of the report and time to confer with the witness prior to her testimony. 5/12/2021 Trial Exh. T1; App. 188–89; Trial Tr. p.140 line 9–23. Exclusion of a witness' testimony is a remedy of last resort, and the district court did not abuse its discretion when it admitted the witness's testimony after providing Middlekauff alternative remedies. *See State v. LeGrand*, 501 N.W.2d 59, 62–63 (Iowa Ct. App. 1993). Of course, the contents of Reedy's testimony were not a surprise to Middlekauff; she admitted that she knowingly possessed marijuana, making her claim of prejudice from a lack of notice as to Reedy's name all the more hollow. Trial Tr. p.146 line 10-18; p.155 line 14–22; *see also* 1/21/2020 Letter (acknowledging knowing possession of marijuana); *State v. Shorter*, 893 N.W.2d 65, 83 (Iowa 2017) ("Under our caselaw, a defendant is

not entitled to relief due to defective minutes under rule 2.5(3) when the defense is not surprised by the subsequent testimony.").

Her additional assertion that without Reedy's testimony the State would not have been able to establish that the marijuana was not hemp is inconsequential. Appellant's Br.53. As she herself admits, the State did not need to conduct laboratory testing to verify the substance's identity. Appellant's Br.55; *see, e.g., State v. Brubaker*, 805 N.W.2d 164, 172 (Iowa 2011) ("We have always recognized that, for a person to be convicted of a drug offense, the State is not required to test the purported drug."). The State needed only to provide enough evidence within the record a factfinder could find that the substance seized was illegal. Valenta's testimony was sufficient on this point. Trial Tr. p.110 line 13–p.112 line 4; p.113 line 18–p.114 line 16. The State has no burden to disprove whether the substance seized was hemp by default. Rather, the defense Iowa Code section 124.401(6) authorizes for hemp possession is yet another affirmative defense; the burden of production to inject the matter into the case rested with Middlekauff, not the State. *See, e.g., State v. Guerrero Cordero*, 861 N.W.2d 253, 260 (Iowa 2015) (overruled on other

grounds by *Alcala v. Marriott Intern., Inc.*, 880 N.W.2d 699 (Iowa 2016)).

This district court's approach was well within the bounds of its wide discretion over the issue.

C. The district court did not err in admitting a DCI laboratory report and marijuana.

On appeal, Middlekauff renews her claim that the State's laboratory report and marijuana itself should not have been admitted because the State failed to suitably establish its chain-of-custody for these items. Appellant's Br.57–60. Neither entitles her to relief.

To establish adequate chain of custody to warrant admission of evidence, the State must "show circumstances making it reasonably probable that tampering, substitution or alteration of evidence did not occur. Absolute certainty is not required." *State v. Bakker*, 262 N.W.2d 538, 542–43 (Iowa 1978). And the State is aided by a natural presumption that "State agents would not tamper with the evidence." *State v. Gibb*, 303 N.W.2d 673, 681 (Iowa 1981). The district court has "considerable discretion" in determining whether the standard is met. *See Biddle*, 652 N.W.2d at 196. The State satisfied that low threshold.

Valenta testified that he seized the marijuana from Middlekauff, placed it into evidence at the Iowa State Patrol Office in Osceola, and it remained there until he signed it out and hand delivered it to the DCI laboratory for testing. Trial Tr. p.115 line 8–p.117 line 6. Further, Valenta specifically recognized the material because the handwriting on the evidence was his own, it had the correct case number, and he had signed his name. Trial Tr. p.118 line 6–p.119 line 11. The State had also presented evidence from a DCI representative explaining the laboratory's procedures and how the material she tested arrived in her possession. Trial Tr. p.89 line 1–p.93 line 3. This was adequate to show that "circumstances making it reasonably probable that tampering, substitution or alteration of evidence did not occur" and was a sufficient chain of custody. *See Biddle*, 652 N.W.2d at 197; *State v. Piper*, 663 N.W.2d 894, 907–08 (Iowa 2003) (overruled on other grounds in *State v. Hanes*, 790 N.W.2d 545 (Iowa 2010)). Middlekauff offers no evidence of tampering, alteration, or substitution to the contrary.

Her complaint that the officer's report indicated he had seized "ten pouches of Blueberry Jack strain" when in reality he had seized ten pouches of marijuana *some of which* was Blueberry Jack exalts

technicality over reality. Appellant's Br.59–60. Valenta explained why there was a discrepancy between his initial report and Reedy's testimony: "I saw that there was Blueberry Jack, so I assumed that they were all ten Blueberry Jack without actually looking at each individual strain." Trial Tr. p.119 line 22–p.121 line 13. When read in tandem, the State's evidence demonstrated the material Valenta seized from Middlekauff and furnished to the DCI was marijuana.

And even if the district court had abused its broad discretion, this alone would not warrant reversal. Iowa R. Evid. 5.103(a) ("Error may not be predicated upon a ruling [that] admits or excludes evidence unless a substantial right of the party is affected . . . ."). "[A] break in the chain of custody goes to the weight of the evidence." *State v. Hutchison*, 341 N.W.2d 33, 37 (Iowa 1983). "It is the exclusive province of the jury to determine the weight that shall be given to proven facts and circumstances[.]" *State v. Kehr*, 110 N.W. 149, 150 (Iowa 1907). Again, Valenta explained away the "discrepancy" from his report and clarified the manner in which the contraband was held. Trial Tr. p.119 line 22–p.121 line 13; p.125 line 23–p.130 line 24. And of course, Middlekauff did not contest the substance's identity:

Q. Are you telling this jury that the substance wasn't marijuana?

A. No.

Q. You knew it was marijuana; right?

A. Yes.

Q. You were the only one in the car?

A. Yes.

Q. You knew exactly where it was?

A. Yes.

Trial Tr. p.146 line 10-18. The jury could consider this testimony when weighing the State's evidence. Even accepting arguendo Middlekauff's suggestion that the district court's initial ruling on her chain-of-custody objection was erroneous, any error was rendered unquestionably harmless. Iowa R. Evid. 5.103(a); Trial Tr. p.89 line 1–p.93 line 3; p.110 line 13–p.112 line 4; p.113 line 18–p.114 line 16; p.115 line 14–p.121 line 13; p.125 line 14–p.128 line 3; p.146 line 10-18.

CONCLUSION

The district court correctly denied Middlekauff's third motion to dismiss. The district court did not err in precluding her from presenting a legally inapplicable defense nor did it abuse its

discretion in its rejecting her evidentiary challenges at trial. The State asks this Court to affirm.

REQUEST FOR NONORAL SUBMISSION

The State does not request oral argument and believes this appeal can be resolved by the parties' briefing. If the Court were to order oral argument, the State would be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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Dated: December 16, 2021

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