IN THE SUPREME COURT OF IOWA
Supreme Court No. 20-1150

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JERRY BURNS,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR LINN COUNTY
THE HONORABLE FAE HOOVER GRINDE, JUDGE

APPELLEE'S BRIEF

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II. Neutral interpretive principles do not support a novel state constitutional rule protecting property abandoned at a restaurant or abandoned DNA.

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III. The district court did not err by declining to issue a novel instruction that would have manufactured evidence about federal sentencing practices.

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IV. There was sufficient evidence to prove the defendant murdered Martinko. The DNA analysis ruled out 99.94% of men in the United States.

Authorities

State v. Leckington, 713 N.W.2d 208 (Iowa 2006)

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ROUTING STATEMENT

This appeal concerns forensic analysis of "abandoned DNA." Cedar Rapids police collected a straw discarded by the defendant at a restaurant, then matched the defendant's DNA on the straw to a 40-year-old cold case in which an 18-year-old girl was brutally stabbed in a mall parking lot. The defendant urges the Court to retain this case to decide questions relating to the DNA testing, even though courts nearly-unanimously find police may test items like the abandoned straw for DNA. Defendant's Second Am. Proof Br. at 14.

The Court should retain the case for a different reason, to decide a question left open in *Gaskins*: whether the Iowa Constitution should be analyzed using neutral interpretive principles. *See State v. Gaskins*, 866 N.W.2d 1, 50 n.25 (Iowa 2015) (Waterman, J., dissenting) ("[T]he court has never before confronted a party's request … to adopt specific neutral criteria—and still has not confronted that argument today."). As explained in this brief, resolving the open question by adopting neutral interpretive principles will benefit the bench and bar by reducing pleas for result-oriented decision making. *Cf.* Iowa R. App. P. 6.1101(2)(c), (d).

STATEMENT OF THE CASE

Nature of the Case

The defendant, Jerry Burns, appeals his conviction for murder in the first degree, a Class A felony in violation of Iowa Code sections 707.1 and 707.2(1) (1979). (The judgment includes a scrivener's error by citing the modern Code; 707.2(1) is the correct provision of the 1979 Code.) The defendant was convicted following trial by jury in the Linn County District Court, on change of venue to Scott County, the Hon. Fae Hoover Grinde presiding.

Course of Proceedings

The State accepts the defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

In December of 1979, Michelle Martinko was an 18-year-old senior at Kennedy High School in Cedar Rapids. Her friends universally described her as "sweet," "friendly," "kind," and "beautiful." Trial tr. vol. III, p. 73, lines 18–21; p. 93, lines 5–11; p. 107, lines 7–10; p. 122, line 25 — p. 123, line 3. She "loved the mall." Trial tr. vol. III, p. 162, lines 16–20.

Martinko was stabbed to death in the parking lot of the recently opened Westdale Mall by a then-unknown assailant. Suppression

Ruling, p. 1; App. 109. The attack was so vicious that a forensic pathologist opined that the murderer likely cut himself during the violence. Trial tr. vol. IV, p. 149, line 12 — p. 150, line 10. The case went cold for 40 years until modern advancements in DNA science allowed the State Crime Lab and a private laboratory to link the defendant to blood found on Martinko's dress and the gearshift of her car. *See* Suppression Ruling, pp. 2–4; App. 110–12.

Martinko runs into friends at the mall and is seen carrying a package toward her car near closing time. A manager taking a deposit to the bank spots Martinko's car in the lot sometime later.

The night of her murder, Martinko and a number of her classmates attended a choir banquet at the Cedar Rapids Sheraton. Trial tr. vol. III, p. 54, lines 5–11. Martinko was well-known among her classmates for driving a large 1972 Buick and, following the banquet, she drove the Buick to the recently-opened Westdale Mall. *See* trial tr. vol. III, p. 55, line 24 — p. 57, line 21; p. 59, lines 1–5; p. 77, lines 5–22; p. 82, lines 3–23; p. 87, lines 2–23.

At the mall, Martinko briefly ran into a group of her classmates, who recalled that Martinko was there to make a payment toward a coat on layaway and did not seem worried, concerned, or scared. *See* trial tr. vol. III, p. 83, line 25 — p. 84, line 6; p. 101, line 25 — p. 102,

line 9; p. 113, lines 8–25; p. 115, lines 8–16; p. 128, line 24 — p. 129, line 7; p. 130, lines 6–14; p. 139, line 3 — p. 142, line 6; p. 161, line 17 — p. 162, line 3; p. 197, line 13 — p. 198, line 2.

The classmates reported that Martinko was wearing a black dress with a rabbit-fur coat. Trial tr. vol. III, p. 75, lines 19–25; p. 100, lines 3–11. And they estimated the time of their encounter with Martinko just before 9:00 p.m., perhaps around 8:50 p.m. *See* trial tr. vol. III, p. 97, line 12 — p. 99, line 24; p. 103, lines 2–6.

While at the mall, Martinko serendipitously encountered Andy Seidel, a previous beau who was now a close friend, while Seidel was shopping for a gift for Martinko. Trial tr. vol. III, p. 114, line 22 — p. 115, line 7; p. 138, lines 7–16; p. 158, lines 3–15. They had an amiable chat for less than five minutes, then went their separate ways. Trial tr. vol. III, p. 142, lines 14–24; p. 143, lines 17–25; p. 163, lines 5–7. Seidel, accompanied by Seidel's roommate, finished shopping and left the mall without Martinko. Trial tr. vol. III, p. 143, lines 23–25.

Martinko also spent some time at the mall with Curt Thomas, a former classmate, while he was on his break from Chess King clothing store. Trial tr. vol. III, p. 190, lines 8–24. Thomas described Martinko that night as "all decked out," wearing a rabbit-fur coat and

a black dress. Trial tr. vol. III, p. 190, line 25 — p. 191, line 4. They went for a short walk, chatted, and had a bite to eat. Trial tr. vol. III, p. 193, line 14 — p. 196, line 15. When Thomas returned to work, he saw Martinko "bundle up" and leave the mall through an exit with double doors. Trial tr. vol. III, p. 198, line 7 — p. 199, line 20; p. 203, line 15 — p. 204, line 17.

Sheryl Anders, another classmate, saw Martinko exit the double doors and start walking toward a parking lot. Trial tr. vol. III, p. 219, line 18 — p. 220, line 16. Martinko was carrying a package or shopping bag and seemed to be in a bit of a hurry—in a "trot" to the car, possibly due to the temperature. Trial tr. vol. III, p. 224, lines 6–22. Anders lost sight of Martinko as Martinko went toward the parking lot, right around closing time for the mall. Trial tr. vol. III, p. 220, lines 11–16; p. 222, line 19 — p. 223, line 2.

Sometime later, between 10:30 and 11:00 p.m., the assistant manager at Pier 1 Imports saw Martinko's very recognizable Buick in the parking lot, "kind of out there by itself." Trial tr. vol. III, p. 228, lines 10–22; p. 230, line 12 — p. 232, line 6; p. 234, line 24 — p. 236, line 14.

That night, Martinko's mother called a number of her daughter's classmates and friends, worriedly inquiring if they knew anything about Martinko's whereabouts. *See* trial tr. vol. III, p. 60, line 18 — p. 61, line 15; p. 164, line 16 — p. 165, line 24. After hearing from Mrs. Martinko, Seidel and his mother got in the car to look for Martinko's Buick, but were unsuccessful. Trial tr. vol. III, p. 165, line 25 — p. 168, line 18.

Police find Martinko's body in the car, covered in blood. Early forensics establish the murderer wore gloves.

Just after 4:00 a.m., Cedar Rapids police were dispatched to Westdale Mall to search for Martinko's car. Trial tr. vol. IV, p. 24, line 18 — p. 26, line 15. Police found the Buick parked about halfway between the Penney's store and the bank. Trial tr. vol. IV, p. 26, lines 16–25. The Buick was frosted over and the doors were locked, except for the driver-side rear door. Trial tr. vol. IV, p. 28, lines 16–24; p. 50, lines 11–13. When a police officer opened that door, he saw Martinko's body "slouched down" on the front passenger seat, "covered in blood"—from her blonde hair to her rabbit-fur coat and black dress. *See* trial tr. vol. IV, p. 28, line 25 — p. 29, line 25; Exhibits 3A & 3B: Crime Scene Photos; App. 131–32. There were

visible stab wounds to Martinko's chest and other lacerations to her head; her black dress was pulled up around her waist. Trial tr. vol. IV, p. 30, lines 1–8. There "were no signs of life" and police observed that Martinko "was obviously dead," with her eyes frozen open. Trial tr. vol. IV, p. 30, lines 1–19.

Identification officers processed the crime scene. Officers observed and photographed Martinko's body, noting that her buttocks were on the floor of the car, with her legs facing the steering wheel and her knees under the dash. Trial tr. vol. IV, p. 52, lines 18–25. Martinko's torso was leaning onto the seat and her head pressed against the door to the right. Trial tr. vol. IV, p. 52, lines 18–25.

Blood was spattered "all over the inside" of the vehicle, including the steering-wheel area and gearshift. Trial tr. vol. IV, p. 55, lines 19–23; p. 57, line 2 — p. 58, line 11; Exhibit 4D: Crime Scene Photo; App. 133.

There were areas inside the car that had a distinctive pattern from contact but did not contain any fingerprints. Trial tr. vol. IV, p. 60, line 10 — p. 61, line 4; p. 65, lines 20–22. Investigators concluded that the murderer was wearing gloves when he stabbed and killed Martinko. *See id.* Investigators later found the distinctive print

matched common rubber gloves from a local grocery store. Trial tr. vol. IV, p. 61, lines 5–13; p. 63, line 19 — p. 65, line 3.

Based on this distinctive-pattern evidence (and the presence of these distinctive patterns in blood on the steering wheel, gearshift, lights, and ignition), investigators concluded that the gloved murderer had driven Martinko's car after killing her. Trial tr. vol. IV, p. 65, lines 4–19; p. 68, lines 14–18; p. 85, lines 2–5. Relying on similar evidence, investigators concluded the murderer had gloves on before approaching the car, as similar distinctive patterns were found on the outside of the driver-side door, without blood. Trial tr. vol. IV, p. 65, line 20 — p. 68, line 15. There was no blood visible outside the car. Trial tr. vol. IV, p. 38, lines 5–7.

Martinko suffered 29 sharp-edge wounds and died from a fatal wound to the aorta. Defensive wounds indicate Martinko put up a fight and the murderer may have cut himself during the struggle.

An autopsy was performed on Martinko's body at a local hospital. The pathologist observed that Martinko's body "was soaked with blood" by the time it arrived at the morgue. Trial tr. vol. IV, p. 127, lines 17–23. She had lost as much as two thirds of her blood volume. Trial tr. vol. IV, p. 148, lines 17–20.

The autopsy revealed a total of 29 sharp-edge wounds: 11 were stab wounds while the remainder were slices or lacerations. *See* trial tr. vol. IV, p. 135, line 16 — p. 136, line 2; p. 140, lines 23 — p. 141, line 8. Defensive wounds were found on Martinko's hands. Trial tr. vol. IV, p. 141, line 1 — p. 142, line 2. One "classic, textbook" defensive wound found on Martinko's hand showed she had raised her hand up and the knife came down and cut it. Trial tr. vol. I, p. 142, lines 3–6. Additional findings included a scalp wound to Martinko's head, caused by either an active blow to the skull or her skull colliding with an object. Trial tr. vol. IV, p. 144, lines 2–12.

Based on these findings, the pathologist concluded that "[t]here was a struggle" leading up to Martinko's death and "her heart was still pumping" when the murderer inflicted the fatal stab wound "deep into [Martinko's] aorta." Trial tr. vol. IV, p. 129, line 8 — p. 130, line 3; p. 159, lines 1–6. The pathologist also opined that it was likely the murderer cut or otherwise wounded himself during the course of the attack. Trial tr. vol. IV, p. 149, line 12 — p. 150, line 10.

Blood from Martinko's dress and the gearshift in the Buick are taken into evidence and eventually tested for DNA.

At the morgue, the black dress was removed and placed into evidence. Trial tr. vol. IV, p. 72, line 22 — p. 73, line 8. There was "quite a bit" of spattered blood on the dress. Trial tr. vol. IV, p. 73 lines 17–21. Police also collected blood samples from the steering wheel and gearshift selector inside Martinko's car. Trial tr. vol. IV, p. 58, lines 9–11.

DNA analysis was first conducted on these items in the late 1990s. *See* Exhibit 9A: 3/14/1997 DNA Lab Report; App. 139. Instruments at the time could only detect Martinko's DNA from the dress and the DNA of more than one indeterminate persons on the gearshift selector. *Id.*; App. 139.

Investigators continued to pursue additional testing due to advances in forensic testing. *See* Suppression Ruling, p. 1; App. 109. Forensic scientists eventually developed a partial male DNA profile from the gearshift selector and a "more complete" DNA profile from a bloodstain on Martinko's black dress. Suppression Ruling, pp. 1–2; App. 109–10. The profile found on the dress was consistent with the one from the gearshift. Suppression Ruling, p. 2; App. 110. *See also*

Exhibits 9A–9D: DNA Lab Reports; App. 139–46; trial tr. vol. V, p. 167, line 14 — p. 168, line 1.

Familial DNA analysis breaks the case open. Investigators rule out more than 160 suspects and narrow the murderer down to the defendant and his three brothers.

In 2018, the State Crime Lab submitted the sample from the dress to a private company, Parabon Nano-Labs, which uploaded the suspect DNA to a public database (GEDmatch) for comparison. Suppression Ruling, p. 2; App. 110. Parabon informed police that a woman in Washington state was a second cousin once removed to the suspect who left the DNA on the dress. Suppression Ruling, p. 2; App. 110. Parabon generated a family tree from the results and police began collecting buccal swabs to rule out different branches of the woman's family tree. Suppression Ruling, p. 2; App. 110.

As part of the family-tree investigation, police contacted Janice Burns of Linn County, Iowa, who agreed to provide a sample of her DNA to the Cedar Rapids police. Suppression Ruling, p. 3; App. 111; supp. tr. vol. I, p. 39, line 17 — p. 40, line 11; trial tr. vol. VI, p. 63, lines 10–25. Parabon's subsequent analysis revealed that Janice shared so much DNA with the suspect DNA from the black dress that Janice and the male suspect were likely first cousins. Suppression

Ruling, p. 3; App. 111; trial tr. vol. VI, p. 64, lines 13–23. Janice told police she had three male first cousins: Donald Burns, Kenneth Burns, and the defendant—three brothers who grew up in Manchester, about an hour from Cedar Rapids. Suppression Ruling, p. 2; App. 110; trial tr. vol. VI, p. 65, lines 3–11.

Investigators surveilled all three brothers in 2018, with the aim of collecting discarded items that would contain the men's DNA. *See* Suppression Ruling, p. 3; App. 111. Police collected a straw from Kenneth and a toothbrush from Donald's trash; laboratory analysis definitively ruled both of them out as suspects. *See* trial tr. vol. VI, p. 66, line 17 — p. 67, line 24; p. 149, lines 11–21; p. 183, line 19 — p. 184, line 19; *see also* Exhibit 11D: DNA Report.

On October 29, 2018, police observed the defendant and his son dining at a Pizza Ranch. Suppression Ruling, p. 3; App. 111. Police observed the defendant drink several sodas from a plastic cup using a clear drinking straw. Suppression Ruling, p. 3; App. 111. After the defendant finished his meal and returned to his car, police collected the straw. Suppression Ruling, p. 3; App. 111; trial tr. vol. VI, p. 69, line 19 — p. 71, line 23.

Police submitted the straw to the State Crime Lab, which compared the defendant's DNA to the DNA from the black dress, and concluded the defendant could not be eliminated as the suspect. Suppression Ruling, p. 3; App. 111; Exhibit 11C: DNA Report; App. 147. In contrast, over the course of the lengthy investigation, police eliminated 161 individual suspects, including Martinko's romantic partners, by use of DNA (128) or other means, such as incarceration during the murder (33). Suppression Ruling, p. 2; App. 110; Exhibit 8: List of Investigated Suspects; App. 134–38; trial tr. vol. VI, p. 13, lines 8–11; p. 39, lines 4–18. Police also uploaded the suspect DNA to the CODIS (government DNA) database, which yielded no matches. Supp. tr. vol. I, p. 24, line 3 — p. 25, line 1; trial tr. vol. VI, p. 13, lines 12–23.

Additional forensic testing confirms the defendant's DNA is consistent with or matches the DNA found on Martinko's bloody dress and the gearshift in the blood-spattered Buick.

Police obtained a search warrant to collect a buccal swab of the defendant's DNA. Suppression Ruling, p. 3; App. 111; trial tr. vol. VI, p. 73, lines 1–25. Police went to the defendant's office in Manchester and questioned him for approximately 90 minutes. Suppression Ruling, p. 3; App. 111. During the interview, the defendant was

minimally responsive to questions about the murder, beyond acknowledging that he knew about the case. *See generally* Exhibit 14A: Defendant Interview. Police noticed "[q]uite a few" noticeable scars on the defendant's hands and arms. Trial tr. vol. VII, p. 33, line 24 — p. 34, line 6. When asked about them, the defendant said he did not know where they all came from, but generally referred to accidents with farm equipment. *See* trial tr. vol. VII, p. 47, lines 4–11. Throughout the interview, the defendant told the police to "test the DNA," presumably in reference to the blood from the crime scene. *See* Exhibit 14A: Defendant Interview, at approx. 13:56:20–13:56:35.

Police did in fact test the DNA, both through the State Crime Lab and an out-of-state private company, after arresting the defendant and obtaining a buccal swab. *See* Suppression Ruling, pp. 3–4; App. 111–12. The State Crime Lab found the defendant's DNA was consistent with the DNA found on Martinko's black dress, to a probability of 1 out of 100 billion unrelated persons. Trial tr. vol. VI, p. 166, line 15 — p. 167, line 21. The State criminalist opined at trial that the DNA match would only be present for the defendant or his identical twin. Trial tr. vol. VI, p. 181, lines 17–21. A private lab, Bode Technology, found the defendant's DNA was consistent with the

blood extracted from the gearshift, with 95% confidence that only 1 out of 1,700 male individuals would match. Trial tr. vol. VII, p. 96, line 20 — p. 107, line 17; *see also* Exhibit 12: Bode DNA Report; App. 149–51. In other words, the match to the defendant was sufficient to exclude 99.94% of all males in the United States. Trial tr. vol. VII, p. 107, lines 10–17.

The defendant made admissions to an inmate he was housed with at the Linn County Jail.

While detained pending trial in Linn County, the defendant was roomed with federal detainee Michael Allison. *See* trial tr. vol. VII, p. 115, lines 2–8. Allison has a history of federal convictions related to drug trafficking and was under federal indictment at the time of trial. *See generally* trial tr. vol. VII, pp. 114–120. Allison was not promised anything in exchange for his testimony, though it was possible that his sentencing exposure may be reduced as a result. *See* trial tr. vol. VII, p. 158, lines 6–9.

Allison and the defendant were "close" while in jail and spoke frequently, often while playing pinochle. Trial tr. vol. VII, p. 120, line 23 — p. 122, line 18. One day, when Allison was beating the defendant badly at the game, the defendant told Allison, "he [the

defendant] was going to have to take [Allison] to the mall." Trial tr. vol. VII, p. 125, lines 2–10.

The defendant also made a number of other incriminating statements, including:

- The defendant told Allison "he wished he had listened to his dad and cleaned up after himself." Trial tr. vol. VII, p. 123, lines 6–14.
- In the same conversation, the defendant said, "no one was thinking about DNA as far as being a possibility" back in 1979. Trial tr. vol. VII, p. 124, lines 11–18.
- On another occasion, the defendant told Allison after returning from a court hearing, "son … they might have me, but I don't have to bow my head to him," referring to an investigator with the Cedar Rapids police. Trial tr. vol. VII, p. 125, lines 14–25.
- The defendant also told Allison that, regardless of the outcome at trial, "he wins, because he had the opportunity to be out there with his family all these years." Trial tr. vol. VII, p. 130, lines 2–8.

Finally, the defendant autographed a news story about the Martinko murder for Allison, writing "To my favorite Michael" and signing it "Jerry Burns." Trial tr. vol. VII, p. 126, line 1 — p. 128, line 22; *see also* Exhibit 16C1: Autographed Story.

ARGUMENT

I. State and federal case law bar the Fourth Amendment claim. The defendant abandoned the straw at the Pizza Ranch and had no reasonable expectation of privacy in his abandoned DNA.

Preservation of Error

The State does not contest that a Fourth Amendment reasonable-expectation-of-privacy challenge was preserved in the district court. *See* Suppression Ruling, pp. 6–9; App. 114.

The defendant did not preserve any challenge based on a theory of trespass, as that claim was not litigated in any fashion below. The word "trespass" does not appear in the defendant's motion to suppress and "trespassory" appears only once in an unrelated passing quotation in his memorandum in support. *See* 12/18/2019 Motion to Suppress; App. 8–16; 1/29/2021 Memorandum in Support of Motion to Suppress; App. 69–108. Neither the word or concept appear in the district court's ruling denying the motion to suppress. *See* Suppression Ruling; App. 109–121.

"It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002); *accord Lamasters v. State*, 821

N.W.2d 856, 862 (Iowa 2012). This Court cannot reach the trespass claim raised by the defendant.

Standard of Review

Constitutional questions are reviewed de novo. *State v. Struve*, 956 N.W.2d 90, 95 (Iowa 2021). This Court gives deference to the fact findings of the district court. *Id.*

Merits

The defendant's federal constitutional briefing concerns two events—the seizure of the straw at the Pizza Ranch and the subsequent extraction and analysis of DNA from the straw. Defendant's Second Am. Proof Br. at 33–55. The defendant addresses these events separately and in reverse chronological order. *See id.* Despite the numerous subparts to arguments in the defendant's brief, both analyses lead to the same conclusion: because the defendant abandoned the straw, he had no reasonable expectation of privacy in the straw or the abandoned DNA contained therein, which necessarily defeats any claim under the Fourth Amendment.

The district court here not-unreasonably condensed these two issues, correctly ruling there was no Fourth Amendment violation because, when the defendant abandoned the straw and accompanying

DNA at restaurant, "he relinquished any expectation of privacy in the drinking straw, the saliva left on it and the DNA contained within the saliva." Suppression Ruling, p. 9; App. 117. This finding is sufficient to defeat the defendant's constitutional claims.

Because a number of authorities delineate between abandonment (grounded in property law) and the reasonable expectation of privacy (a modern invention of constitutional law), the State addressees each strand of case law separately below. In any event, the defendant's claim fails both analyses. Just as police can analyze fingerprints left on items by a burglar, or test the semen left behind by a rapist, police can analyze abandoned property for abandoned DNA.

A. The defendant abandoned the straw, relinquishing any interest in the straw and the DNA on it.

In one strand of cases, focused on abandonment, the defendant's claim is foreclosed by on-point controlling and persuasive authorities that hold the Fourth Amendment does not regulate seizure or search of abandoned property. Here, police initially obtained the defendant's DNA profile from a straw the defendant left behind "after he finished his meal, paid the check and exited" a Pizza

Ranch restaurant. Suppression Ruling, p. 3; App. 111. The district court, citing longstanding principles of federal constitutional law, found the defendant had abandoned the straw when he left the restaurant. Suppression Ruling, pp. 8–9; App. 116–17. Federal constitutional law compels this Court to affirm.

Greenwood v. California, 486 U.S. 35 (1988), forecloses relief under the federal Constitution. The Fourth Amendment does not protect any interest in publicly abandoned items, even garbage placed near the home abutting curtilage. *Id.* at 39–41. This proposition is not novel and it is reflected in other Supreme Court precedent. *See, e.g.*, *Abel v. United States*, 362 U.S. 217 (1960) (no Fourth Amendment violation when police seized items defendant left behind in the waste basket); *Hester v. United States*, 265 U.S. 57 (1924) (no Fourth Amendment violation when police examined the contents of a jug discarded by the defendants while fleeing).

On these facts, there is no question the defendant discarded the straw as trash in a location accessible to the public, to wit: the Pizza Ranch. Suppression Ruling, pp. 8–9; App. 116–17. This ends the analysis, as abandoned property is simply "beyond the protections of

the Fourth Amendment." Wayne R. LaFave, *Abandoned Effects Generally*, 1 Search & Seizure § 2.6(b) (6th ed.).

To the extent this Court wishes to look further into the persuasive case law, modern authorities also consistently apply the abandonment analysis to discarded items containing DNA, across a wide array of facts. *See, e.g., Marino v. Commonwealth*, 488 S.W.3d 621, 624 (Ky. Ct. App. 2016) (defendant relinquished interest in cup left on library table, no search or seizure occurred when testing the abandoned cup for DNA); *State v. Williford*, 767 S.E.2d 139, 144–45 (N.C. App. 2015) (same for cigarette butt in parking lot); *Com. v. Hopkins*, No. 964 WDA 2014, 2015 WL 5970796, at *7 (Pa. Super. Ct. Aug. 31, 2015) (water cup thrown in trash can of municipal building); *People v. Gallego*, 190 Cal. App. 4th 388, 395, 117 Cal. Rptr. 3d 907, 911 (2010) (cigarette butt on sidewalk); *Williamson v. State*, 413 Md. 521, 536, 993 A.2d 626, 635 (2010) (McDonald's cup discarded as trash); *People v. Laudenberg*, No. B199633, 2008 WL 2814480, at *2 (Cal. Ct. App. July 23, 2008) (coffee cup left at a coffee shop); *Piro v. State*, 190 P.3d 905, 910 (Idaho Ct. App. 2008) (straw and water bottle left at jail); *State v. Athan*, 158 P.3d 27, 37 (Wash. 2007) (en banc) (saliva on mailed envelope); *Com. v. Perkins*, 883 N.E.2d 230,

239 (Mass. 2008) (cigarette butts and pop can left in interview room); *Com. v. Bly*, 862 N.E.2d 341, 356 (Mass. 2007) (cigarette butts left in interview room); *Com. v. Cabral*, 866 N.E.2d 429, 434–35 (Mass. App. Ct. 2007) (saliva on a sidewalk); *Hudson v. State*, 205 S.W.3d 600, 604 (Tex. App. 2006) (Dr. Pepper can in trash).

Cases across the country consistently re-affirm that "[p]olice may surreptitiously follow a suspect to collect DNA, fingerprints, footprints, or other possibly incriminating evidence" without violating the Fourth Amendment. *Athan*, 158 P.3d at 37. Or, as one commentator says more dramatically, "Courts have uniformly rejected Fourth Amendment protection against surreptitious harvesting of out-of-body DNA by the police." *See* Albert E. Scherr, *Genetic Privacy & the Fourth Amendment: Unregulated Surreptitious DNA Harvesting*, 47 Ga. L. Rev. 445, 454 (2013). The defendant cannot find relief under the federal Constitution because he abandoned the straw.

Finally, in the interest of addressing an ambiguity, some courts (including this Court) have occasionally used the language of standing when evaluating abandoned property and the Fourth Amendment. *See State v. Bumpus*, 459 N.W.2d 619, 625 (Iowa 1990)

("Once an individual voluntarily abandons property he or she no longer has standing to challenge any search or seizure that may be made."). This distinction in vocabulary is ultimately immaterial, as the same precedents that find no substantive Fourth Amendment violation from seizure of abandoned property could also be resolved through a finding that the claimants lacked standing because they had no protected Fourth Amendment interest. Either way, the defendant's claim is without merit.

B. The defendant had no reasonable expectation of privacy in the straw or the DNA.

Rather than a pure abandonment analysis, some courts resolve abandoned-DNA cases using slightly different language, grounded in expectation-of-privacy vocabulary. The Ohio Supreme Court summarizes this approach well:

> [N]numerous courts around the country have examined this issue and have reached the same conclusion that we do here—a person has no reasonable expectation of privacy in his or her DNA profile extracted from a lawfully obtained DNA sample.

State v. Emerson, 981 N.E.2d 787, 792 (Ohio 2012) (collecting cases). Similarly representative is a holding of the Maryland Court of Special Appeals, analogizing to fingerprint analysis of seized items:

> Once an individual's fingerprints and/or his blood sample for DNA testing are in lawful police possession, that individual is no more immune from being caught by the DNA sample he leaves on the body of his rape victim than he is from being caught by the fingerprint he leaves on the window of the burglarized house or the steering wheel of the stolen car.

Wilson v. State, 752 A.2d 1250, 1272 (Md. App. 2000); *accord State v. Hauge*, 79 P.3d 131, 145–46 (Haw. 2003); *Smith v. State*, 744 N.E.2d 437, 439 (Ind. 2001); *State v. Barkley*, 551 S.E.2d 131, 135 (N.C. App. 2001); *Wilson v. State*, 752 A.2d 1250, 1272 (Md. App. 2000); *People v. King*, 232 A.D.2d 111, 117–18 (N.Y. App. Div. 1997)).

The federal Supreme Court adopted a substantially similar rationale in a post-*Katz* case, albeit one that did not use significant expectation-of-privacy language. In *United States v. Edwards*, police arrested the defendant, who was suspected of breaking into a post office, and later lawfully seized his clothing. 415 U.S. 800, 801–02 (1974). The defendant's clothing was subjected to examination or testing that revealed paint chips matching the post office window. *Id.* at 802. The defendant argued that both the clothing itself, and the resulting examination, should be suppressed due to lack of a warrant. *Id.* The Supreme Court concluded that, because the clothing was lawfully seized, the Fourth Amendment did not require a warrant to

conduct an examination or test the clothing. *Id.* at 805–06. The same logic governs here: because police lawfully obtained the straw, the Fourth Amendment did not require a warrant to conduct an examination or testing. *See id.*

An unreported Iowa case is in accord with the expectation-of-privacy authorities. In *Christian*, the defendant left behind a fork and water bottle after a meeting, which were seized by an undercover police officer and subsequently tested for DNA. *State v. Christian*, No. 04-0900, 2006 WL 2419031, at *4 (Iowa Ct. App. Aug. 23, 2006). A panel of the Court of Appeals unanimously held that the defendant had no objectively or subjectively reasonable expectation of privacy in the fork or bottle, and affirmed the denial of the motion to suppress. *Id.* at *4. The defendant does not address *Christian* in his appellate brief, and below he made only the vague claim that unspecified developments since *Christian* rendered it obsolete. *See* 1/29/2021 Memorandum in Support, pp. 15–16; App. 83–84. This is not so, as the modern authorities in the preceding paragraphs make clear. *Christian* correctly applied the controlling legal principles, as did the district court here.

The defendant does not directly confront these authorities on appeal, but instead points to a single case from the Fourth Circuit, *United States v. Davis*, 690 F.3d 226 (4th Cir. 2012). Defendant's Second Am. Proof Br. at 48–52. *Davis* is an "outlier among courts to consider the issue." *United States v. Hicks*, No. 218CR20406JTFTMP, 2020 WL 7704556, at *4 (W.D. Tenn. May 27, 2020), *report and recommendation adopted,* No. 2:18-CR-20406-JTF-7, 2020 WL 7311607 (W.D. Tenn. Dec. 11, 2020). And it "is based on a unique fact pattern" not present in this or other cases. *United States v. Juneau*, No. 19-CR-274-WMW-KMM, 2020 WL 9170452, at *17 (D. Minn. Dec. 21, 2020), *report and recommendation adopted,* No. 19-CR-0274 (WMW/KMM), 2021 WL 806368 (D. Minn. Mar. 3, 2021). And even if *Davis* were good law, it is distinguishable in at least two ways. First, as other courts have recognized, the broad language of its holding does not reach forensic analysis for purposes of DNA testing. And second, the decision—even if correct—is fact-bound and inapposite.

Davis was convicted of murder after a baseball hat worn by the shooter was submitted to a DNA database and returned a hit for him. *See Davis*, 690 F.3d at 229–32. The hit was returned based on a

sample previously submitted when Davis was the victim of an unrelated shooting and his DNA had been retained in the database after not yielding a match for another unrelated investigation. *See id.* The Fourth Circuit found that Davis had a reasonable expectation of privacy in the DNA extracted from clothes seized when he was the victim of the shooting, and that this rendered subsequent unrelated testing unreasonable. *Id.* The Fourth Circuit's fact-driven analysis emphasized that the initial seizure of Davis's clothes was "because he was the victim of a crime." *Id.* at 245. The Court's holding is grounded in expectation-of-privacy language, finding that "a victim retains a privacy interest in his or her DNA material, even if [clothing containing the DNA] is lawfully in police custody." *Id.* at 246.

Maryland's highest court, which sits in the same federal circuit as the *Davis* Court, has drawn a clear line rendering *Davis* inapplicable to cases like this one. In *Raynor*, the Maryland Court correctly concluded that *Davis* appears to rest on a faulty premise when DNA testing is conducted at specific loci for purposes of identification. *Raynor v. State*, 99 A.3d 753, 764 (Md. 2014). The Maryland Court recognized that forensic DNA testing for identification does not reveal "physiological data," but rather "only

identifying information." *Id.* The Court thus rejected complaints made by the defendant there (and here), finding that "attempts to evoke images of an oppressive 'Big Brother' cataloguing our most intimate traits" are unpersuasive, as "the reality … is far less troubling." *Id.* (internal citation and quotation marks omitted); *accord Williamson v. State*, 993 A.2d 626, 639 (Md. 2010) (similarly rejecting claims about the expectation of privacy in DNA; finding that a privacy complaint about testing DNA for "identification only" "does not have 'feet' in the present case").

Other states have similarly recognized that the Fourth Amendment is not violated by DNA testing for identity, as compared to other potentially far-reaching types of DNA analysis that would reveal more intimate information. *See Hauge*, 79 P.3d at 145 (rejecting a defendant's "parade of horribles" about government surveillance; instead finding that DNA testing identification is analogous to forensic fingerprint analysis when limited to identification); *accord Piro*, 190 P.3d at 911 (collecting cases that recognize testing DNA for identification only "does not infringe on a privacy interest in one's genetic identity").

The Maryland courts, and sister states with similar holdings, correctly limit *Davis*. Perhaps if the police here catalogued numerous traits about the defendant's physiology and health conditions (like genetic predispositions to cancer or the like), there would be some merit to the hyperbolic privacy complaints made by the defendant and amicus in the briefing. But when police test DNA against specified loci solely for purposes of identifying a criminal offender, those complaints ring hollow and do not warrant exclusion of evidence. Testing DNA solely for identification is functionally identical to analyzing fingerprints at a crime scene and similarly does not require a separate Fourth Amendment analysis or warrant. *Cf. Williamson*, 993 A.2d at 640. The defendant wisely does not ask to extend the rule proposed by his brief to require a warrant for fingerprint analysis, yet that is the inevitable conclusion of his argument. Warrantless DNA testing of seized items for identification, much like fingerprint analysis or testing rape kits, does not offend the Fourth Amendment.

But even if one sets aside the Maryland reasoning, the holding of *Davis* is fact-dependent and inapplicable here. It is perhaps understandable that the Fourth Circuit was concerned that police had

obtained the defendant's DNA solely "because he was the victim of a crime." *Davis*, 690 F.3d at 245. Assuming the correctness of the Court's finding that "a victim retains a privacy interest in his or her DNA material, even if it is lawfully in police custody," *id.* at 246, that holding does not extend to this case. This defendant was not a victim and the police did not obtain the defendant's DNA as a consequence of any victimization. For both the defendant's DNA left on the blood and gearshift, as well as the DNA sample from the straw, police obtained and extracted the information solely as a product of the defendant's status as a top suspect in a long-cold brutal homicide. To the extent the victim-centered holding of *Davis* may be correct, it is inapplicable here.

Last, even if this Court finds some portion of the Fourth Circuit's reasoning persuasive, that is not the end of the analysis. The Court must still weigh whether the search of the DNA in this case was "reasonable," balancing any intrusion on the defendant's privacy with the legitimate government need to investigate crime. *Davis*, 690 F.3d at 248–49 (citing and quoting *United States v. Knights*, 534 U.S, 112, 119 (2001)).

Testing the defendant's discarded straw was reasonable under the Fourth Amendment. To the extent the defendant had any expectation of privacy in the discarded straw, it was exceptionally limited—trash left behind on a table inside a restaurant accessible to the public and frequented by other patrons. Any expectation of privacy is further diminished by the defendant not taking any action to restrict public access to the straw, such as keeping it on his person or depositing it in a regulated personal trash receptacle. *See Davis*, 690 F.2d at 249 (finding expectation of privacy diminished because the defendant "did nothing to retrieve the clothing or otherwise claim ownership in it"). On the other hand, the State interest in testing the straw for DNA was compelling. Officers sought to solve a 40-year-old cold case and had materially narrowed the suspect pool to the defendant and his brothers through prior investigation and forensic testing. Given the age of the case and lack of other evidence, DNA was the only realistic path toward solving the Martinko murder. These facts pass muster under a reasonableness analysis.

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The Fourth Amendment does not prohibit the legitimate investigative activity conducted by police in this case. The

Constitution does not protect abandoned property, nor does it independently protect abandoned DNA. For the same reasons police do not need a warrant to dust seized items for fingerprints or test a rape kit for identifying DNA, police also lawfully tested the straw abandoned by the defendant here. The federal Constitution affords the defendant no relief and this Court should affirm.

II. Neutral interpretive principles do not support a novel state constitutional rule protecting property abandoned at a restaurant or abandoned DNA.

Preservation of Error

The defendant failed to preserve a "trespass" claim under the Iowa Constitution for the same reasons he failed to preserve such a claim under the federal Constitution, as discussed in Division I. In short, the defendant never made an argument about trespass below, under either Constitution, nor did the district court rule on any such claim. *See* 12/18/2019 Motion to Suppress; App. 8–16; 1/29/2021 Memorandum in Support of Motion to Suppress; App. 69–108; Suppression Ruling; App. 109–121. This bars review. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002); *Lamasters v. State*, 821 N.W.2d 856, 862 (Iowa 2012).

In addition to his failure to preserve any "trespass" claim, the defendant also failed to preserve any distinct claim under the Iowa Constitution. In its ruling on the DNA issue, the district court repeatedly cited the Fourth Amendment and case law interpreting the same. *See* Suppression Ruling, pp. 6–8; App. 114–16. The court did not cite any case law interpreting Article I, section 8, nor did the court rule on such a claim. *See generally* Suppression Ruling, pp. 6–9; App. 114–17. As a result, even if the defendant had pressed a state constitutional claim, the lack of a ruling precludes appellate review. *See Meier*, 641 N.W.2d at 537 (a claim must be "both raised and decided" below to preserve error).

Beyond the lack of a ruling, however, the defendant also failed to advance a specific Iowa Constitution claim. The defendant's resistance did not request any specific rule under the Iowa Constitution or any particular outcome, beyond that he win. *See* 1/29/2021 Memorandum in Support; App. 69–108. The defendant's only argument is that the Court has sometimes granted greater protection under the Iowa Constitution than the federal in the past, so it should here too. *See Id.*, pp. 3–8; App. 71–76. This should not be sufficient to preserve a claim under the Iowa Constitution for

appellate review. *Cf. State v. Prusha*, 874 N.W.2d 627, 630 (Iowa 2016). The State had no opportunity to rebut the claims advanced on appeal below and to allow them now thwarts the purposes of the error-preservation requirement.

Standard of Review

Constitutional questions are reviewed de novo. *State v. Struve*, 956 N.W.2d 90, 95 (Iowa 2021). This Court gives deference to the fact findings of the district court. *Id.*

Merits

The defendant next urges that his suppression clam should meet a different fate under the state Constitution than the federal. Defendant's Second Am. Proof Br. at 55–72. The specifics of the defendant's arguments, as the State understands them, are (1) that police committed a "trespass" in seizing the straw and/or testing the DNA and (2) that the defendant had a reasonable expectation of privacy in the straw and/or DNA. *See id.*

The defendant's argument proceeds from the flawed premise that Article I, section 8 of the Iowa Constitution necessarily "provides greater protection of individual privacy than the Fourth Amendment." Defendant's Second Am. Proof Br. at 55. But there is

no jurisprudential or constitutional basis for believing the Iowa Constitution is "a one-way ratchet to provide only greater rights and remedies than a parallel provision of the United States Constitution." *State v. Brown*, 930 N.W.2d 840, 857 (Iowa 2019) (McDonald, J., specially concurring). Instead, depending on the circumstances, the Iowa Constitution may "provide less or more protection than the Federal Constitution." *Id.* This position is supported by legal scholarship and the precedent of other state courts of last resort. *See id.* at 856–63 (collecting authorities).

Given the propensity of litigants (like this defendant), for result-oriented outcomes under the Iowa Constitution, the State continues to urge this Court to address the issue that divided it in *State v. Gaskins*, 866 N.W.2d 1 (Iowa 2015), and adopt neutral interpretive principles to ground state constitutional litigation. *See Gaskins*, 866 N.W.2d at 38–56 (dissent by Waterman, J., joined by Mansfield and Zager, JJ., "reiterat[ing the] call for our court to adopt neutral interpretive criteria"). The State here urges the same five principles or criteria it urged in *Gaskins*, which are distilled from decisions across the country (including those of this Court):

1. Development of the claim in lower courts;

> 2. Constitutional text;
>
> 3. Constitutional history, including reports of state constitutional debates and state precedent;
>
> 4. Decisions of sister states, particularly when interpreting similar constitutional text; and
>
> 5. Practical consequences, including the need for national uniformity.

Gaskins, 866 N.W.2d at 51–52 (Waterman, J., dissenting; referring to the State's brief). As discussed in Divisions II.B and II.C below, few if any neutral interpretive principles support the defendant's request for relief here, and this Court should reject his state constitutional claims.

A. The neutral interpretive principles discussed but not ruled on in *Gaskins* provide an appropriate scaffolding for state constitutional litigation.

An appellate court acts at its best, and is viewed as most legitimate, when its decisions rest on neutral interpretive principles. *E.g.,* Alan G. Tarr, Understanding State Constitutions 175 (1998). Adopting such principles "ensure[s] that judgments are grounded in law rather than in the judges' policy preferences" and gives the public confidence that decisions are "rooted in law rather than in will." *Id.* at 175–76.

This Court historically used a version of neutral interpretive principles when interpreting the Iowa Constitution. *See* Jeff Hicks, Note, *The* Effler *Shot Across the Bow: Developing A Novel State Constitutional Claim Under the Threat of Ineffective Assistance of Counsel*, 59 Drake L. Rev. 931, 943–58 (2011) (collecting cases to demonstrate the Court, until at least 2009, essentially followed the neutral principle or criteria approach). In this Court's words, "In order to justify a different result under our state constitution, … there must be some principled basis for distinguishing" the Iowa Constitution from identical federal provisions. *State v. Allen*, 690 N.W.2d 684, 690 (Iowa 2005), *overruled by State v. Young*, 863 N.W.2d 249 (Iowa 2015). In the 2010s, the Court began interpreting the Iowa Constitution in novel ways without a grounding in neutral principles, leading to criticism. *See* Eric M. Hartmann, Note, *Preservation, Primacy, and Process: A More Consistent Approach to State Constitutional Interpretation in Iowa*, 102 Iowa L. Rev. 2265, 2265, 2267, 2290 (2017) (describing the Court's approach to state constitutional litigation as "less than principled," "neither consistent nor predictable," and one that "fosters uncertainty and frustration"); Elisabeth A. Archer, Note, *Establishing Principled Interpretation*

Standards in Iowa's Cruel and Unusual Punishment Jurisprudence, 100 Iowa L. Rev. 323, 325, 346 (2014) (criticizing the Court's state constitutional decisions as "standardless" and based on "empty and conclusive" assertions). It is time to return to an approach grounded in neutral interpretive principles.

Across the country, neutral interpretive principles are commonly deployed by other state courts of last resort in analyzing their respective constitutions. *See, e.g.*, *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 421 (Conn. 2008); *Kahn v. Griffin*, 701 N.W.2d 815, 829 (Minn. 2005); *State v. Harmon*, 113 S.W.3d 75, 78–79 (Ark. 2003); *Mogard v. City of Laramie*, 32 P.3d 313, 315–25 (Wyo. 2001); *Gannon v. State*, 704 A.2d 272, 276 (Del. 1998); *State v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991); *State v. Muhammad*, 678 A.2d 164, 173 (N.J. 1996) (citing *State v. Hunt*, 450 A.2d 952 (N.J. 1982)); *State v. Gunwall*, 720 P.2d 808, 812–13 (Wash. 1986); *State v. Jewett*, 500 A.2d 233, 237 (Vt. 1985).

Adopting neutral interpretive principles does not serve a liberal or conservative agenda. Instead, the use of these principles has, as intended, "resulted in an articulable, reasonable and reasoned approach to developing an independent body of state constitutional

law…." Laura L. Silva, *State Constitutional Criminal Adjudication in Washington Since* State v. Gunwall*: "Articulable, Reasonable and Reasoned" Approach*?, 60 Alb. L. Rev. 1871, 1906–07 (1997) (noting the success of neutral interpretive principles in anchoring search-and-seizure decisions, with somewhat less success in other areas). Empirical data supports that requiring neutral interpretive principles reduces result-oriented advocacy. *See* Richard S. Price, *Lawyers Need Law: Judicial Federalism, State Courts, and Lawyers in Search and Seizure Cases*, 78 Alb. L. Rev. 1393, 1452–53 (2015); Richard S. Price, *Arguing* Gunwall*: The Effect of the Criteria Test on Constitutional Rights Claims*, J. of Law and Cts., vol. 1., no. 2, at 342–43, 352–55 (Fall 2013).

At the risk of repeating a bit of what was debated but not resolved in *Gaskins*, the State urges the following five neutral interpretive principles:

1. Development of the claim in lower courts.

The opening consideration in evaluating a novel state constitutional claim should be whether or not the claim was adequately litigated below. A form of this requirement, in the shape of error-preservation rules, has been part of Iowa case law since the

state's founding and has been repeatedly and recently reaffirmed. *See*, *e.g.*, *State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999); *Danforth, Davis & Co. v. Carter*, 1 Iowa 546, 553 (1855). The error-preservation rule has "roots that extend to the basic constitutional function of appellate courts," as embodied by the limitation of this Court's power on appeal to the correction of errors at law. *See State v. Harrington*, 893 N.W.2d 36, 42 (Iowa 2017) (citing Thomas A. Mayes & Anuradha Vaitheswaran, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice*, 55 Drake L. Rev. 39, 43 (2006)); Iowa Const. art. V, § 4; *see also State v. Tidwell*, No. 13-1080, 2013 WL 6405367, at *2 (Iowa Ct. App. Dec. 5, 2013) (McDonald, J.) ("If a litigant fails to present an issue to the district court and obtain a ruling on the same, it cannot be said that we are correcting an error at law.").

By adopting this neutral interpretive principle, the Court can formally recognize that it will not engage in novel constitutional interpretation absent preserved error and sufficient adversarial briefing from the parties.

2. Constitutional text.

Seemingly every state to adopt neutral interpretive principles finds constitutional text a relevant consideration. *See*, *e.g.*, *Kerrigan*, 957 A.2d at 462; *Kahn*, 701 N.W.2d at 829; *Gannon*, 704 A.2d at 276; *Edmunds*, 586 A.2d at 895; *Hunt*, 450 A.2d at 965 (Handler, J., concurring); *Gunwall*, 720 P.2d at 811. "Comparing the text" of the state constitutional provision and a federal constitutional provision "is arguably the most important step in ascertaining Iowa Framers' intent and meaning." Archer, *Establishing Principled Interpretation Standards*, 100 Iowa L. Rev. at 353.

Materially different text may justify different interpretations. *See*, *e.g.*, Timothy Sandefur, *The Arizona "Private Affairs" Clause*, 51 Ariz. St. L.J. 723, 723 (2019) (discussing the "private affairs" clause of the Arizona Constitution, which lacks a federal analogue); Bruce Kempkes, *The Natural Rights Clause of the Iowa Constitution: When the Law Sits Too Tight*, 42 Drake L. Rev. 593, 597 (1993) (discussing the "natural rights clause" contained in Article I, section 1 of the Iowa Constitution, which lacks a federal analogue); Peter G. Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts*, 33 Syr. L. Rev. 731, 763 (1982) (noting the Washington

framers explicitly rejected a proposal identical to the Fourth Amendment).

Conversely, public confidence in the courts increases when multiple bodies interpret identical provisions identically. *See New Jersey v. Hempele*, 576 A.2d 793, 817 (N.J. 1990) (Garibaldi, J., dissenting) (noting citizen confusion when state and federal police must operate under different standards, noting it "appears illogical to the public and hence breeds a fundamental distrust of the legal system"). As Maryland's appellate courts have put it, materially identical provisions are *in pari materia* with their federal analogues and should generally invoke the same interpretation. *See generally* Irma S. Raker, *Fourth Amendment and Independent State Grounds*, 77 Miss. L.J. 401 (2007) (discussing Maryland search-and-seizure provisions).

Minor stylistic differences generally do not justify novel constitutional interpretation. *See Developments in the Law—The Interpretation of State Constitutional Rights*, 95 Harv. L. Rev. 1324, 1387 (1982) ("When nontextual evidence is unavailable … minor linguistic variation has seldom played a decisive role" in interpreting state-constitution provisions); *accord Gaskins*, 866 N.W.2d at 52

n.27 (Waterman, J., dissenting) ("One expects that, if the semicolon in Article I, section 8 fundamentally altered the meaning of that provision, this argument would have emerged at some point within the first 150 years this Court interpreted the Iowa Constitution—not for the first time in 2010." (quoting the State's brief)).

3. Constitutional history, including reports of state constitutional debate and state precedent.

"Each state has its own legal history, including case law, and its own peculiar socio-economic and geographic characteristics. Courts in a number of states have used these unique characteristics to justify taking positions independent of and more demanding than federal constitutional law." Galie, *The Other Supreme Courts*, 33 Syr. L. Rev. at 764.

One example that exemplifies the kind of historical background properly considered under this principle is jury trials for petty offenses. The federal Constitution does not require trial by jury for petty offenses. *Duncan v. Louisiana*, 391 U.S. 145, 160 (1968). However, the citizens of Maine have been entitled to jury trials for petty offenses dating back to the colonial era (before the federal Constitution) and there was no evidence the framers of the Maine Constitution intended to depart from that practice. *Maine v. Sklar*,

317 A.2d 160, 165–67 (Me. 1974). As a result, this "special historical experience in Maine" justifies a novel state constitutional interpretation. *Id.* at 167*; see also Hendershot v. Hendershot*, 263 S.E.2d 90, 95 (W. Va. 1980) (exploring the same issue in light of West Virginia's "historical roots"). In other words, the unique history of a state constitution may justify a unique interpretation.

Academic commentaries in Iowa and elsewhere also endeavor to put state constitutional provisions in the appropriate historical context. These materials tend to focus on original meaning, primary historical sources like debates, and developments in the case law. *See*, *e.g.*, Edward M. Mansfield & Conner L. Wasson, *Exploring the Original Meaning of Article I, Section 6 of the Iowa Constitution*, 66 Drake L. Rev. 147 (2018); Tyler M. Stockton, *Originalism and the Montana Constitution*, 77 Mont. L. Rev. 117, 148 (2016); Jack L. Landau, *The Search for the Meaning of Oregon's Search and Seizure Clause*, 87 Or. L. Rev. 819 (2008); Kory A. Langhofer, *Arizona Together and the Fabricated Founding: The Original Meaning of the Separate Amendment Rule*, 40 Ariz. St. L.J. 85 (2008). This kind of historical survey can prove valuable in understanding the nature or import of state constitutional provisions.

While appropriate use of constitutional history or traditions is a valid interpretive tool, the Court must ensure it honestly views the historical record. "Ransacking the past for isolated 'good quotes' is bad history and bad law[.]" H. Jefferson Powell, *The Use of State Constitutional History* in Paul Finkelman & Stephen E. Gottlieb, Toward A Usable Past: Liberty Under State Constitutions (1991). In other words, "judges who turn to history must commit themselves to doing it right." Jack L. Landau, *A Judge's Perspective on the Use and Misuse of History in State Constitutional Interpretation*, 38 Val. U. L. Rev. 451, 486 (2004) (also collecting cases). To avoid selective reading or imparting unfair value judgments, an analysis of constitutional history is likely best limited to a review of existing constitutional decisions and primary sources related to the constitution at issue.

An honest investigator of constitutional history must also leave room for the possibility that the historical record will reveal a state constitution affords less, rather than more, protection of individual rights than the federal Constitution. *See Brown*, 930 N.W.2d at 857 (McDonald, J., specially concurring) (collecting authorities). This is particularly true given that, at the time the Iowa Constitution was

framed, it is unlikely anyone envisioned the incorporation doctrine that would eventually hold many federal constitutional rights enforceable against the states; the Fourteenth Amendment was ratified in 1868, a full decade after adopting the 1857 Iowa Constitution (and even longer after its predecessors in 1844 and 1846). To ignore this history, and assume the Iowa Constitution always goes beyond what is required by federal constitutional law, necessarily leads to a "results-oriented approach that ... create[s] distortions in Iowa legal doctrine." *Id.* at 861 (McDonald, J., specially concurring). Avoiding result-oriented distortion of the law is precisely why neutral interpretive principles are necessary.

4. Decisions of sister states, particularly when interpreting similar constitutional text.

State supreme courts commonly engage in "horizontal federalism" by looking at how other state courts of last resort have interpreted their own constitutional provisions. *See* James N.G. Cauthen, *Horizontal Federalism in the New Judicial Federalism: A Preliminary Look at Citations*, 66 Alb. L. Rev. 783, 790 (2003) (roughly a third of cases interpreting a state constitutional provision look to other states' decisions).

As with the dangers of selectively reviewing constitutional history, any comparative review of other states' case law must be tempered with the reality that, in the modern world of Westlaw and digital legal research, "decisions from [...] sister states can be cited to support almost any point of view." *State ex rel. Rear Door Bookstore v. Tenth Dist. Ct. of Appeals*, 588 N.E.2d 116, 121 (Ohio 1992).

Such an analysis is likely most helpful when states have similar or identical constitutional provisions. *E.g.*, *Jewett*, 500 A.2d at 237 (discussing similarities between the New Hampshire and Rhode Island Constitutions' "legal remedy clause" and decisions involving the same); *Barrows v. Garvey*, 193 P.2d 913, 917 (Ariz. 1948) (same for Arizona, Washington, and California Constitutions' provisions concerning justices of the peace); *Mundell v. Swedlund*, 71 P.2d 434, 439 (Idaho 1937) (same for California, Utah, South Carolina, and Idaho Constitutions' provisions regarding legislative approval of amendments). Much like how consistent interpretation of similar state and federal provisions breeds legitimacy, the same is true when multiple state supreme courts interpret similar language similarly.

5. Practical consequences, including the need for national uniformity.

The last neutral interpretive principle is deliberately flexible, permitting a court to consider the practical implications of its constitutional rules, as well as the national or local character of the issue presented. "Where consistency, uniformity, or cooperation is an important value, state constitutionalism should attempt to support that value." Robert F. Utter, *The Practice of Principled Decision-Making in State Constitutionalism*, 65 Temp. L. Rev. 1153, 1166 (1992). The benefits of uniformity include, but are not limited to

> (1) Predictability within a particular geographic region;
>
> (2) Simplicity, clarity, and efficiency by reducing variation;
>
> (3) The appearance of neutrality; and
>
> (4) The enhancement of reputation by evincing unanimity and consistency.

Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. Pa. L. Rev. 703, 732–33 (2016) (capitalization and formatting modified). In the context of criminal justice, a court must balance "national uniformity" with unique "state policy considerations." *Gunwall*, 720 P.2d at 67.

This Court has explicitly recognized that uniformity is beneficial. *State v. Olsen*, 293 N.W.2d 216, 219–20 (Iowa 1980) ("We have an interest in harmonizing our constitutional decisions with those of the [federal] Supreme Court when reasonably possible[...]."). And this Court has previously expressed "a desire for consistency" in constitutional interpretation. *State v. Ramirez*, 597 N.W.2d 795, 797 (Iowa 1999), *overruled by State v. Bruegger*, 773 N.W.2d 862 (Iowa 2009); *see Des Moines Joint Stock Land Bank of Des Moines v. Nordholm*, 253 N.W. 701, 709 (Iowa 1934) ("[G]ood policy and a desired consistency between the two Constitutions rather dictate that the interpretation of the two clauses be similar. Such consistency in interpretation will accomplish consistency in operation.").

As the *Gaskins* dissent correctly puts it: "Adherence to settled federal precedent provides predictability, stability, uniformity, and legitimacy." 866 N.W.2d at 53 (Waterman, J., dissenting). That is not to say a state supreme court should never strike its own path. But it should be unusual, rather than pedestrian, for this Court to disregard the prevailing rules that affect criminal justice across the 50 states.

Finally, one assertion about national uniformity made by the special concurrence in *Gaskins* requires debunking. The special

concurrence claimed, "Interestingly, none of the cases cited by the dissent has a similar criterion with emphasis on national uniformity." *Gaskins*, 866 N.W.2d at 34 (Appel, J., specially concurring). But this is not accurate. *Gunwall*—which was cited by the *Gaskins* dissenters and is one of the leading cases adopting neutral interpretive principles—directly emphasizes in its sixth criterion that matters "local in character" are more likely to support independent state constitutional interpretation than matters for which "there appear[s] to be a need for national uniformity." *Gunwall*, 720 P.2d at 813; *accord Hunt*, 450 A.2d at 966 (Handler, J., concurring). The desire for uniformity is an appropriate consideration among a flexible inquiry into practical considerations.

B. Neutral interpretive principles do not support a novel state constitutional rule about trespass and property abandoned in a public place. In any event, police did not trespass in obtaining the straw or analyzing the DNA here.

The defendant first argues for a novel state constitutional rule that would find police "trespassed" against him by seizing the discarded straw after he left the Pizza Ranch restaurant. Defendant's Second Am. Proof Br. at 58–64. The application of neutral interpretive principles shows the Iowa Constitution does not include

this heretofore unknown protection against seizure of discarded waste objects.

Development of the claim in the lower courts. As discussed in the error preservation section, this claim was not litigated in any fashion below. Based on the sequence of amended briefs and the motion practice, it appears the "trespass" claim occurred to the defendant only after this Court's decision in *State v. Wright*, 961 N.W.2d 396, 415–17 (Iowa 2021). *See* 3/23/2021 Defendant's Proof Brief (no trespass argument); 6/4/2021 Response to Motion to Strike; 7/6/2021 First Amended Brief (arguing trespass with approximately a dozen citations to *Wright*). A threshold consideration to any state constitutional claim must be whether the claim was litigated below, such that this Court has an error to review or correct on appeal. With no error to correct, this Court is not empowered by the Iowa Constitution to adopt a novel constitutional rule. *See* Iowa Const. art. V, § 4.

Constitutional text. The defendant does not attempt to stake out any claim that the text of Article I, section 8 compels resolution of this issue in his favor, nor could he. The text of the Fourth Amendment and Article I, section 8 are functionally identical.

Constitutional history, including reports of state constitutional debates and state precedent. This Court's recent sharply divided decision in *Wright* could arguably provide some grounding for the defendant's claim, if he had preserved the issue. But there is better-fitting precedent to consider first.

In *Barrett*, the defendant inadvertently left behind a 143-page journal at an Iowa City restaurant. *State v. Barrett*, 401 N.W.2d 184, 189–90 (Iowa 1987). The contents of the journal, which was eventually read by restaurant employees, reflected the defendant's intent to harm others. *Id.* at 90. Police eventually seized, read, and photocopied the journal without a warrant. *Id.* at 190. The defendant argued that seizure of the journal by police violated "his rights under the fourth amendment to the federal constitution and article I, section eight of the Iowa Constitution." *Id.* This Court unanimously rejected the defendant's argument, finding the defendant had no expectation of privacy in the journal, given the "public nature" of its abandonment. *See id.* So too here. The defendant here publicly abandoned the straw in the restaurant and the police seizure of the discarded straw and its contents was lawful in light of *Barrett*.

Barrett remains good law and it would appear this Court would have to expressly overrule that case to grant this defendant relief. But *Barrett* is not addressed in the defendant's appellate brief. He instead hangs virtually his entire argument on *Wright*, 961 N.W.2d at 415–17. The State believes *Wright* was wrongly decided. But this Court need not revisit *Wright* to resolve the question presented here. This case is easily distinguished based on the language of *Wright*, which limits its holding in two ways: first, to effects that "belong" to the defendant; and second, to police conduct that amounts to "trespass." *Id.* at 415–17.

First, there is no colorable claim that the straw "belonged" to the defendant. While the razor-thin *Wright* majority found a lack of abandonment due to local ordinances limiting collection of garbage bags to certain persons, there is no record evidence of any comparable legal provision regulating the collection of detritus after diners leave a restaurant. While a homeowner may be permitted to retrieve garbage bags from the receptacle in their driveway prior to collection by waste engineers, the same cannot be said of a diner's authority to re-enter the restaurant after leaving and then rifle through the dumpster for a straw. Property discarded at a restaurant

is "clearly abandoned" and unprotected. *State v. Mattheson*, 407 So. 2d 1150, 1158 (La. 1981) (evidence seized from restaurant bathroom garbage can).

Second, police did not trespass to obtain the straw. Although the ownership and trespass analysis in *Wright* is muddled, the premise underlying the trespass finding appears to be that collection of garbage by "any person, other than an authorized collector" is prohibited by law. *Wright*, 961 N.W.2d at 417. Again, the same cannot be said of a restaurant diner's discarded straw. The defendant cites no law prohibiting collection of detritus after a diner leaves the restaurant, whether the collection is by a waiter, busboy, or any other person. As a result, the conduct of police was not "unlawful and prohibited," and there is no constitutional violation. *Id.* at 417.

In his brief, the defendant shifts much of his argument away from the straw and toward the DNA analysis. *See* Defendant's Proof Br. at 61–65. But this is self-defeating for all the reasons discussed in Division I, based on the nearly unanimous holdings of every court to consider the question: once police lawfully seize an item containing DNA, police may analyze the DNA for identity without a warrant. *See* Division I.A (collecting cases). Thus, the seizure of the straw disposes

of the defendant's argument, and he cites no authority that would extend the holding of *Wright* or any other case law to lawfully seized property.

Nor does the defendant's citation to Iowa Code section 729.6 support any novel constitutional rule about DNA and trespass. Defendant's Second Am. Proof Br. at 62–63. The statute expressly authorizes the police to obtain and test genetic information "[t]o identify an individual in the course of a criminal investigation." Iowa Code § 729.6(3)(c)(1). The defendant's assertion that the statute includes an unspoken warrant requirement is supported by nothing but his hope for a favorable disposition. Defendant's Second Am. Proof Br. at 65. The Legislature knows how to require a warrant or court order when it intends to do so. *E.g.,* Iowa Code Chs. 808, 810. The deliberation omission of a warrant requirement in section 729.6(3)(c)(1) is fatal to the defendant's reliance on the statute. And there is no merit to the defendant's comparison of section 729.6(3)(c)(1) to a statute that carves out an exemption to a constitutional provision—for the reasons expressed in Division I and above in this Division, a discarded straw containing abandoned DNA is not protected by the Constitution at all.

The suggestion that the Legislature cannot authorize the police do anything that private citizens cannot is a radical notion entirely untethered from all but fringe legal theories. *See Wright*, 961 N.W.2d at 450–51 (C.J. Christensen, dissenting) (noting that both the courts and the Legislature have authorized police, under certain circumstances, to make warrantless arrests, enter private property to effect an arrest, issue citations without a warrant, block roads, conduct *Terry* stops, and more—even though private citizens cannot do the same); *id.* at 453–54 (Waterman, J, dissenting) (noting such an approach "has never been recognized by any court or dissent in the country"); *id.* at 461–62 (Mansfield, J, dissenting) (noting under such an approach, police could not investigate crime in parks after closing time or cross a police barricade). The *Wright* majority expressly disavows such a broad rule, which the defendant does not admit in his appellate briefing. *See id.* at 412 n.5 (McDonald, J., for the majority) (rebuking the dissents' criticism of the "if a private citizen can't do it, the police can't do it either" rule by saying "that is not what we hold"). This radical theory of law, relied on by the defendant, has not been embraced by a majority of this Court, nor should it be.

Last, suppose the defendant is correct that a trespass was committed by police in seizing the straw. If he is right, he still is not entitled to any relief. No person has title to abandoned property, until it is found or taken, and title then vests in the first finder. *See Abandonment of Tangible Personal Property*, 25 Am. Jur. Proof of Facts 2d 685 (West 2021) (originally published in 1981). Here, the first finder was the police, thereby vesting the police with title to the straw. It is axiomatic one cannot trespass against oneself, as the crime or tort must be committed against the property of another. *See* Iowa Code § 716.7; *see generally Liability for Intentional Intrusions on Land,* Restatement (Second) of Torts § 158 (1965). There was no trespass, as the police were the only entity with an interest in the straw; the defendant's interest was extinguished when he discarded the straw, paid his bill, and left the restaurant. *See* Suppression Ruling, p. 3; App. 111.

Decisions of sister states, particularly when interpreting similar constitutional text. The defendant cites no case law from any other jurisdiction interpreting a state constitutional provision to support his claim. The State is aware of none.

Practical consequences, including the need for national uniformity. As with his federal constitutional claim, to accept the defendant's argument here would require this Court to hold that a warrant is required every time police seize items containing fingerprints at a crime scene and submit those items for fingerprint analysis at the State Crime Lab, and to obtain a warrant for a swab every time a rapist deposits his DNA on or inside a victim of sexual assault. There is no support for this outcome in the law of this state or any other. Nor is there any reason Iowa should stand alone as the only jurisdiction to find constitutional trespass can be committed against publicly accessible abandoned property.

C. Police did not violate the defendant's reasonable expectation of privacy in seizing the straw or testing for DNA.

The second barrel of the defendant's state constitutional attack hinges on expectations of privacy. Defendant's Second Am. Proof Br. at 66–71. He urges a novel state constitutional rule that would render DNA left at crime scenes behind by a suspect immune to seizure or search. *See id.*

Development of the claim in the lower courts. The defendant made, and the district court ruled on below, an argument

about the reasonable expectation of privacy. Suppression Ruling, p. 9. App. 117. But, as discussed above, the defendant did not make any arguments about Iowa Code section 729 or how that statute (according to him) informs state constitutional law. If the text of the statute, as the defendant suggests, is so important as to justify a novel state constitutional rule, depriving the State of the opportunity to make record on any issue related to the statute weighs against deciding any state constitutional question on appeal. As does the lack of ruling on the issue from the district court, which now faces reversal on a ground never litigated.

Constitutional text. The defendant does not attempt to stake out any claim that the text of Article I, section 8 compels resolution of this issue in his favor, nor could he. The text of the Fourth Amendment and Article I, section 8 are functionally identical.

Constitutional history, including reports of state constitutional debates and state precedent. The defendant has little to say about expectation of privacy that has not already been addressed in the discussion of abandonment and trespass. *See* Defendant's Second Am. Proof Br. at 66–71. As discussed above, the State maintains *Wright* was wrongly decided. Perhaps most relevant

to a discussion of constitutional history is that neither this defendant, nor the lengthy list of authorities cited by the *Wright* majority, supply any evidence that discarded items were historically protected from police or private-actor search when the Iowa Constitution was framed. Tellingly, Justice Waterman's assertion that "discarded trash was fair game for searches by police and private citizens alike when our Federal Constitution was enacted" goes entirely unchallenged by the *Wright* majority, and appears to correctly describe the time of the Iowa Constitution's framing as well. *Wright*, 961 N.W.2d at 454 n.23 (Waterman, J., dissenting). This undercuts any novel state constitutional to the contrary.

However, again assuming without conceding that *Wright* was correctly decided, the plain language of the opinion defeats the defendant's argument. The 4–3 *Wright* majority held that the defendant "had an expectation based on positive law that his privacy, as a factual matter, would be lost, if at all, only in a certain, limited way"—that is, through collection by a garbage collector. 961 N.W.2d at 419. There is no similar expectation "based on positive law" (or anything else) that a diner's straw will only be disposed of in a certain way or by certain persons at the restaurant. This ends the analysis.

But even setting aside the distinctions between this case and *Wright*, the core of the analysis is whether the defendant subjectively had a reasonable expectation of privacy in the straw and whether society was objectively prepared to recognize any such expectation of privacy as reasonable. Society is not prepared to recognize that discarded straws are immune to handling; instead, society recognizes that garbage items discarded at a restaurant after a diner leaves belong to the restaurant and may be disposed of pursuant to whatever process the restaurant wishes to deploy, whether that is recycling, compost, incineration, or anything else.

The defendant claims in his brief the "only" on-point state case in evaluating expectation of privacy for abandoned property is *State v. Bumpus*, 459 N.W.2d 619 (Iowa 1990). Defendant's Second Am. Proof Br. at 67. But that is not accurate. In addition to *Barrett* (discussed in Division II.A above), this Court found there was no reasonable expectation of privacy in abandoned property in *State v. Flynn*, 360 N.W.2d 762 (Iowa 1985). There, the defendant went to the Urbandale Golf and Country Club, hoping to secret business records related to a criminal investigation. *Flynn*, 360 N.W.2d at 764. He was unable to enter the building where he planned to hide

the papers and instead placed the records under a tarp covering peat moss. *Id.* The defendant left the club intending to return but, during the hours he was gone, police seized the papers he attempted to hide. *Id.* This Court ruled that, regardless of the defendant's subjective hope or belief the papers would remain secret, there was no objective expectation of privacy in papers abandoned on others' property, even when hidden. *See id.* at 766. While *Flynn* is grounded in the Fourth Amendment, rather than the Iowa Constitution, *Flynn*'s overt acceptance in *Barrett* and this Court's reliance on *Flynn* strongly imply an identical outcome had Flynn raised an Iowa Constitution claim. *See Barrett*, 401 N.W.2d at 190. Just like Flynn had no expectation of privacy in the papers once he abandoned them, the defendant here had no expectation of privacy after discarding the straw, paying his bill, and leaving the restaurant.

Nothing about our state history or precedent warrants the one-of-a-kind rule advocated by the defendant, which would operate to prevent testing items left at a public location (including a crime scene) for DNA without a warrant.

Decisions of sister states, particularly when interpreting similar constitutional text. The defendant cites no

case law from any other jurisdiction interpreting a state constitutional provision to support his claim. The State is aware of none.

Practical consequences, including the need for national uniformity. As with his other claims, there is no limiting principle to the rule advocated by the defendant, which would seemingly require a warrant to analyze DNA found at a crime scene or swab a victim for DNA following a sexual assault. No jurisdiction's constitutional provisions require a warrant on these facts and Iowa should not be the first.

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The defendant's state constitutional arguments are not grounded in neutral interpretive principles and are little more than a plea to adopt a rule that would afford him relief. To the extent there is any support for the defendant's claims in our constitutional history, *Wright* is easily distinguished (assuming it is correctly decided) and other Iowa precedent supports affirming the denial of the motion to suppress.
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III. The district court did not err by declining to issue a novel instruction that would have manufactured evidence about federal sentencing practices.

Preservation of Error

The defendant requested the instruction below. *See* trial tr. vol. X, p. 83, line 22 — p. 86, line 23.

Standard of Review

Review is for correction of errors at law. *Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699, 707 (Iowa 2016). However, this Court has held there is no duty to give jury instructions, even if the instruction correctly states the law, when the instruction is embodied in other instructions." *Id.* (citing and quoting *Sonnek v. Warren*, 522 N.W.2d 45, 47 (Iowa 1994)). In other words, this Court "review[s] jury instructions as a whole to determine whether the jury instructions correctly state the law." *State v. Tipton*, 897 N.W.2d 653, 694 (Iowa 2017).

Merits

The defendant's next issue concerns the district court's refusal to give an instruction that has, it would seem, never before been requested or given in a reported Iowa decision. *See* Defendant's Second Am. Proof Br. at 72–81. The defendant essentially complains that the district court should have issued an instruction telling the

jury about the various parameters of federal sentencing law, including that it was possible the federal government would ask that Michael Allison be sentenced below the mandatory minimum, if and only if federal prosecutors filed such a motion. Defendant's Am. Proof Br. at 72–80.

The defendant cites no case law authorizing judges in Iowa to issue such an instruction. *See* Defendant's Second Am. Proof Br. at 72–80. That alone is sufficient to establish the district court did not err.

But setting the lack of legal authority aside, what the defendant really wanted was not an instruction on the law, but on the facts. His appeal brief suggests he was unsatisfied with Allison's knowledge of the possibility he would receive a sentencing reduction for providing substantial assistance. *See* Defendant's Second Am. Proof Br. at 72–80. In other words, the defendant wanted evidence in the record about the substantial-assistance process and how it might have affected Allison's motive. No citation is needed for the proposition that jury instructions do not exist to create evidence. And, as the district court recognized, the record evidence was not sufficient to support the instruction. Trial tr. vol. X, p. 86, lines 9–23. If the

defendant wished to explore the substantial-assistance issue, his remedy was to more effectively cross-examine Allison or call another witness; not to ask the district court to create evidence in the guise of an instruction.

The instructions given at trial were adequate to facilitate the jury's evaluation of Allison's testimony. The jury was expressly instructed that "Allison has admitted he was convicted of a crime" and that the jury could use that "evidence only to help you decide whether to believe the witness and how much weight to give his testimony." Jury Instr. No. 15: Allison Conviction; App. 156. The jury was further instructed they could determine credibility in part based on "[t]he witness's interest in the trial, their motive, candor, bias and prejudice." Jury Instr. No. 11: Credibility; App. 155. This was sufficient to convey the law to the jury and the denial of the defendant's proposed instruction in favor of the model instruction was harmless, in light of the cross-examination and the instructions given. *See* sent. tr. p. 27, line 11 — p. 28, line 5 (the district court describing the defense cross-examination of Allison as "vigorous and thorough"). Moreover, nothing about Allison's testimony or the jury instruction tipped the scales of this prosecution: this was a DNA case.

IV. There was sufficient evidence to prove the defendant murdered Martinko. The DNA analysis ruled out 99.94% of men in the United States.

Preservation of Error

The defendant unsuccessfully challenged the sufficiency of evidence on identity below. *See* trial tr. vol. VIII, p. 46 line 10 — p. 52, line 14.

Standard of Review

When evaluating a sufficiency challenge, evidence is viewed in the light most favorable to the State and all reasonable inferences are drawn to uphold the verdict. *State v. Leckington*, 713 N.W.2d 208, 212–13 (Iowa 2006). "A jury is free to believe or disbelieve any testimony as it chooses and to give as much weight to the evidence as, in its judgment, such evidence should receive." *State v. Liggins*, 557 N.W.2d 263, 269 (Iowa 1996).

Merits

The defendant's final challenge asserts that there was insufficient evidence to convict him of first-degree murder. Defendant's Second Am. Proof Br. at 82–84. Given the standard of review, this argument is meritless, and the approximate four pages of appellate briefing the issue received from the defendant warrants little response.

Blood was spattered "all over the inside" of Martinko's Buick and expert testimony established "[t]here was a struggle" leading up to Martinko's death during which the murderer likely cut or otherwise wounded himself. Trial tr. vol. IV, p. 55, lines 19–23; p. 57, line 2 — p. 58, line 11; p. 129, line 8 — p. 130, line 3; p. 159, lines 1–6; p. 149, line 12 — p. 150, line 10. During a police interview, officers noticed "quite a few" scars on the defendant's hands and arms, and he gave generally evasive answers, insisting that police "test the DNA." Trial tr. vol. VII, p. 33, line 24 — p. 34, line 6; *see* Exhibit 14A: Defendant Interview, at approx. 13:56:20–13:56:35.

When police did test the DNA, they found the defendant's DNA was consistent with that found on Martinko's bloody dress (to a probability of 1 out of 100 billion unrelated persons) and the bloody gearshift (to a probability of 1 out of 1,700 male individuals). Trial tr. vol. VI, p. 166, line 15 — p. 167, line 21; Trial tr. vol. VII, p. 96, line 20 — p. 107, line 17. This match was sufficient to exclude 99.94% of all males in the United States. Trial tr. vol. VII, p. 107, lines 10–17.

This evidence was all bolstered by the defendant's admissions to Michael Allison, including that "he wished he had listened to his dad and cleaned up after himself," that "no one was thinking about DNA

as far as being a possibility" back in 1979, and that, regardless of the outcome at trial, the defendant "wins, because he had the opportunity to be out there with his family all these years." Trial tr. vol. VII, p. 123, lines 6–14; p. 124, lines 11–18; p. 130, lines 2–8.

The combination of a DNA match that excluded 99.94% of men in the United States with the defendant's admissions was more than sufficient for the jury to find the defendant guilty beyond a reasonable doubt.

CONCLUSION

This Court should affirm the defendant's conviction.

REQUEST FOR ORAL ARGUMENT

If retained by the Supreme Court, the State believes oral argument would assist the Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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