IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. JERRY LYNN BURNS, Defendant-Appellant.	Supreme Court No. 20-1150

APPEAL FROM THE IOWA DISTRICT COURT
FOR LINN COUNTY
HONORABLE FAE E. HOOVER

APPELLANT'S FINAL BRIEF

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that this Defendant-Appellant's Final Brief was filed via EDMS on December 6, 2021, and that a copy of this document will be served this date by U.S. Mail upon any counsel of record or unrepresented parties in this action not served by the electronic filing system.

The undersigned further certifies that on this same date he served this Second Amended Proof Brief upon Defendant-Appellant by U.S. Mail, proper postage prepaid, addressed to Jerry L. Burns, No. 6931989, Anamosa State Penitentiary, 406 N. High Street, Anamosa, IA 52205.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions:

Statutes:

Other Authorities:

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. **Whether the trial court erred in denying Defendant's motion to suppress the warrantless search of Defendant's DNA and the fruits thereof under the Fourth Amendment to the United States Constitution.**

Authorities

Bloch v. Ribar, 156 F.3d 673 (6th Cir. 1998)
Boyd v. United States, 116 U.S. 616 (1886)
Brigham City v. Stuart, 547 U.S. 398 (2006)
California v. Acevedo, 50 U.S. 565 (1991)
California v. Greenwood, 486 U.S. 35 (1988)
Carpenter v. United States, 138 S.Ct. 2206 (2018)
Chambers v. Maroney, 399 U.S. 42 (1970)
Chapman v. California, 386 U.S. 18 (1967)
In re Shabazz, 200 F.Supp.2d 578 (D.S.C. 2002)
Katz v. United States, 389 U.S. 347 (1967)
Kentucky v. King, 563 U.S. 452 (2011)
Kyllo v. United States, 533 U.S. 27 (2001)
Nicholas v. Goord, 430 F.3d 652 (2nd Cir. 2005)
Oregon v. Elstad, 470 U.S. 298 (1985)
Payton v. New York, 445 U.S. 573 (1980)
Riley v. California, 573 U.S. 373 (2014)
Rise v. State of Or., 59 F.3d 1556 (9th Cir. 1995)
Segura v. United States, 468 U.S. 796 (1984)
Silverman v. United States, 365 U.S. 505 (1961)
Skinner v. Railway Labor Executives' Association, et al., 489 U.S. 602 (1989)
Smith v. Maryland, 442 U.S. 735 (1979)
State v. Lovig, 675 N.W.2d 557 (Iowa 2004)
State v. Manna 534 N.W.2d 642 (Iowa 2011)
State v. Storm, 898 N.W.2d 140 (Iowa 2017)
United States v. Camberos-Villapuda, 832 F.3d 948 (8th Cir. 2016)
United States v. Conner, 948 F. Supp. 821 (N.D. Iowa 1996)
United States v. Davis, 690 F.3d 226 (4th Cir. 2012)
United States v. Di Re, 332 U.S. 581 (1948)

United States v. Jones, 565 U.S. 400 (2012)
United States v. Kincade, 379 F.3d 813 (9th Cir. 2004)
United States v. Kraklio, 451 F.3d 922 (8th Cir. 2006)
United States v. Mitchell, 652 F.3d 387 (3rd Cir. 2011)
United States v. Riesselman, 646 F.3d 1072 (8th Cir. 2011)
United States v. Szubelek, 402 F.3d 175 (3rd Cir. 2005)
United States v. Westinghouse Electric Corp., 638 F.2d 570 (3rd Cir. 1980)
Walter v. United States, 447 U.S. 649 (1980)
Weeks v. United States, 232 U.S. 383 (1914)
Whiteley v. Warden, Wyo. State Penitentiary, 401 U.S. 560 (1971)
Wong Sun v. United States, 371 U.S. 471 (1963)
U.S. Const. amend. IV
42 U.S.C. § 1320d
Elaine Y. Y. Cheung, et al., *Predictive DNA analysis for biogeographical ancestry*, Australian Journal of Forensic Sciences, 50:6, 651–658 (Jan. 2018)
S. Shifman, et al., *A whole genome association study of neuroticism using DNA pooling*, Molecular Psychiatry 13, 302–312 (2008)
Stylianos E. Antonarakis, *Diagnosis of Genetic Disorders at the DNA Level*, New England Journal of Medicine, 320(3): 153–63 (Jan. 19, 1989)
Natalie Ram, *Genetic Privacy After Carpenter*, 105 Va. L. Rev. 1357, 1382 (2019)

II. Whether the trial court erred in denying Defendant's motion to suppress the warrantless search of Defendant's DNA and the fruits thereof under article I, section 8 of the Iowa Constitution.

Authorities

Benjamin v. Lindner Aviation, Inc., 534 N.W.2d 400 (Iowa 1995)
Irons v. Community State Bank, 461 N.W.2d 849 (Iowa App. 1990)
McClurg v. Brenton, 98 N.W. 881 (Iowa 1904)
Rakas v. Illinois, 439 U.S. 128 (1978)
Schneckloth v. Bustamonte, 412 U.S. 218 (1973)
State v. Baldon, 829 N.W.2d 785 (Iowa 2013)

State v. Ahart, 324 N.W.2d 317 (Iowa 1982)
State v. Baker, 441 N.W.2d 388 (Iowa Ct. App. 1989)
State v. Breuer, 577 N.W.2d 41 (Iowa 1998)
State v. Brown, 905 N.W.2d 846 (Iowa 2018)
State v. Bumpus, 459 N.W.2d 619 (Iowa 1990)
State v. Cline, 617 N.W.2d 277 (Iowa 2000)
State v. Coleman, 890 N.W.2d 284 (Iowa 2017)
State v. Crawford, 659 N.W.2d 537 (Iowa 2003)
State v. Fleming, 790 N.W.2d 560 (Iowa 2010)
State v. Legg, 633 N.W.2d 763 (Iowa 2001)
State v. Lovig, 675 N.W.2d 557 (Iowa 2004)
State v. McGrane, 733 N.W.2d 671 (Iowa 2007)
State v. Ochoa, 792 N.W.2d 260 (Iowa 2010)
State v. Pettijohn, 899 N.W.2d 1 (Iowa 2017)
State v. Short, 851 N.W.2d 474 (Iowa 2014)
State v. Storm, 898 N.W.2d 140 (Iowa 2017)
State v. Strong, 493 N.W.2d 834 (Iowa 1992)
Torres v. Madrid, 141 S. Ct. 989, 995 (2021)
Westra v. Iowa Dept. of Transp., 929 N.W.2d 754 (Iowa 2019)
Iowa Const. art. I, § 8
Iowa Code section 729.6
29 U.S.C. § 1191b
Tanner M. Russo, Note, *Garbage Pulls Under the Physical Trespass Test*, 105 Va. L. Rev. 1217, 1246–47 (2019)

III. Whether the trial court abused its discretion by failing to give Defendant's proposed instruction related to Michael Allison's credibility.

Authorities

Herbst v. State, 616 N.W.2d 582 (Iowa 2000)
State v. Hall, 235 N.W.2d 702 (Iowa 1975)
State v. Holtz, 548 N.W.2d 462 (Iowa Ct. App. 1996)
State v. Plain, 898 N.W.2d 801 (Iowa 2017)
State v. Templeton, 258 N.W.2d 380 (Iowa 1977)
State v. Webb, 516 N.W.2d 824 (Iowa 1994)

State v. Winters, No. 10-1665, 2011 WL 5387293, (Iowa Ct. App. Nov. 9, 2011)
Wade v. United States, 504 U.S. 181 (1992)
18 U.S.C. §3553(e)
21 U.S.C. § 841

IV. Whether the evidence was sufficient to convict Defendant of Murder in the First Degree.

Authorities

State v. Brubaker, 805 N.W.2d 164 (Iowa 2011)
State v. Hearn, 797 N.W.2d 577 (Iowa 2011)
State v. Sutton, 636 N.W.2d 107 (Iowa 2001)
State v. Truesdell, 679 N.W.2d 611 (Iowa 2004)

ROUTING STATEMENT

The Iowa Supreme Court should retain this case because the issues it raises involve substantial issues of first impression, as well as fundamental issues of broad public importance requiring ultimate determination by the Supreme Court. Iowa R. App. P. 6903(2)(d) and 61101(2)(c). Namely, this Court should retain jurisdiction to determine whether police can constitutionally search an individual's DNA without a warrant.

STATEMENT OF THE CASE

On January 24, 2019, the State filed a trial information charging Jerry Lynn Burns ("Defendant") with the offense of

Murder in the First Degree in violation of Iowa Code sections 707.1 and 707.2(1). (Trial Information; App. pp. 5–7).

Prior to trial, Defendant filed a motion to suppress the warrantless search of his DNA and the fruits thereof. (Defendant's Motion to Suppress; App. pp. 8–16). The trial court denied the motion. (Ruling on Motion to Suppress Evidence; App. 109–121).

A jury trial was held February 12–24, 2020. The jury returned a guilty verdict on the charge of first-degree murder. (Verdict; App. 163–64). Defendant filed a motion for new trial on May 28, 2020, and a supplemental motion for new trial on August 5, 2020. (5/28/20 Motion for New Trial; 8/5/20 Supplemental Motion for New Trial). On August 7, 2020, the trial court denied Defendant's motion for new trial. That same date, the trial court held a sentencing hearing, imposed judgment, and sentenced Defendant to a term of natural life in prison without the possibility of parole. (Sentencing Order; App. 165–67). Defendant filed a timely notice of appeal on September 2, 2020. (Notice of Appeal; App. 168–70)

STATEMENT OF THE FACTS

Background: On December 20, 1979, police discovered the victim, Michelle Martinko ("Martinko"), in her car in the parking lot of the Westdale Mall in Cedar Rapids. (1/10/20 Tr. pp. 10–11, ln. 10–1; p. 13, ln. 1–23). Martinko had been stabbed to death. (1/10/20 Tr. p. 14, ln. 10–13). Over the next three decades, law enforcement investigated numerous suspects without making any arrests. (1/10/20 Tr. pp. 17–18, ln. 13–13).

In late 2005, DNA testing on a sample taken from the dress Martinko was wearing at the time of her murder yielded a partial male profile. (2/14/20 Tr. pp. 157–59, ln. 16–15; pp. 160–63, ln. 16–14). In 2018, utilizing the assistance of a private lab, law enforcement uploaded the partial profile to GEDmatch, a public genealogy website with a database of DNA profiles. (1/10/20 Tr. p. 28–31, ln. 22–15; p. 33, ln. 9–13). Through kinship analysis and genetic genealogy, police identified four sets of great-great-grandparents as relatives of the donor of the unidentified profile. (1/10/20 Tr. pp. 28–29, ln. 22–8; pp. 36–37, ln. 13–14). After collecting and testing samples of members of the great-great-

grandparents' family tree, police further narrowed their search to three brothers: Defendant, Donald Burns, and Kenneth Burns. (1/10/20 Tr. pp. 38–41, ln. 18–7).

On October 29, 2018, police surveilled Defendant at a restaurant in Manchester, Iowa. (1/10/20 Tr. p. 42, ln. 4–15). After Defendant left the restaurant, police, without a warrant, collected the drinking straw Defendant used during his meal. (1/10/20 Tr. pp. 42–43, ln. 25–14; 1/16/20 Tr. p. 66, ln. 8–18). Police submitted the straw to the DCI criminalistics laboratory. (1/10/20 Tr. p. 43, ln. 14–15). The lab extracted Defendant's DNA from the straw and performed an analysis to determine Defendant's DNA profile. (1/10/20 Tr. pp. 46– 47, ln. 23–3). The lab then compared Defendant's DNA profile to the partial unidentified profile obtained from the sample of Martinko's dress and concluded that Defendant could not be excluded as the donor of the unidentified profile. (1/10/20 Tr. p. 47, ln. 4–8).

On December 19, 2018—the 39th anniversary of Martinko's death—police approached Defendant at his business. (1/10/20 Tr. p. 56, ln. 2–14). During a conversation with Defendant, police

confronted him with the results of the DNA testing. (1/16/20 Tr. p. 5, ln. 3–16; pp. 18–20 ln. 7–20). Police also served Defendant with a warrant compelling him to submit a buccal swab for DNA testing. (1/16/20 Tr. pp. 22–23, ln. 25–10). Police took Defendant into formal custody, and he was subsequently charged with Martinko's murder. (Trial Information; App. pp. 5–7; 1/16/20 Tr. pp. 44–45, ln. 1–4).

Pretrial Motion to Suppress: Defendant filed a motion to suppress the results of the warrantless search of his DNA from the straw police collected at the restaurant and all evidence derived therefrom. (Defendant's Motion to Suppress; App. pp. 11–12). The motion was based on a violation of Defendant's right to be free from unreasonable searches and seizures as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution, and article I, section 8 of the Iowa Constitution. (*Id.*).

After a hearing, the trial court denied Defendant's motion. The trial court acknowledged that DNA contains "vast," "intimate," and "personal" information. (Ruling on Motion to Suppress Evidence, App. p. 114). However, the Court held that when Defendant left the restaurant without the straw, he relinquished

any expectation of privacy in the straw, the saliva he left on the straw, and DNA contained in the saliva. (Ruling on Motion to Suppress Evidence; App. pp. 116–17).

Trial Evidence: In December 1979, Martinko was an 18-year-old senior at Kennedy High School in Cedar Rapids. (2/12/20 Tr. pp. 41–42, ln. 13–15). On December 19, 1979, Martinko attended a choir banquet at the Sheraton Hotel with several of her classmates. (2/12/20 Tr. pp. 54–55, ln. 1–12). Witnesses observed Martinko wearing a black dress and a rabbit fur coat. (2/12/20 Tr. p. 75, ln. 19–25; p. 100, ln. 8–11; p. 108, ln. 22–25). Martinko told several people that she planned on going to the Westdale Mall after attending the banquet. (2/12/20 Tr. pp. 55–56, ln. 13–21; pp. 76–77, ln. 7–4).

Several of Martinko's friends and acquaintances spoke with her at the mall. (2/12/20 Tr. pp. 83–84, ln. 17–6; pp. 100–01, ln. 18–4; pp. 190–94, ln. 8–4). Tracy Price, who went to school with Martinko, testified that Martinko told him she was trying to locate a coat her mom had put on layaway. (2/12/20 Tr. pp. 106–07, ln. 16–1; pp. 112–13, ln. 16–16). Martinko showed him a "wad of bills"

that she was going to put toward the dress. (2/12/20 Tr. p. 117, ln. 5–11). Todd Bergen also observed Martinko with the "large wad of cash" she planned to use to purchase the coat. (2/12/20 Tr. pp. 128–29, ln. 11–7).

Martinko worked at a clothing store named Brooks. (2/12/20 Tr. pp. 56–57, ln. 22–6). In March 1981, Charles "Andy" Seidel—Martinko's former boyfriend—was interviewed by law enforcement. (2/12/20 Tr. pp. 149–50, ln. 22–11; pp. 170–71, ln. 16–20). At that time, Seidel reported under oath that Martinko told him a "grotesquely ugly" man had been watching her at Brooks. (2/12/20 Tr. pp. 172–74, ln. 17–20). Seidel also told police that Martinko seemed "intensely bothered" by the incident because she was "really quiet" during the week before her death. (2/12/20 Tr. p. 174, ln. 21–24).

At approximately 4:00 a.m. on December 20, 1979, Officer James Kinkead was dispatched to the mall with a description of Martinko's vehicle. (2/13/20 Tr. pp 24–25, ln. 4–18). He discovered the vehicle in the parking lot, halfway between JCPenney and the bank. (2/13/20 Tr. pp. 25–26, ln. 19–25). The driver's side rear door

was unlocked; Kinkead opened the door and observed someone slouched down in the front passenger seat. (2/13/20 Tr. pp. 28–29, ln. 16–18). Kinkead then went to the front passenger door, where he observed Martinko covered in blood. (2/13/20 Tr. pp. 29, ln. 19–25). She appeared to have several stab wounds to her chest, a laceration to her chin, and her dress was pulled up around her waist. (2/13/20 Tr. p. 30, ln. 1–8). Martinko was fully clothed; she was wearing a dress, pantyhose, and a rabbit fur coat. (2/13/20 Tr. p. 30, ln. 7–13).

Officer Richard White processed Martinko's vehicle. (2/13/20 Tr. pp. 43–47, ln. 6–6; p. 50, ln. 14–20). White observed blood all over the front seat of the car, including the dash, windshield, visors, and headliner. (2/13/20 Tr. 55, ln. 16–23). White collected a sample of blood from the gearshift lever by scraping it with a razor blade and lifting tape. (2/13/20 Tr. p. 58, ln. 4–25). A sample of blood was also collected from the steering wheel. (2/13/20 Tr. p. 167–68, ln. 20–6). Officers did not observe any blood spots or trails leading away from the car. (2/13/20, pp. 37–38, ln. 23–7; 2/13/20 Tr. p. 89, ln. 10–21).

White collected Martinko's clothing at her autopsy, including her dress, pantyhose, underwear, and fur coat. (2/13/20 Tr. pp. 72–73, ln. 22–16). White agreed that based on his observations there was no evidence that Martinko had been sexually assaulted. (2/13/20 Tr. p.86, ln. 3–8).

Dr. Richard Fiester performed the autopsy. (2/13/20 Tr. p. 119, ln. 11–14). Dr. Fiester observed multiple incised or sharp-edge wounds to Martinko's body, arms, legs, and hands. (2/13/20 Tr. p. 129, ln. 2–13). Dr. Fiester observed several defensive wounds on Martinko's hands. (2/13/20 Tr. pp. 141–, ln. 11–19). Dr. Fiester testified that Martinko bled to death. (2/13/20 Tr. pp. 129–30, ln. 25–3).

Over the years, samples from evidence collected at the crime scene were analyzed for DNA. In 2002 and 2003, DNA testing from five different locations of the dress yielded a 15-loci female profile, believed to be Martinko's profile. (2/14/20 Tr. pp. 139–40, ln. 2–8; pp. 144–45, ln. 6–1; pp. 152–55, ln. 13–8). In 2002, testing of a sample from the gearshift lever yielded a mixed profile including at least one major female contributor and one minor male contributor.

(2/14/20 Tr. p. 141, ln. 14–18; pp. 141–42, ln. 23–1; p. 145, ln. 2–4; pp. 149–50, ln. 11–23; p. 167, ln. 14–19).

In 2005, the DCI lab took samples from four additional locations on the dress, each of which screened positive for blood. (2/14/20 Tr. p. 158, ln. 10–20). The lab obtained a female profile consistent with the profile believed to be Martinko's from three of the cuttings. (2/14/20 Tr. pp. 158–59, ln. 21–9; pp. 161–62, ln. 4–14). The lab obtained a mixture of partial profiles from one of the cuttings, which was taken from the lower back of the dress.[1] (2/14/20 Tr. p. 161, ln. 9–11; pp. 162–63, ln. 21–24). The major contributor to sample F5 was the partial profile of an unidentified male. (2/14/20 Tr. pp. 162–63, ln. 21–8; pp. 201–02, ln. 24–7). The minor contributor to F5 was consistent with Martinko's profile. (2/14/20 Tr. p. 169, ln. 14–19). The major contributor to sample F5 could not be eliminated as the minor contributor to the sample from the gearshift lever. (2/14/20 Tr. pp. 167–68, ln. 11–25).

[1] For ease of reference, Defendant shall refer to the sample of the dress from which the unidentified profile was obtained as sample F5, which was the designation used by the lab. (2/14/20 Tr. pp. 167–68, ln. 20–19).

Law enforcement proceeded with its investigation assuming that the contributor of the major profile on item F5 was the perpetrator. (2/17/20 Tr. pp. 10–12, ln. 21–3). In 2018, police utilized the services of a private lab—Parabon—to perform kinship analysis and genetic genealogy by running the unidentified profile through GEDmatch. (2/17/20 Tr. pp. 43–46, ln. 11–3). Parabon's analysis identified the descendants of four sets of great-great-grandparents as potential contributors to the unidentified profile. (2/17/20 Tr. p. 46, ln. 4–8). Police collected DNA samples from descendants of three branches of the family tree, from which Parabon narrowed the focus of the investigation to Defendant and his two brothers. (2/17/20 Tr. p. 46, ln. 9–15; Joint Exh. 10).

Investigator Denlinger described to the jury how police covertly collected a straw used by Defendant and sent the straw to the DCI lab for DNA analysis. (2/17/20 Tr. pp. 69–72, ln. 6–25). The lab extracted Defendant's DNA from the straw, obtained his profile, and determined that he could not be eliminated as the contributor to sample F5. (Tr. 2/17/20 Tr. p. 142, ln. 14–18; pp. 148–49, ln. 4–10). A subsequent analysis of Defendant's buccal swab

confirmed the result. (2/17/20 Tr. pp. 164–67, ln. 2–19). The probability of finding the profile from sample F5 in a population of unrelated individuals chosen at random would be less than one out of one hundred billion. (2/17/20 Tr. p. 167, ln. 19–21).

The DCI lab determined that, due to reliance on an outdated mixture statistic, it could not generate a report as to the minor male profile from the gearshift lever. (2/17/20 Tr. pp. 197–99, ln. 25–8). Law enforcement sent the gearshift sample to a private lab—Bode Technology—which performed Y-STR DNA testing on the sample and a buccal swab from Defendant. (2/18/20 Tr. pp. 87–90, ln. 7–7; pp. 96–97, ln. 17–19). Defendant could not be eliminated as the contributor to the partial Y-STR profile developed from the gearshift sample. (2/18/20 Tr. pp. 100–04, ln. 14–5). One in approximately 1,700 male individuals would be expected to have the Y-STR profile from the gearshift sample. (2/18/20 Tr. pp. 105–06, ln. 15–24).

DNA comes from a variety of sources, including blood, semen, saliva, sweat, mucus, or skin cells. (2/20/20 Tr. pp. 10–11, ln. 10–3). DNA can be deposited through coughs, sneezes, and speaking.

(2/20/20 Tr. p. 17, ln. 18–23). DNA can also be deposited by touching items; in fact, the average human sheds approximately two million skin cells per minute. (2/20/20 Tr. p. 25, ln. 15–23). Moreover, DNA can transfer either directly from a person to an object, or indirectly between objects. (2/17/20 Tr. pp. 199–01, ln. 24–7; 2/20/20 Tr. pp. 17–18, ln. 24–24; p. 25, ln. 11–14). Of course, DNA testing cannot determine when or how DNA was left on a piece of evidence. (2/17/20 Tr. pp. 210–11, ln. 19–2).

All the DNA experts agreed that it cannot be determined whether the DNA on the evidence assumed to be Defendant's DNA came from blood, sweat, saliva, mucus, semen, skin cells, or some other source. (2/14/20 Tr. pp. 44–45, ln. 18–16; Tr. 2/14/20 p. 202, ln. 12–19; 2/17/20 Tr. pp. 195–96, ln. 20–5; 2/18/20 Tr. p. 110, ln. 11–17). Per the defense's expert, the amount of DNA reportedly found to be present on sample F5 was inconsistent with blood being the source of the DNA, *i.e.*, if blood were the source of the DNA, you would expect much more DNA. (2/20/20 Tr. pp. 42–47, ln. 20–11).

The prosecution called Michael Allison to testify. Allison lived in the same housing unit as Defendant and bunked next to him in

the county jail while Defendant was awaiting trial. (2/18/20 Tr. p. 120, ln. 14–22; p. 151, ln. 13–15).

The State elicited testimony from Allison concerning incriminating statements Defendant purportedly made to him. According to Allison, on one occasion Defendant told him that "he wished he had listened to his dad and cleaned up after himself." (2/18/20 Tr. pp. 122–23, ln. 19–14). Per Allison, Defendant stated that, back in 1979 "no one was thinking about DNA as far as it being a possibility." (2/18/20 Tr. p. 124, ln. 11–18). Allison testified that on another occasion, after he beat Defendant in a game of cards, Defendant threatened to take Allison "to the mall." (2/18/20 Tr. p. 125, ln. 2–10). Lastly, Allison testified that Defendant told him Defendant "feels like no matter what happens in this case, that he wins, because he had the opportunity to be out there with his family all these years." (2/18/20 Tr. p. 130, ln. 2–8).

On cross examination, Allison agreed that he has been convicted multiple times for drug trafficking, trafficking illegal aliens across the border, and conspiracy to commit mail fraud. (2/18/20 Tr. pp. 131–32, ln. 6–22).

At the time of his testimony, Allison was facing federal charges of conspiracy to distribute methamphetamine having previously been convicted of two drug trafficking offenses. (2/18/20 Tr. pp. 132–33, ln. 23–24). Allison negotiated a plea to his pending charges that was no longer in effect at the time of his testimony. (2/18/20 Tr. pp. 137–40, ln. 25–14). Per the negotiated plea, the parties stipulated that Allison would receive a prison sentence of 17 years. (2/18/20 Tr. p. 146, ln. 1–8; Deft. Exh. H1). According to Allison, he withdrew the plea because there was a "mistake" concerning the "weight" of methamphetamine he was alleged to have conspired to distribute, which reduced his potential sentence to zero to twenty years. (2/18/20 Tr. p. 145, ln. 2–10; ln. 21–25; p. 146, ln. 18–25; p. 148, ln. 1–9). Allison was waiting for a new deal at the time of his testimony. (2/18/20 Tr. p. 148, ln. 10–12). Allison agreed that the federal sentencing guidelines allow the government to ask for a lesser sentence than the guidelines call for, although he denied having a cooperation agreement. (2/18/20 Tr. p. 149–50, ln. 11–23).

Prior to trial, Defendant proposed a non-model instruction to guide the jury's consideration of Allison's testimony. In short, the proposed instruction would have instructed the jury that it could consider Allison's agreement to provide substantial assistance to the prosecution in exchange for a recommended sentence less than the mandatory minimum in assessing his credibility. (Deft. Proposed Inst. 17; App. pp. 152–53). During the jury instruction conference, defense counsel proposed that he would modify the instruction to indicate that if the jury finds that Allison hopes to receive a reduced sentence on his pending criminal charges, the jury could consider that as a factor in giving weight to his testimony. (2/21/20 Tr. p. 84, ln. 2–14).

The trial court overruled Defendant's proposed instruction and instead gave the model instruction. (2/21/20 Tr. p. 86, ln. 16–23). In doing so, the court stated that based on Allison's testimony it was unclear whether he would receive any benefit from the testimony he provided. (2/21/20 Tr. p. 86, ln. 12–15).

Additional facts necessary to address the arguments raised herein are addressed below.

ARGUMENT

I. The trial court erred in denying Defendant's motion to suppress where the warrantless extraction of Defendant's DNA profile violated his rights under the Fourth Amendment of the United States Constitution.

A. Preservation of Error

Issues must be presented to and passed upon by the trial court before they can be raised and decided on appeal. *State v. Manna* 534 N.W.2d 642, 644 (Iowa 2011). Defendant filed a motion to suppress the evidence derived from law enforcement's warrantless extraction and analysis of his DNA from the straw based on his right to be free from unreasonable searches and seizures. The trial court denied the motion. The adverse ruling on Defendant's motion to suppress preserves error for this Court's review. *State v. Lovig*, 675 N.W.2d 557, 562 (Iowa 2004).

B. Standard of Review

This Court reviews the denial of a motion to suppress based upon the deprivation of a state or federal constitutional right de novo. *State v. Storm*, 898 N.W.2d 140, 144 (Iowa 2017). This Court gives deference to the trial court's findings of fact due to its

opportunity to assess the credibility of witnesses, but the Court is not bound by those findings. *Id.*

C. The Fourth Amendment is an essential restraint on police power.

Prior to Defendant's arrest, police rifled through more than one million DNA profiles to find a potential donor to the DNA profile found on the victim's dress. (1/10/20 Tr. p. 31, ln. 10–22). During their investigation, police eliminated 161 identified "suspects" by collecting their DNA and comparing it to the suspect profile. (2/17/20 Tr. p. 39, ln. 4–18). Police then surreptitiously collected DNA from Defendant and his brothers, without their knowledge or consent. (1/10/20 Tr. pp. 50–51, ln. 19–8). Police collected the above-described DNA and accessed the foregoing DNA profiles—including the DNA profile of Defendant—all without a warrant or any judicial oversight.

The manner in which police invaded the privacy of countless other individuals holds constitutional significance. Indeed, the constitution acts as a check against such Orwellian use of police power:

> The Fourth Amendment is a restraint on Executive power. The Amendment constitutes the Framers' direct constitutional response to the unreasonable law enforcement practices employed by agents of the British Crown. Over the years . . . the Court has recognized the importance of this restraint as a bulwark against police practices that prevail in totalitarian regimes.
>
> This history is, however, only part of the explanation for the warrant requirement. The requirement also reflects the sound policy judgment that, absent exceptional circumstances, the decision to invade the privacy of an individual's personal effects should be made by a neutral magistrate rather than an agent of the Executive.

California v. Acevedo, 50 U.S. 565, 586 (1991) (Stevens, J. dissenting) (citations omitted).

Here, law enforcement disregarded the Fourth Amendment's protections by surreptitiously obtaining and/or comparing countless individuals' DNA profiles to the suspect profile without applying for any warrants. "The essential purpose of a warrant requirement is to protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents." *Skinner v. Railway Labor Executives' Association, et al.*, 489 U.S. 602, 621 (1989). At a minimum, the police subjected the 161 individuals they specifically identified as "suspects" to "random or arbitrary" acts

where they obtained and analyzed the individuals' DNA without any determination from a judge that probable cause existed to do so.

D. Law enforcement's extraction of Defendant's genetic material from the straw and subsequent analysis to develop his DNA profile constitutes a search.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, and against unreasonable searches and seizures[.]" U.S. Const. amend. IV. Historically, Fourth Amendment jurisprudence turned on whether the government "obtain[ed] information by physically intruding on a constitutionally protected area." *United States v. Jones*, 565 U.S. 400, 405–06 n.3 (2012). However, the Supreme Court subsequently recognized that "the Fourth Amendment protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). The Amendment's protections were therefore decoupled from common-law trespass. *Kyllo v. United States*, 533 U.S. 27, 32 (2001). Rather, for Fourth Amendment purposes, a search includes intrusion into an area an individual expects to preserve as private,

so long as his expectation is one that society is prepared to recognize as reasonable. *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

In *Carpenter v. United States,* 138 S.Ct. 2206 (2018), the Supreme Court rejected the notion that the government may use advancements in technology to circumvent what constitutes a "search" for purposes of the Fourth Amendment. In doing so, the Court noted two "basic guideposts" or aims of the Fourth Amendment: (1) to secure "the privacies of life" against "arbitrary power;" and (2) to "place obstacles in the way of a too permeating police surveillance." *Id.* at 2214 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886); quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)). "As technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Id.* (quoting *Kyllo*, 533 U.S. at 34 (2001)) (internal quotation marks omitted).

Though it predates *Carpenter*, *Kyllo* is instructive. In *Kyllo*, the Court addressed the question of "what limits there are upon

[the] power of technology to shrink the realm of guaranteed privacy." *Kyllo*, 533 U.S. at 43. The government used a thermal imager to detect the amount of heat emanating from the defendant's home. *Id.* at 29–30. A thermal imager detects infrared radiation which "virtually all objects emit but which is not visible to the naked eye." *Id.* at 29. In assessing whether the government's use of a thermal imager constituted a search, the Court noted that visual surveillance of the portion of a house in plain public view is not a search under the Fourth Amendment. *Id.* at 31–32. However, the Court rejected the notion that the government could utilize "sense-enhancing technology" to gather information regarding the interior of a home that could not have otherwise been obtained without physical intrusion into a constitutionally protected area. *Id.* at 35 (citing *Silverman v. United States*, 365 U.S. 505 (1961)). The Court reaffirmed that the Fourth Amendment cannot be interpreted mechanically, because doing so "would leave the homeowner at the mercy of advancing technology[.]" *Id.*

The Fourth Amendment is triggered not just when technology is used to search a home, but also when the government seeks to

obtain physical evidence from a person. *Skinner*, 489 U.S. at 616. Thus, when the government draws blood to analyze for drugs or alcohol, two searches that invade a person's privacy interests occur: first, the compelled physical intrusion of the skin, and second, the ensuing chemical analysis of the sample to obtain physiologic data. *Id.* The chemical analysis of blood constitutes a search under the Fourth Amendment in part because it "can reveal a host of private medical facts about" an individual. *Id.* at 617. Relying on *Skinner*, several federal courts have held that physical extraction of blood and subsequent analysis of it to obtain a DNA profile *each* constitute a search. E.g., *Nicholas v. Goord*, 430 F.3d 652, 670 (2nd Cir. 2005) ("The second intrusion to which offenders are subject is the analysis and maintenance of their DNA information[.]"); *United States v. Szubelek*, 402 F.3d 175, 182 (3rd Cir. 2005) (citing *Skinner*, 489 U.S. at 616); *United States v. Davis*, 690 F.3d 226, 246 (4th Cir. 2012) (holding that the extraction of DNA and the creation of a DNA profile constitute a search).

In the instant case, Investigator Denlinger and several other officers conducted surveillance on Defendant at his place of

business. They followed Defendant to a restaurant, went into the restaurant, and sat in a booth next to him. The officers observed Defendant eating his lunch and drinking out of a cup with a straw. After Defendant left the restaurant, the officers covertly collected Defendant's straw and sent it to the Iowa DCI lab. Using highly specialized equipment and expertise, analysts at the lab extracted Defendant's DNA from the straw and developed a DNA profile. Consistent with *Skinner* and its progeny, the extraction and development of Defendant's DNA profile constitutes a search under the Fourth Amendment, distinct from the officers' collection of the straw.

E. Defendant had a reasonable expectation of privacy in his DNA profile.

It is difficult to conceive of information more personal than the genetic code that contributes so much to our very being. DNA can identify our ancestry, relatives, and parentage.[2] DNA can be used to determine whether we have certain diseases or are

[2] Elaine Y. Y. Cheung, et al., *Predictive DNA analysis for biogeographical ancestry*, Australian Journal of Forensic Sciences, 50:6, 651–658 (Jan. 2018).

susceptible to cancers or mental disorders.[3] DNA is even thought to be predictive of whether a person is likely to exhibit certain personality traits or engage in particular behaviors.[4]

Given the "deeply revealing nature" of our genetic makeup, Defendant had a reasonable expectation of privacy in his DNA profile. *Carpenter*, 138 S.Ct. at 2223. The Fourth Amendment protects Defendant's "privacy interest in preventing the government from obtaining the vast array of data that can be ascertained through an analysis of [his] DNA." *In re Shabazz*, 200 F.Supp.2d 578, 583 (D.S.C. 2002). "DNA genetic pattern analysis catalogs uniquely private genetic facts about the individual that should be subject to rigorous confidentiality requirements even broader than the protection of an individual's medical records." *Rise v. State of Or.*, 59 F.3d 1556, 1569 (9th Cir. 1995) (Nelson, J. dissenting), overruled on other grounds as recognized by *Crowe v.*

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[3] Stylianos E. Antonarakis, *Diagnosis of Genetic Disorders at the DNA Level*, New England Journal of Medicine, 320(3): 153–63 (Jan. 19, 1989).

[4] S. Shifman, et al., *A whole genome association study of neuroticism using DNA pooling*, Molecular Psychiatry 13, 302–312 (2008).

County of San Diego, 608 F.3d 406 (9th Cir. 2010). That society views this expectation as reasonable is demonstrated by legislation granting genetic information the same level of protection as protected health information under the Health Insurance Portability and Accountability Act of 1996. 42 U.S.C. § 1320d–9(a)(1). Similarly, more than 30 states have enacted measures providing some level of privacy for genetic information. Natalie Ram, *Genetic Privacy After Carpenter*, 105 Va. L. Rev. 1357, 1382 (2019).

Defendant's status at the time the analysis was performed is material to the reasonableness of his expectation of privacy in his DNA. Courts who have upheld the constitutionality of DNA collection statutes have emphasized that incarcerated individuals, convicted felons, and parolees have a diminished expectation of privacy. E.g., *United States v. Kraklio*, 451 F.3d 922, 924–25 (8th Cir. 2006) (holding that the DNA Analysis Backlog Elimination Act of 2000 was constitutional as applied to a probationer due in part to "probationers' diminished privacy rights"); *United States v. Mitchell*, 652 F.3d 387, 415–16 (3rd Cir. 2011) (upholding the

constitutionality of a federal statute authorizing the collection of a DNA sample from pretrial detainees based on the detainees' diminished privacy interest in their identity). At the same time, courts have been quick to draw a distinction between the privacy rights of those who have been lawfully arrested and/or adjudicated guilty of a crime and those who, like Defendant at the time his DNA was covertly searched, have not:

> We also wish to emphasize the limited nature of our holding. With its alarmist tone and obligatory reference to George Orwell's *1984*, Judge Reinhardt's dissent repeatedly asserts that our decision renders every person in America subject to DNA sampling…Nothing could be further from the truth—and we respectfully suggest that our dissenting colleague ought to recognize the obvious and significant distinction between the DNA profiling of law-abiding citizens who are passing through some transient status (e.g., newborns, students, passengers in a car or on a plane) and lawfully adjudicated criminals whose proven conduct substantially heightens the government's interest in monitoring them and quite properly carries lasting consequences that simply do not attach from the simple fact of having been born, or going to public school, or riding in a car.

United States v. Kincade, 379 F.3d 813, 835–36 (9th Cir. 2004) (O'Scannlain, J., plurality opinion).

Like the "law-abiding citizen" "passing through some transient status," Defendant—a patron at a restaurant—retained a reasonable expectation of privacy in his DNA profile at the time police collected the straw and sent it to the DCI crime lab. "Information about one's body and state of health is a matter which the individual is ordinarily entitled to retain within the private enclave where he may lead a private life." *Bloch v. Ribar*, 156 F.3d 673, 685 (6th Cir. 1998) (quoting *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 577 (3rd Cir. 1980)). As a law-abiding citizen, Defendant never surrendered his reasonable expectation of privacy in his DNA profile; on the contrary, when police approached him on December 19, 2018, and asked him if he would give a sample of his DNA, Defendant refused. (1/16/10 Tr. pp. 21–22, ln. 21–10).

Because the analysis of Defendant's DNA qualified as a search for purposes of the Fourth Amendment—and provided further that Defendant retained a reasonable expectation of privacy in his DNA—law enforcement was constitutionally required to obtain a warrant before analyzing Defendant's DNA absent an applicable exception. *Riley v. California*, 573 U.S. 373, 382 (2014)

(citing *Kentucky v. King*, 563 U.S. 452, 460 (2011)) ("In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement.")

F. The warrantless extraction and analysis of Defendant's DNA was unreasonable.

The text of the Fourth Amendment requires (1) that all searches and seizures be reasonable, and (2) a warrant may not issue unless probable cause is properly established, and the scope of the authorized search is set out with particularity. *Payton v. New York*, 445 U.S. 573, 584 (1980). In most instances a warrant must be secured for a search to be lawful. *King*, 563 U.S. at 459. However, because the ultimate touchstone of the Fourth Amendment is "reasonableness," the warrant requirement is subject to certain reasonable exceptions. *Id.* (citing *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)). "[B]ecause each exception to the warrant requirement invariably impinges to some extent on the protective purpose of the Fourth Amendment, the few situations in which a search may be conducted in the absence of a warrant have been carefully delineated and the burden is on those seeking the

exemption to show the need for it." *Acevedo*, 500 U.S. at 589 n.5 (1991) (citations omitted) (internal quotation marks omitted).

Police did not obtain a warrant before surreptitiously obtaining Defendant's DNA and subjecting it to chemical analysis. Absent a warrant, the search was presumptively unreasonable. No exceptions to the warrant requirement applied. The search was unconstitutional, and the results of the search and fruits therefrom should have been suppressed. E.g., *Wong Sun v. United States*, 371 U.S. 471, 484–85 (1963).

G. The trial court erred in holding that Defendant relinquished his expectation of privacy in his DNA by leaving his straw at the restaurant.

The trial court held that Defendant relinquished his right to privacy in his DNA by abandoning his drinking straw at the restaurant. Citing *California v. Greenwood*, 486 U.S. 35 (1988), the court compared Defendant's DNA to garbage left for collection between a home and public road. (Ruling on Motion to Suppress Evidence; App. pp. 115–17). The trial court's rationale is flawed, and its holding is erroneous, for several reasons.

1. *Greenwood* is inapplicable because it involves a search of garbage, not chemical analysis of DNA.

In *Greenwood*, the Supreme Court held that the Fourth Amendment does not apply to garbage left outside the curtilage of a private residence. *Greenwood*, 486 U.S. at 37. In reaching its conclusion, the Court noted it is "common knowledge" that plastic bags left on the side of a public street are "readily accessible to animals, children, scavengers, snoops, and other members of the public." *Id.* at 40. Relatedly, the Court pointed out that police "cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public." *Id.* at 41. The Court determined that the defendants therefore had no reasonable expectation of privacy in the items they had so discarded. *Id.*

The trial court's reliance on *Greenwood* is a nonstarter. By leaving his drinking straw at the restaurant, Defendant did not make his DNA "readily accessible" to members of the public. For example, it is not as though the waiter at the restaurant could see Defendant's DNA profile by examining it after Defendant left the restaurant. On the contrary, police were only able to obtain

Defendant's DNA profile by sending the straw to a lab which used specialized equipment to extract, analyze, and ultimately determine his DNA profile. And even then, the results of the analysis could only be interpreted by individuals with the technical expertise to do so. By leaving his straw at the restaurant, Defendant did not expose his DNA to the public in the manner contemplated by *Greenwood*.

The application of *Greenwood* to this situation is inconsistent with other Supreme Court precedent. As noted above, the chemical analysis of Defendant's DNA is a search separate and apart from the seizure of the straw. *Skinner*, 489 U.S. at 616–17. Even if police lawfully obtained the straw, that does not mean that their search of Defendant's DNA comported with the Fourth Amendment. *Walter v. United States*, 447 U.S. 649, 654 (1980) ("The fact that FBI agents were lawfully in possession of the boxes of film did not give them authority to search their contents.") Assuming for the sake of argument that Defendant forfeited a reasonable expectation of privacy in the straw, the trial court's ruling is bereft of analysis supporting the conclusion that he also thereby forfeited a

reasonable expectation of privacy in his DNA under the Fourth Amendment.

2. Abandonment does not apply to unavoidably shed DNA.

Everywhere we go we leave a trail of DNA behind us. A person's DNA can be extracted from their blood, saliva, mucus, sweat, semen, or hair. DNA is also found in skin cells, which a person leaves behind whenever they touch an object. In fact, the average person sheds about two million skin cells per minute. (2/20/20 Tr. p. 25, ln. 15–23). Moreover, DNA can easily transfer from one object to another. (2/17/20 Tr. pp. 199–01, ln. 24–7; 2/20/20 Tr. pp. 17–18, ln. 24–24; p. 25, ln. 11–14)

Against this backdrop, to hold that Defendant abandoned his expectation of privacy in his DNA simply by going about his day is intellectually dishonest. Abandonment connotes a denial of ownership and physical relinquishment of property. *United States v. Camberos-Villapuda*, 832 F.3d 948, 951–52 (8th Cir. 2016). Defendant never disavowed ownership of his DNA profile. Nor did he voluntarily relinquish the cells which were chemically analyzed and from which his profile was eventually derived. In fact,

Defendant credibly testified that he did not realize he was leaving cells behind from which his DNA profile could be obtained. (1/24/20 Tr. pp. 140–41, ln. 21–4).

Although people have shed DNA for as long as they have walked the earth, the technology to extract and generate a DNA profile is of relatively recent vintage. Michael Peterson—a retired criminalist with the DCI lab called by the State—testified that the DCI lab did not begin to utilize DNA until the late 1980s, and even then, the available techniques did not provide the ability to discriminate between individuals. Over the years, as newer testing methods developed and the sensitivity of the tests increased, the lab could develop profiles from a wider variety of sources and smaller amounts of genetic material. (2/14/20 Tr. pp. 8–10, ln. 7–1; 2/17/20 Tr. p. 152, ln. 17–23).

Law enforcement's increased ability to detect what was once undetectable through evolving technology does not, however, trump the Fourth Amendment. Just as the government cannot use thermal imaging to obtain information about the relative amounts of heat emanating from inside a person's home, it also cannot use

the "sense-enhancing technology" of PCR to extract and obtain a person's DNA profile. *Kyllo*, 533 U.S. at 35. To hold otherwise would put every citizen "at the mercy of advancing technology[.]"[5] *Id.* Indeed, if a warrant is not required in this situation, then police will be able to obtain any person's DNA they wish simply by surveilling the person and collecting anything that person has handled and left behind.

3. This Court should follow the rationale of *United States v. Davis* and hold that the warrantless extraction and analysis of Defendant's DNA violated the Fourth Amendment.

The Fourth Circuit correctly applied Supreme Court precedent in an analogous situation by holding that the warrantless extraction of DNA violated the Fourth Amendment. In *Davis*, the defendant was convicted of armed robbery and murder which

[5] The comparison between this situation and the facts in *Kyllo* is especially apt. Just as every home emanates heat, every person sheds DNA. A thermal imager and the chemical analysis of DNA make visible what is invisible to the naked eye. Most importantly, advancements in technology—a thermal imager on one hand and PCR technology on the other—enable law enforcement to access private information without physical intrusion which would otherwise historically have required a warrant, *i.e.*, a search warrant for the home as to the former, and a search warrant to draw blood as to the latter.

occurred in 2004. *Davis*, 690 F.3d at 229. Police connected the defendant to the scene by uploading a profile recovered from a ballcap and weapon used by the shooter to a local DNA database. *Id.* The profile hit on the defendant. *Id.*

Prior to trial, the defendant moved to suppress the DNA evidence on the basis that the warrantless extraction and chemical analysis of his DNA violated the Fourth Amendment. *Id.* at 232. The police obtained his DNA through events that occurred almost four years prior to the shooting with which the defendant was charged. *Id.* at 230. In 2000, the defendant went to the hospital for a gunshot wound and told staff he was the victim of a robbery. *Id.* Police responded to the hospital to investigate and recovered clothing that hospital personnel had removed from the defendant. *Id.* In June of 2001, police suspected the defendant of having committed another murder. *Id.* at 231. The police—without a warrant—submitted the defendant's clothing to a lab for DNA analysis. *Id.* The defendant's profile did not match the profile obtained in connection with the 2001 murder. *Id.* Police entered the defendant's profile into the local DNA database, where it

remained until the hit that resulted in the defendant's arrest for the 2004 murder. *Id.*

In addressing the Fourth Amendment issue, the Fourth Circuit first held that the search and seizure of the defendant's bloody clothing in 2000 was lawful. *Id.* at 233–38. However, the court noted that the analysis of bodily fluids can reveal "physiologic data" and "private medical facts" such that the analysis intrudes upon expectations of privacy that society has long recognized as reasonable. *Id.* at 243 (citing *Skinner*, 489 U.S. at 616–17). The court further determined that "the extraction of DNA and the creation of a DNA profile result[ed] in a sufficiently separate invasion of privacy that such acts must be considered a separate search under the Fourth Amendment even when there is no issue concerning the collection of the DNA sample." *Id.* at 246.

The court then assessed the reasonableness of the search, which "is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Id.* at 247. In considering the totality of

the circumstances, the court acknowledged that the defendant's expectation of privacy diminished to some degree because he knew that police retained his clothing yet had taken no action to retrieve it. *Id.* at 248. However, the court also noted that the DNA search was conducted when the defendant was a free citizen and had never been convicted of a felony. *Id.* at 249. In balancing the government's interest in apprehending and prosecuting violent offenders with the defendant's privacy rights, the court stated:

> [W]e are guided by the weighty reasons underlying the warrant requirement: to allow a detached judicial officer to decide "[w]hen the right of privacy must reasonably yield to the right of search," and not "a policeman or Government enforcement agent." The right protected is "a right of personal security against arbitrary intrusions by official power." The importance of the judge or magistrate in the process is why the exceptions to the warrant requirement are "jealously and carefully drawn."
>
> The potential for arbitrary intrusions of one's privacy from warrantless searches in cases involving felons, parolees, or arrestees is mitigated by the fact that officials are required to collect from everyone in that certain group of persons.
>
> In this case, by contrast, [the defendant's] DNA was specifically sought as a result of police suspicions that he was involved in the Neal murder, and based on some quantum of proof

> amounting to less than probable cause. . . Thus, the precise concern that the warrant requirement was designed to alleviate is plainly before us here. That fact alone severely diminishes the reasonableness of the search.

Id. at 249–50 (internal citations omitted). The court therefore held that the warrantless extraction and analysis of the defendant's DNA was unreasonable and violated the Fourth Amendment.

The same analysis applies in this case. Even if police lawfully obtained the straw, Defendant retained a reasonable expectation of privacy in his DNA and his DNA profile. Defendant's expectation of privacy was not overcome by law enforcement's need to apprehend the individual it believes perpetrated the victim's murder. Moreover, that police sought Defendant's DNA without *any* evidence connecting Defendant to the victim, the scene, or her murder, *i.e.*, without any amount of proof nearing probable cause, "severely diminishes the reasonableness of the search." The warrantless extraction and analysis of Defendant's DNA violated the Fourth Amendment, and the trial court therefore erred in denying Defendant's motion to suppress.

H. The results and fruits of the warrantless search should have been suppressed.

Evidence obtained through an unconstitutional search or seizure must be suppressed as well as any evidence later discovered to be an illegal "fruit of the poisonous tree." *Segura v. United States*, 468 U.S. 796, 804 (1984) (citing *Wong Sun*, 371 U.S. at 484). "Any evidence secured through an unreasonable, hence illegal, search and seizure may not be used in a federal prosecution, nor may the fruit of such tainted evidence be admitted against the defendant whose privacy rights were originally violated." *United States v. Conner*, 948 F. Supp. 821, 829 (N.D. Iowa 1996) (citing *Weeks v. United States*, 232 U.S. 383 (1914)); *Wong Sun*, 371 U.S. at 484–88. Evidence is fruit of the poisonous tree if the illegal search is a but-for cause of obtaining the evidence. E.g., *United States v. Riesselman*, 646 F.3d 1072, 1079 (8th Cir. 2011).

Here, because the extraction and analysis of Defendant's DNA violated the Fourth Amendment, the results of the search, *i.e.*, Defendant's DNA profile and its consistency with the suspect profile from the scene, should have been suppressed. The results of the warrantless search served as the basis for the warrant to obtain

a buccal swab from Defendant, which in turn yielded Defendant's DNA profile. (12/17/18 Search Warrant; App. pp. 121–30). The analysis of Defendant's buccal swab should therefore have been suppressed as fruit of the poisonous tree. Moreover, police exploited the results of the illegal search to question Defendant. Defendant's statements should therefore have also been suppressed. *Oregon v. Elstad*, 470 U.S. 298, 333–34 (1985).

I. The Fourth Amendment violation was not harmless, and reversal is therefore required.

Violations of the Fourth Amendment are subject to the harmless error doctrine. *Chambers v. Maroney*, 399 U.S. 42, 52–53 (1970). The State bears the burden of showing that the improperly admitted evidence was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967).

There was no evidence of Defendant's involvement in the victim's murder absent the evidence obtained in violation of the Fourth Amendment. No other evidence connected Defendant to the scene, the victim, or her murder. The improper admission of the evidence therefore requires reversal. *Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560, 569 n.13 (1971) (rejecting

assertion of harmless error where the improperly admitted evidence was "damning," and no other evidence placed the defendant at the scene of the crime).

II. The trial court erred in denying Defendant's motion to suppress where the warrantless extraction of Defendant's DNA profile violated his rights under the Article I, Section 8 of the Iowa Constitution.

A. Preservation of Error and Standard of Review

The adverse ruling on Defendant's motion to suppress preserves error for this Court's review. *Lovig*, 675 N.W.2d at 562. This Court reviews the denial of a motion to suppress based upon the deprivation of a constitutional right de novo. *Storm*, 898 N.W.2d at 144.

B. The Iowa Constitution provides greater protection of individual privacy than the Fourth Amendment.

Article I, section 8 of the Iowa Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized.

Iowa Const. art. I, § 8. As noted by Justice Appel, "This provision of the Iowa Constitution is perhaps the most important provision of our Bill of Rights protecting Iowans from an authoritarian state." *Westra v. Iowa Dept. of Transp.*, 929 N.W.2d 754, 767 (Iowa 2019) (Appel, J. dissenting). Article I, section 8 ensures that "government power is exercised in a carefully limited manner." *State v. Coleman*, 890 N.W.2d 284, 299 (Iowa 2017). In particular, "the warrant requirement . . . is one of the bulwarks of individual liberties in Iowa." *Westra*, 888 N.W.2d at 417 (Appel, J. dissenting).

Given the importance of article I, section 8 to preserving individual liberty in this state, this Court has refused to apply federal precedent eroding the protections of the Fourth Amendment under the guise of "reasonableness" to its Iowa counterpart. In particular, this Court has zealously guarded the warrant-preference requirement when assessing the legality of a search. *State v. Ochoa*, 792 N.W.2d 260, 285 (Iowa 2010). Under the Iowa Constitution, a warrantless search that does not fall squarely within one of the "jealously and carefully drawn exceptions" is unreasonable. *State v. Strong*, 493 N.W.2d 834, 836 (Iowa 1992).

Moreover, there is no good-faith exception to the exclusionary rule applicable to warrantless searches under article I, section 8. *State v. Cline*, 617 N.W.2d 277, 292–93 (Iowa 2000), *abrogated on other grounds by State v. Turner*, 630 N.W.2d 601, 606 n.2 (Iowa 2001).

In keeping with an approach that emphasizes "robust protection of individual rights under the Iowa Constitution," this Court has been more reticent to find diminished expectations of privacy—and has more narrowly tailored exceptions to the warrant requirement—than have federal courts in analyzing the Fourth Amendment. *State v. Brown*, 905 N.W.2d 846, 856 (Iowa 2018). For example, this Court has: refused to apply the search-incident-to-arrest exception to justify a warrantless breath test to determine BAC (*State v. Pettijohn*, 899 N.W.2d 1 (Iowa 2017)); rejected the notion that a parolee suffers from a diminution of constitutional protections from warrantless search and seizures based solely on his status as a parolee (*State v. Short*, 851 N.W.2d 474 (Iowa 2014)); and held that when an individual is not named in a premises search warrant as a party for whom there is probable cause to search, the

search of that individual or his possessions is unlawful (*Brown*, 905 N.W.2d at 851–56).

C. Law enforcement's warrantless seizure of Defendant's DNA constitutes an illegal trespass in violation of article I, section 8.

1. Law enforcement violates article I, section 8 when it commits a trespass.

This Court recently addressed whether article I, section 8 requires an officer to obtain a warrant based on probable cause before seizing opaque garbage bags located in an alley behind the defendant's residence and searching them at the station. *State v. Wright*, 961 N.W.2d 396, 400–02 (2021). The Court identified two constitutional bases for challenging such a search under article I, section 8. *Id.* at 411–420. One, a search of the defendant's garbage is constitutionally proscribed if it amounts to a trespass under a common law understanding of search and seizure law. *Id.* Two, the search is unconstitutional if it violates the defendant's reasonable expectation of privacy under the expectation-of-privacy rubric of search and seizure precedent. *Id.*

In *Wright*, this Court addressed whether the officer's search of the defendant's garbage constituted a warrantless trespass. The

Court rejected the notion that an expectation of privacy is relevant to whether a search or seizure has occurred. *Id.* at 414. Rather, it held that the officer seized the garbage "under any fair and ordinary definition of the term" when he removed the garbage from the defendant's bins and transported it back to the station. *Id.* at 413. (citing *Torres v. Madrid*, 141 S. Ct. 989, 995 (2021)). Likewise, the officer performed a search when he rummaged through the garbage bags at the station "with a view to the discovery of contraband or illicit or stolen property, or some evidence of guilt to be used in the prosecution of a criminal action[.]" *Id.* (quoting Henry Campbell Black, *A Dictionary of Law* 1069 (1st ed. 1891)).

The crux of the issue was whether the property belonged to the defendant at the time it was seized and searched. *Id.* at 415. The State argued that the defendant abandoned his garbage, and, for that reason, it did not constitute the defendant's "papers and effects" under the constitution. *Id.*

In addressing the State's abandonment argument, this Court first noted that abandonment is shown by proof that the owner intends to abandon the property and has voluntarily relinquished

all right, title, and interest in it. *Id.* (quoting *Benjamin v. Lindner Aviation, Inc.*, 534 N.W.2d 400, 406 (Iowa 1995)). However, abandonment requires a relinquishment of ownership interest without regard for who becomes the next owner such that the item in question can be considered "unowned" and available for the taking by the finder. *Id.* (quoting Tanner M. Russo, Note, *Garbage Pulls Under the Physical Trespass Test*, 105 Va. L. Rev. 1217, 1246–47 (2019)). Clear Lake—the municipality in which the search occurred—restricted by ordinance the manner in which residents may lawfully dispose of waste. *Id.* at 400, 415. Specifically, city ordinance made it "unlawful for any person to . . . [t]ake or collect any solid waste which has been placed out for collection on any premises, unless such person is an authorized solid waste collector." *Id.* (citation omitted). Based on the ordinance, this Court concluded that the defendant did not abandon all right, title, and interest in his garbage by placing it in the alley; rather, by moving his trash to the alley for collection, the defendant agreed only to convey it to a licensed collector. *Id.*

Finally, this Court held that the officer's conduct constituted a trespass rendering the search unconstitutional under article I, section 8. *Id.* at 415–17. Specifically, by violating the local ordinance as to public trash collection and disposal, the officer committed an act that was "unlawful, tortious, or otherwise prohibited." *Id.* at 416. That the garbage was seized by an officer rather than a private citizen was of no import: "The mere fact that a man is an officer, whether of high or low degree, gives him no more right than is possessed by the ordinary private citizen to. . . search for the evidences of crime, without a legal warrant procured for that purpose." *Id.* at 417 (quoting *McClurg v. Brenton*, 98 N.W. 881, 882 (Iowa 1904)).

2. Law enforcement committed an unlawful trespass by searching Defendant's DNA without a warrant.

The Iowa legislature has conferred upon Iowa citizens a right to privacy in their DNA profile. Iowa Code §729.6(3) provides, in relevant part:

> a. A person shall not obtain genetic information or samples for genetic testing from an individual without first obtaining informed and written consent from the individual or the individual's authorized representative.

> b. A person shall not perform genetic testing of an individual or collect, retain, transmit, or use genetic information without the informed and written consent of the individual or the individual's authorized representative.

Iowa Code §729.6(3)(a) and (b). The Iowa Code provides that "genetic testing" has the same definition as provided by 29 U.S.C. §1191b(d)(7). Iowa Code §729.6(2)(e) The United States Code defines "genetic test" as "an analysis of human DNA, RNA, chromosomes, proteins, or metabolites, that detects genotypes, mutations, or chromosomal changes." 29 U.S.C. §1191b(d)(7). The Iowa Code further provides that §729.6(3) may be enforced through a civil action for affirmative relief or injunction. Iowa Code §729.6(8)(a) and (b).

Iowa Code §729.6 provides Iowa citizens with an exclusive possessory interest in their "genetic information." The statute prohibits another person from obtaining samples for genetic testing from an individual and/or performing genetic testing of an individual without that individual's informed consent. "One of the main rights attaching to property is the right to exclude others, ..., and one who owns or lawfully possesses or controls property will in

all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." *State v. Baker*, 441 N.W.2d 388, 390 (Iowa Ct. App. 1989) (alteration in original) (quoting *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978)).

By "rummaging" through Defendant's DNA "with a view to the discovery … [of] some evidence of guilt to be used in the prosecution of a criminal action," law enforcement performed a search of Defendant's "property" within the meaning of article I, section 8. *Wright*, 961 N.W.2d at 413. Moreover, law enforcement violated the statute by obtaining a genetic sample from Defendant and performing genetic testing of him without his informed written consent. Iowa Code §729.6(3). Law enforcement therefore trespassed upon Defendant's person and/or effects by engaging in means and methods of criminal investigation that were "unlawful, tortious, or otherwise prohibited." Article I, section 8 precludes such an unlawful trespass, and the trial court should have granted Defendant's motion to suppress on that basis.

Additionally, Defendant did not abandon his DNA by leaving his straw behind at the restaurant. Abandonment requires proof

that the owner of the property (1) *intends* to abandon the property and (2) has *voluntarily* relinquished *all* right, title, and interest in it. *Wright*, 961 N.W.2d at 415. There is no evidence that Defendant knew he left behind a sample of his genetic material on the straw from which his DNA profile could be obtained and, therefore, the State failed to show that he intended to abandon it. More importantly, by leaving his DNA behind, Defendant did not relinquish all his interest in it; on the contrary, Iowa Code §729.6(3) provides that an individual does not relinquish his interest in his genetic information or genetic samples unless he gives informed written consent. Defendant did not give police informed written consent to obtain a sample of his DNA or test it and, therefore, abandonment does not apply.

Defendant feels obliged to address an exception to the informed consent requirements for genetic sampling and testing set forth in Iowa Code §729.6(3)(a) and (b) which states as follows: "To identify an individual in the course of a criminal investigation by a law enforcement agency." Iowa Code §729.6(3)(c)(2).

Considering the rules of construction, the only reasonable interpretation of the foregoing exception is it makes clear that an individual cannot invoke §729.6(3)(a) and (b) in refusing to provide a genetic sample to law enforcement in possession of a valid warrant. Not only is such an interpretation consistent with the plain meaning of the statute, but a contrary interpretation, *i.e.*, that the statute prohibits all citizens *except* law enforcement from obtaining genetic samples and performing genetic testing of an individual without the individual's consent and without reference to probable cause, would render the statute unconstitutional under article I, section 8. *Wright*, 961 N.W.2d at 417 (quoting *Carpenter*, 138 S. Ct. at 2270) (noting that the legislature could not "pass laws declaring your house or papers to be your property except to the extent the police wish to search them without cause."). Given that a statute, if fairly possible, is to be construed to avoid doubt as to its constitutionality, the exception articulated in §729.6(3)(c)(2) cannot be viewed as providing a gateway for law enforcement to trespass upon a citizen's proprietary right to his or her genotype.

D. In the alternative, Defendant had a legitimate, constitutionally protected expectation of privacy in his DNA profile that law enforcement violated when it searched his DNA.

1. Defendant had a reasonable expectation of privacy in his DNA which he did not abandon by leaving his straw at the restaurant.

Under the expectation-of-privacy framework, this Court employs a two-step approach to determine whether there has been a violation of article I, section 8 of the Iowa Constitution. *State v. Fleming*, 790 N.W.2d 560, 564 (Iowa 2010). The first step requires the defendant to show a legitimate expectation of privacy in the area searched. *Id.* Whether a person has a legitimate expectation of privacy with respect to a certain area is made on a case-by-case basis considering the unique facts of the situation. *Id.* (citing *State v. Breuer*, 577 N.W.2d 41, 46 (Iowa 1998)). To be constitutionally protected, the expectation of privacy must be one that society recognizes as reasonable. *Id.* (citing *Breuer*, 577 N.W.2d at 46). This determination is made "by examining property laws as well as society's generally recognized and permitted expectations about privacy." *Id.* (citing *Breuer*, 577 N.W.2d at 46).

For the reasons stated in Argument I(E) above, Defendant had a legitimate expectation of privacy in his DNA profile. Moreover, the reasonableness of Defendant's expectation of privacy in his DNA is bolstered by the statute that protects the privacy of an individual's genotype as set forth in Argument II(C)(2). Given that Iowa Code §729.6 generally prohibits a person from obtaining genetic samples for genetic testing and/or performing genetic testing without informed written consent, it would be anomalous to hold that Defendant did not have a reasonable expectation of privacy in his DNA. Not only does §729.6 foster an expectation of privacy in an individual's genotype, it also tacitly recognizes that expectation as one society views as reasonable.

The trial court's novel application of the abandonment doctrine to Defendant's DNA should be rejected by this Court. First, application of the abandonment doctrine is not supported by any controlling legal authority. The only time this Court has invoked the abandonment doctrine, the at-issue expectation of privacy related to a tangible object. *State v. Bumpus*, 459 N.W.2d 619, 625 (Iowa 1990) (defendant abandoned expectation of privacy

in pouch he threw over a fence). For the reasons stated in Argument I(G) above, the notion that one surrenders any reasonable expectation of privacy in their DNA by touching an object in public is inconsistent with the rationale underpinning the concept of abandonment.

Second, the trial court's application of the abandonment doctrine does not comport with Iowa Code §729.6. The code provides that a person "shall not obtain genetic information or samples for genetic testing without first obtaining informed and written consent from the individual[.]" Iowa Code §729.6(3)(a). The surreptitious collection of an individual's cells from an item the individual has handled and left behind would violate the plain meaning of the statute. To hold otherwise would nullify the privacy over genetic information the statute is clearly intended to provide. Defendant therefore did not abandon his reasonable expectation of privacy in his DNA simply by leaving the straw behind.

Relatedly, the trial court's application of the abandonment doctrine to Defendant's DNA profile does not square with this Court's precedent in consent cases. Like abandonment, consent—

in this context—involves the relinquishment of a constitutional right to privacy. *Schneckloth v. Bustamonte*, 412 U.S. 218, 284 (1973) (Marshall, J. dissenting). When consent is used to support a search, the consent must be real and not a pretext for unjustified police intrusion into areas of privacy protected by the constitution. *State v. Baldon*, 829 N.W.2d 785, 792 (Iowa 2013) (citing *Schneckloth*, 412 U.S. at 228). Thus, the focus is on whether the consent was given voluntarily. *Id.* Article I, section 8 does "not allow the government to avoid an important constitutional check on its power by using an unfair play on human nature." *Id.* at 802.

The limitations imposed by this Court on the application of consent to searches under article I, section 8 is equally applicable to the surreptitious and warrantless collection of unavoidably shed DNA. Shedding DNA, or leaving a trail of DNA wherever you go, is not a volitional act. To hold otherwise would simply be pretext for unjustified police intrusion into areas of privacy protected by the constitution.

Finally, the trial court's application of the abandonment doctrine as articulated in *Greenwood* is inconsistent with this

Court's decision in *Wright*. In *Wright*, this Court departed from *Greenwood* and held that, despite leaving his garbage on a public way, the defendant retained "an expectation based on a positive law that his privacy, as a factual matter, would be lost, if at all, only in a certain, limited way. Specifically, [the defendant] had an expectation based on positive law that his garbage bags would be accessed only by a licensed collector under contract with the city." *Wright*, 2021 WL 2483567, at *17. Similarly, despite leaving his straw at the restaurant, Defendant here had an expectation based on positive law, *i.e.*, Iowa Code §729.6(3)(a) and (b), that his DNA would remain private unless and until he gave informed written consent for someone to collect and test it.

2. The State unreasonably invaded Defendant's protected privacy interest in his DNA.

The second step in the two-step approach in analyzing a claim under article I, section 8 is whether the State unreasonably invaded a protected privacy interest. *State v. Legg*, 633 N.W.2d 763, 767 (Iowa 2001). A warrantless search is per se unreasonable unless the State proves by a preponderance of the evidence that an exception to the warrant requirement applies. *State v. Crawford*,

659 N.W.2d 537, 541 (Iowa 2003). In the proceedings below, the State did not attempt to establish an exception to the warrant requirement. Rather, the State argued that a warrant was not required because Defendant abandoned his expectation of privacy in his DNA. (Brief in Support of State's Resistance to Motion to Suppress; App. pp. 45–47). This Court should therefore hold that a warrant was required before police collected and searched Defendant's DNA, and the warrantless search of Defendant's DNA was unreasonable.

E. The unlawful search of Defendant's DNA requires reversal.

"An unlawful search taints all evidence obtained in the search or through leads uncovered by that search and bars its subsequent use." *State v. Ahart*, 324 N.W.2d 317, 318 (Iowa 1982). Although there are exceptions to the exclusionary rule, none apply here. E.g., *State v. McGrane*, 733 N.W.2d 671, 680–82 (Iowa 2007). Specifically, the results of the unlawful search of Defendant's DNA served as the basis for the warrant to obtain his buccal swab, which was used to confirm the results of the prior warrantless search. Given that the State's case hinged on the DNA results, suppression

of the DNA evidence requires reversal of Defendant's conviction. E.g., *Fleming*, 790 N.W.2d at 568–69.

III. The trial court's refusal to instruct the jury on the law related to Michael Allison's motive to testify against Defendant constitutes a prejudicial abuse of discretion.

A. Preservation of Error

A timely and specific objection to the court's failure to fully instruct the jury on the law applicable to the issues which the jury must decide is sufficient to preserve error. *State v. Templeton*, 258 N.W.2d 380, 382 (Iowa 1977) (citation omitted). When the issue is not integral to the case or when an instruction on an integral issue is correct as proposed but not as explicit as a party desires the party must request an additional instruction before the jury is charged. *Id.* (citation omitted).

This issue is preserved for this Court's review because Defendant requested the at-issue additional instruction before the jury was charged and the trial court rejected the instruction. (2/21/20 Tr. pp. 83–86, ln. 16–23; App. pp. 158–61).

B. Standard of Review

This Court reviews the refusal to give a cautionary jury instruction for abuse of discretion. *State v. Williams*, 929 N.W.2d 621, 628 (Iowa 2014) (citing *State v. Plain*, 898 N.W.2d 801, 822 (Iowa 2017)). An abuse of discretion occurs where the district court's decision rested on grounds or reasoning that were clearly untenable or clearly unreasonable. *Id.* at 629.

C. The trail court's failure to instruct the jury on the law related to Allison's potential plea agreement constitutes an abuse of discretion.

A trial court must instruct the jury on all issues important to the jury's consideration of the case. *State v. Hall*, 235 N.W.2d 702, 725 (Iowa 1975). Trial courts are not bound by the jury instructions promulgated by the Iowa State Bar Association, or the instructions approved of by this Court. *State v. Holtz*, 548 N.w.2d 462, 164 (Iowa Ct. App. 1996); *State v. Williams*, 929 N.W. 2d 621, 642 (Iowa 2019), reh'g denied (July 15, 2019). A court should give a proffered instruction where it is a correct statement of the law, it is applicable to the circumstances of the case, and it is not stated elsewhere in the instructions. *State v. Winters*, No. 10-1665, 2011 WL 5387293,

at *4 (Iowa Ct. App. Nov. 9, 2011) (citing *Herbst v. State*, 616 N.W.2d 582, 585 (Iowa 2000)).

1. Defendant's proposed instruction was a correct statement of the law.

Michael Allison was facing significant federal charges for drug trafficking at the time he testified against Defendant. (2/18/20 Tr. pp. 132–33, ln. 23–24). Defendant proposed an instruction that would have informed the jury that Allison could receive a lesser sentence, including a sentence below the mandatory minimum, in exchange for his testimony against Defendant. (Deft. Proposed Inst. 17; App. pp. 152–53; 2/21/20 Tr. . 84–85, ln. 2–3; App. pp. 159–60).

Defendant's proposed instruction correctly stated the law. Pursuant to 21 U.S.C. § 841(b)(1)(A)(viii), Allison faced a mandatory minimum sentence of 15 years and a maximum sentence of life imprisonment if convicted on Count I of the indictment. Defendant's proposed instruction therefore appropriately described Allison's exposure to a prison sentence with a mandatory minimum. The proposed instruction also would have informed the jury that, consistent with federal law, the prosecution

in Allison's case could file a motion asking that Allison be sentenced below the mandatory minimum. 18 U.S.C. §3553(e); U.S.S.G. § 5k1.1. Finally, Defendant's proposed instruction accurately explained that the judge sentencing Allison would have no power to sentence Allison below the statutory minimum for providing substantial assistance against Defendant unless the government filed such a motion. *Wade v. United States*, 504 U.S. 181, 185 (1992).

2. Defendant's proposed instruction was applicable to the circumstances of Allison's testimony.

Allison initially signed a plea agreement on November 21, 2019, before he approached police with information about Defendant. (Deft. Exh. H1, p. 15; 2/18/20 Tr. pp. 150–51, ln. 24–2). Allison testified that he subsequently told his attorney that he had information about Defendant, and he alluded to wanting to speak with the United States Attorney. (2/18/20 Tr. p. 148, ln. 13–25). Allison's attorney informed him that it would be in Allison's best interests to "pull" his plea deal and renegotiate. (2/18/20 Tr. pp. 147–48, ln. 4–9). Allison "pulled" the deal on January 15, 2020, before he met with law enforcement to give them information about

Defendant. (2/18/20 Tr. p. 147, ln. 13–16; p. 148, ln. 13–17; pp. 150–51, ln. 24–2). Per Allison, he anticipated that the potential sentencing range on his new deal would decrease from "15 to life" to "zero to 20." (2/18/20 Tr. p. 148, ln. 5–9). Allison was still waiting on his new deal at the time he testified against Defendant. (2/18/20 Tr. p. 148, ln. 10–12).

Based on the foregoing, there was more than a sufficient factual basis for giving Defendant's proposed jury instruction. Allison had a plea deal in place which he agreed to withdraw shortly before approaching authorities with "information" about Defendant. Allison hoped and/or believed that the range of potential punishment pursuant to his new deal would decrease dramatically: from 15-years-to-life imprisonment under his prior deal to zero-to-20-years' imprisonment under the new deal.

3. The instructions given to the jury did not explain Allison's motive to give substantial assistance to the prosecution's efforts to convict Defendant.

The instructions provided to the jury did not explain the incentive for Allison to provide substantial assistance to the prosecution of Defendant. Instruction number 11 instructed the

jury that, in deciding what testimony to believe, it could consider a witness's interest in the trial and their motive. (Instruction No. 11; App. p. 155). However, none of the instructions informed the jury of the legal basis for Allison's interest and/or motive to testify against Defendant. Namely, the remaining instructions did not tell the jury that the prosecutor in Allison's case could file a substantial-assistance motion after Allison testified, asking the court presiding over Allison's criminal case to sentence him to a term of incarceration less than the mandatory minimum.

The only other instruction related to Allison informed the jury that Allison admitted he was convicted of a crime, and that his conviction could be used only to help it decide whether to believe him and how much weight to give his testimony. (Instruction No. 15; App. p. 156). Once again, that instruction did not convey to the jury the legal basis for discrediting Allison's testimony should it believe that Allison was motivated to testify against Defendant by Allison's own self-interest.

In summary, Defendant's proposed instruction correctly stated the law, it was applicable to the circumstances of the case,

and it was not stated elsewhere in the instructions. It would therefore have been proper for the trial court to give the instruction.

4. The trial court's refusal to give the proffered instruction constitutes an abuse of discretion.

The trial court refused to give Defendant's proposed instruction to the jury because it was "unclear" from Allison's testimony whether he would receive any benefit from the testimony he provided. (2/21/20 Tr. p. 86, ln. 12–15; App. p. 161). In lieu of Defendant's proposed instruction, the trial court instructed the jury per Iowa Model Criminal Instruction 200.36 based on Allison's prior conviction.

Respectfully, the trial court's rationale is factually, legally, and logically infirm. Allison did not need to have an agreement in place at the time of his testimony for him to have a motive to provide substantial assistance to the prosecution. Nothing precluded Allison from reaching such an agreement after he testified at Defendant's trial. What matters is that there was a legal mechanism whereby Allison could potentially receive a more favorable sentence in his own case by helping the State prosecute Defendant. Defendant was entitled to have the jury instructed as

to the existence of that legal mechanism, regardless of whether Allison admitted that he was motivated by his own self-interest.

The trial court's decision to provide Iowa Model Criminal Instruction 200.36 in lieu of Defendant's proposed instruction is "clearly untenable." A reasonable jury might accept the word of a convict if it believes the witness is motivated to testify truthfully against the defendant. Indeed, Allison disavowed using Defendant as a "bargaining chip" to try to get a better sentence in his federal case, testifying instead that he had a daughter the same approximate age as Martinko and that Defendant's putative statements "disgusted him." (2/18/20 Tr. pp. 157–58, ln. 22–27). Allison's testimony of a pure motive to testify against Defendant made Defendant's proposed instruction even more critical to his defense.

A trial court's denial of a cautionary instruction constitutes an abuse of discretion where its decision rests on an erroneous application of law. *Plain*, 898 N.W.2d at 816–17. An abuse of discretion also occurs where a trial court refuses a cautionary instruction based on an erroneous belief that the instruction is

embodied in other instructions. *E.g.*, *Williams*, 929 at 642 (Iowa 2019) (Appel, J. dissenting). Here, the trial court abused its discretion where it denied Defendant's proposed instruction based on an erroneous belief that the instruction was not applicable and that it was embodied in other instructions.

D. The trial court's abuse of discretion constitutes prejudicial and reversible error.

An instructional error must be prejudicial to warrant reversal. *State v. Webb*, 516 N.W.2d 824, 831 (Iowa 1994). The failure to tender the at-issue proposed instruction prejudiced Defendant because Allison's credibility was of paramount importance to the prosecution's case. According to Allison, Defendant made several incriminating statements while they were in jail together prior to Defendant's trial. The testimony was critical to the State's case. The prosecution presented no evidence of motive, and it failed to marshal evidence establishing a connection between Defendant and Martinko. Apart from Allison, the only "evidence" of Defendant's involvement in the crime was his DNA at the scene. Yet all the experts agreed that the source of the DNA could not be determined, and that DNA can transfer. Given

the lack of evidence, it is not surprising that the prosecution heavily relied on Allison's testimony during closing argument. (2/24/20 Tr. pp. 29–31, ln. 3–15).

The prosecution relied heavily on Allison's testimony in securing Defendant's conviction. The instruction proposed by Defendant to explain Allison's potential motive to testify falsely was therefore critical to the defense. The failure to give the instruction not only deprived Defendant of a legal instruction to appropriately guide the jury's consideration of Allison's credibility, but it also allowed the prosecution to unfairly and inaccurately argue that Allison had no motive to testify falsely. The error was prejudicial and requires reversal.

IV. The evidence was insufficient to support Defendant's guilt beyond a reasonable doubt.

A. Preservation of Error and Standard of Review

A defendant preserves error on a claim of insufficient evidence by making a motion for judgment of acquittal at trial and identifying the specific grounds raised on appeal. *State v. Truesdell*, 679 N.W.2d 611, 615 (Iowa 2004). Here, Defendant preserved error by renewing his motion for judgment of acquittal at

the close of the State's case based on the lack of evidence identifying Defendant as the perpetrator. (2/24/20 Tr. pp. 69–72, ln. 20–7).

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

B. The evidence was insufficient to convict Defendant of first-degree murder.

In reviewing challenges to the sufficiency of the evidence, the jury's verdict will be upheld only if there is substantial evidence in the record to support it. *State v. Sutton*, 636 N.W.2d 107, 110 (Iowa 2001) (citations omitted). Substantial evidence means evidence that could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt. *Id.* In making this determination, the court must look at all the record evidence, not just the evidence supporting guilt. *Id.*

At the time of Defendant's arrest, the victim's murder was 39 years old. Over the years, police developed numerous suspects, each of whom police presumably believed may have had the motive and/or opportunity to have committed the offense. The victim's murder could have been a robbery-gone-wrong: she was observed

showing large amounts of money at the mall shortly before her demise. Or, in the alternative, the victim could have fallen prey to the "grotesquely ugly" man who had been watching her at work and making her feel uncomfortable.

Police were unable to develop any connection between Defendant and Martinko, and they could not ascertain a motive for her murder. (2/18/20 Tr. p. 51, ln. 12–23; 2/24/20 Tr. p. 48, ln. 15–16). The only evidence connecting Defendant to the murder is his DNA at the scene. However, because DNA is transferrable, there is no way to know *how* or *when* Defendant's DNA arrived on the evidence. Moreover, there is no way to know if the actual perpetrator left his DNA on any other items of evidence, several of which were not tested by law enforcement.

This Court is tasked with determining whether the presence of Defendant's DNA at the crime scene—without more—is sufficient to prove Defendant's guilt of Martinko's murder beyond a reasonable doubt. "Inferences drawn from the evidence must raise a fair inference of guilt on each essential element. An inference must do more than create speculation, suspicion, or conjecture.

Evidence that allows two or more inferences to be drawn, without more, is insufficient to support guilt." *State v. Brubaker*, 805 N.W.2d 164, 172 (Iowa 2011), *as amended on denial of reh'g* (Nov. 3, 2011) (citations omitted) (internal quotation marks omitted). Here, because the DNA only raises speculation as to Defendant's involvement in the victim's murder, it alone is insufficient to sustain his guilt beyond a reasonable doubt.

CONCLUSION

For the reasons stated in Arguments I and II, Defendant-Appellant, Jerry Burns, respectfully requests that this Court reverse the trial court's ruling on his motion to suppress and, because the evidence not subject to exclusion is insufficient to convict him of first-degree murder, remand the cause for entry of an order dismissing the charge.

In the alterative, for the reasons stated in Argument IV, Defendant respectfully requests that this Court reverse the judgment of conviction and remand for an entry of an order dismissing the charge.

In the alternative, for the reasons stated in Argument III, Defendant respectfully requests that this Court reverse the judgment of conviction and remand for a new trial.

Defendant respectfully requests all other relief deemed just and appropriate.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Defendant requests oral argument because oral argument would assist this Court in its analysis of the issues presented.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This Proof Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 13,714 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This Proof Brief complies with the typeface requirements of Iowa. R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Century, Font size 14.

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