IN THE SUPREME COURT OF IOWA
Supreme Court No. 19–1919

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TYJUAN LEVELL TUCKER,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE ROBERT J. BLINK, JUDGE (PRETRIAL),
& THE HONORABLE WILLIAM P. KELLY, JUDGE (TRIAL)

APPELLEE'S BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Did the court err in determining that Tucker failed to show that underrepresentation of African-Americans on his jury pool was caused by systematic exclusion?

Authorities

Duren v. Missouri, 439 U.S. 357 (1979)
Peters v. Kiff, 407 U.S. 493 (1972
Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)
State v. Lilly, 930 N.W.2d 293 (Iowa 2019)
State v. Plain, 898 N.W.2d 801 (Iowa 2016)
State v. Shaw, No. 18–0421, 2019 WL 5790884 (Iowa Ct. App. Nov. 6, 2019)
State v. Wilson, 941 N.W.2d 579 (Iowa 2020)
Iowa Code § 607A.22(1)
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Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be* ExpaNDED, 59 DRAKE L. Rev. 761 (2011)
STATE DATA CENTER, *Nativity and Citizenship Status by Race and Ethnicity*, https://www.iowadatacenter.org/data/acs/social/citizenship/18over-nativity (Polk County, 2014–2018 data)

II. Can this Court resolve Tucker's claim that his counsel was ineffective for failing to offer evidence that would show that underrepresentation of African-Americans on his jury pool was caused by systematic exclusion?

Authorities

Dayton v. Pac. Mut. Life Ins. Co., 210 N.W. 945 (Iowa 1926)
Dunbar v. State, 515 N.W.2d 12 (Iowa 1994)
Farmers' State Sav. Bank of Promise City v. Miles, 221 N.W. 449 (Iowa 1928)
Gear v. State, No. 08–1150, 2009 WL 1886839 (Iowa Ct. App. July 2, 2009)
Grayson v. State, No. 17–0919, 2018 WL 347552 (Iowa Ct. App. Jan. 10, 2018)
Guzman-Perez v. State, No. 15–0519, 2017 WL 3524714 (Iowa Ct. App. Aug. 16, 2017)
Howell v. Bennett, 103 N.W.2d 94 (Iowa 1960)
Jessop v. State, No. 01–1333, 2002 WL 31761711 (Iowa Ct. App. Dec. 11, 2002)
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State v. Francis, No. 18–0831, 2019 WL 2372902 (Iowa Ct. App. June 5, 2019)
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State v. Senn, 882 N.W.2d 1 (Iowa 2016)
State v. Thorndike, 860 N.W.2d (Iowa 2015)
Iowa Code § 814.7

III. Did the trial court abuse its discretion in excluding documentary evidence that Tucker failed to provide to the State in advance of trial, in violation of an order to comply with reciprocal discovery?

Authorities

DeVoss v. State, 648 N.W.2d 56 (Iowa 2002)
Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)
State v. Brown, 397 N.W.2d 689 (Iowa 1986)
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State v. Reynolds, 746 N.W.2d 837 (Iowa 2008)
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Watson v. State, No. 11–1833, 2013 WL 99862 (Iowa Ct. App. Jan. 9, 2013)
Whitley v. C.R. Pharmacy Srv., Inc., 816 N.W.2d 378 (Iowa 2012)
Iowa R. Crim. P. 2.14(3)(a)
Iowa R. Crim. P. 2.14(5)
Iowa R. Crim. P. 2.14(6)(c)
Iowa R. Evid. 5.104(d)

IV. Did the trial court abuse its discretion in sustaining the State's objection to the unredacted video, which contained hearsay statements that pertained to a police shooting in a separate incident?

Authorities

United States v. Castro-Cabrera, 534 F.Supp.2d 1156 (C.D. Cal. 2008)
DeVoss v. State, 648 N.W.2d 56 (Iowa 2002)
Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)
State v. Austin, 585 N.W.2d 241 (Iowa 1998)
State v. Belken, 633 N.W.2d 786 (Iowa 2001)
State v. Davis, No. 13–1099, 2014 WL 5243343 (Iowa Ct. App. Oct. 15, 2014)
State v. Huser, 894 N.W.2d 472 (Iowa 2017)
State v. Wells, 522 N.W.2d 304 (Iowa Ct. App. 1994)
State v. Windsor, 316 N.W.2d 684 (Iowa 1982)
Iowa R. Evid. 5.103(a)

V. Did the trial court err in overruling Tucker's motion for judgment of acquittal and ruling that the evidence was sufficient to support conviction for possession of marijuana with intent to distribute?

Authorities

United States v. Ramirez, 608 F.2d 1261 (9th Cir.1979)
State v. Adams, 554 N.W.2d 686 (Iowa 1996)
State v. Gay, 526 N.W.2d 294 (Iowa 1995)
State v. Grant, 722 N.W.2d 645 (Iowa 2006)
State v. Huser, 894 N.W.2d 472 (Iowa 2017)
State v. Sanford, 814 N.W.2d 611 (Iowa 2012)
State v. Skinner, No. 03–0777, 2004 WL 144201 (Iowa Ct. App. Jan. 28, 2004)
State v. Williams, 695 N.W.2d 23 (Iowa 2005)
Williams v. State, 409 S.E.2d 649 (Ga. 1991)

ROUTING STATEMENT

Tucker seeks retention to address his challenge to the jury pool. *See* Def's Br. at 10. This case is a poor candidate for retention because there is no record to support any argument on systematic exclusion. This challenge can be resolved by applying legal principles that were fully explained in *State v. Lilly*, 930 N.W.2d 293 (Iowa 2019). Thus, transfer to the Iowa Court of Appeals would be appropriate. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

This is Tyjuan Levell Tucker's direct appeal from his conviction for possession of marijuana with intent to distribute, a Class D felony, in violation of Iowa Code section 124.401(1)(d) (2018). A jury found him guilty, after he testified that he did not have possession of the ounce of marijuana that police found in his underwear. Tucker's sentence was suspended, and he was placed on probation. *See* Sent.Tr. 73:15–83:4; Sentencing Order (11/12/19); App. 20.[1]

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[1] Tucker was also convicted of a simple misdemeanor offense of interference with official acts, following a bench trial on a record that substantially overlapped with the record made at the jury trial. That conviction is not at issue in this appeal, and Tucker has not sought discretionary review. *See* Iowa Code §§ 814.6(1)(a)(1), 814.6(2)(d).

On appeal, Tucker argues: **(1)** the trial court erred in finding that he failed to prove systematic exclusion and failed to carry his burden on prong #3 of his fair-cross-section challenge; **(2)** his trial counsel was ineffective for failing to offer evidence that could have established systematic exclusion for prong #3 of that fair-cross-section challenge; **(3)** the trial court erred in excluding documents that pertained to a settlement and payout in the days before Tucker's arrest, as a sanction for his failure to turn over those documents in reciprocal discovery; **(4)** the trial court erred in sustaining the State's objections to the redacted portions of the arresting officer's body-camera footage, on the grounds that the statements that Tucker wanted to admit were inadmissible hearsay, were irrelevant, and were unfairly prejudicial; and **(5)** the evidence was insufficient to support conviction on the specific-intent element of possession with intent to distribute.

Course of Proceedings

The State generally accepts Tucker's description of the course of proceedings. *See* Iowa R. App. P. 6.903(3); Def's Br. at 10–12.

Facts

On the evening of July 28, 2018, Des Moines Police Department Officers Ryan Garrett and Brian Joseph were on patrol in Des Moines.

They observed what looked like a hand-to-hand transaction in the parking lot of a Burger King, between a woman who was "standing at the driver's side of a green Sebring" and the driver of that Sebring. *See* TrialTr.V2 48:8–49:6. The driver of the Sebring saw their marked patrol vehicle as it approached him—and he "immediately exit[ed] the parking lot of the Burger King," failing to yield and cutting off another vehicle on the roadway as he did so. *See* TrialTr.V2 48:8–50:9. The officers followed the Sebring and initiated a traffic stop. *See* TrialTr.V2 50:10–51:5. Tucker was the driver; nobody else was in the car. *See* TrialTr.V2 58:11–25. Footage from Officer Garrett's body camera was admitted into evidence with some redactions, over Tucker's objection to the redactions. *See* TrialTr.V2 51:6–55:12; State's Ex. 2. The video showed that Tucker denied smoking marijuana, even after the officer told him that he "smelled like weed." *See* State's Ex. 2, at 0:58–1:47.

When officers searched Tucker's person, they discovered a bag of marijuana "inside his underwear," against his skin. *See* TrialTr.V2 55:17–56:2. The bag contained about an ounce of marijuana. *See* TrialTr.V2 58:3–10; TrialTr.V2 143:5–144:25; State's Ex. 5; App. 120. When the officers searched Tucker's vehicle, they did not find any drug paraphernalia that could be used to smoke marijuana. *See*

TrialTr.V2 56:3–57:12. But they did find about $650 in cash, in the center console. *See* TrialTr.V2 57:13–24. They had "observed that something was exchanged" as they approached the parking lot, but they "could not observe what was actually exchanged." *See* TrialTr.V2 59:5–18. When asked if an ounce of marijuana was an amount that was consistent with personal use, Officer Garrett said:

> I would say that over an extended period of time, maybe. I would say that normal contact that we have with personal users on the street is more — it's more like a quarter ounce.

See TrialTr.V2 69:7–15; *see also* TrialTr.V2 153:7–154:11 ("Most of the street-level stuff is going to be grams, maybe an ounce, but primarily just grams."). The street value of an ounce of marijuana would range from about $150 to $300. *See* TrialTr.V2 170:8–171:2; *cf.* TrialTr.V2 162:12–25 (accidentally providing incorrect figures).

When an ounce of marijuana is held for personal use, it is usually accompanied by "indicia of ingestion" which might include "[p]ipes, rolling papers, or blunt wraps" because "it you're a user, you usually have those things together." *See* TrialTr.V2 164:9–166:8. It is common for investigators to find "drug notes" in searches of homes, but they are found much less frequently when a person is "dealing out of a vehicle or hand to hand." *See* TrialTr.V2 155:13–157:6.

That $650 was mostly in $100 bills, which was common "if you are dealing with ounces" of marijuana. *See* TrialTr.V2 77:11–25. From his experience with street-level enforcement, Officer Garrett knew that most transactions involving marijuana were "usually quantities for users [that] are less than an ounce." *See* TrialTr.V2 84:2–86:8.

Tucker testified at trial. He said that he was driving a new car that he purchased with money that he got from a recent settlement, and that the cash in his vehicle was left over from that amount. *See* TrialTr.V3 44:3–47:9; *see also* State's Ex. 2, at 7:58–8:35 (incorrectly estimating the amount of money in his car as $800). However, Tucker claimed that he "had no marijuana" and that the police had planted it. TrialTr.V3 33:15–35:2. Tucker subsequently retreated from that claim on cross-examination, but he still insisted that he had no idea where the marijuana had come from. *See* TrialTr.V3 47:16–48:16. The video showed that Tucker reacted by screaming and resisting when officers found something in his underwear during the patdown search—which was when it became clear that they were about to find the marijuana. *See* State's Ex. 2, at 2:15–3:55. Then, moments later, Tucker claimed "that girl just threw it to me." *See* State's Ex. 2, at 4:40–4:52.

Additional facts will be discussed when relevant.

ARGUMENT

I. The court did not err in rejecting Tucker's challenge to his jury pool. He failed to show underrepresentation was caused by systematic exclusion.

Preservation of Error

Tucker raised this challenge before voir dire, and the trial court ruled that he failed to establish systematic exclusion. *See* TrialTr.V1 18:7–35:3. Error was preserved to renew that challenge on appeal. *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

Standard of Review

Review of a ruling on a fair-cross-section challenge is de novo. *See State v. Lilly*, 930 N.W.2d 293, 298 (Iowa 2017) (quoting *State v. Plain*, 898 N.W.2d 801, 810 (Iowa 2016)).

Merits

In *Lilly*, the Iowa Supreme Court confirmed that Iowa follows *Duren v. Missouri* and requires proof of three elements to "establish a prima facie violation of the fair-cross-section requirement":

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

See Lilly, 930 N.W.2d at 299 (quoting *Plain*, 898 N.W.2d at 821–22 (quoting *Duren v. Missouri*, 439 U.S. 357, 364 (1979))). Iowa courts analyze the jury pool that comprises all people who were summoned for jury service in that county for that trial date, instead of the single jury panel that was assigned to the defendant's courtroom for trial. *See State v. Wilson*, 941 N.W.2d 579, 593 (Iowa 2020); *see generally Lilly*, 930 N.W.2d at 298 n.2 (citing Iowa Code §§ 607A.3(7), (9)).[2]

The first prong of *Lilly* is met because Tucker is alleging underrepresentation and systematic exclusion of a distinctive group: African-Americans. It is not relevant that Tucker is African-American. There is no group membership requirement for this claim. Just like the petitioner in *Duren* (who was a man who alleged underrepresentation and systematic exclusion of female jurors), *any* defendant may allege underrepresentation and systematic exclusion of African-Americans.

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[2] Incidentally, Tucker was correct that the trial court should analyze the jury pool to determine if prong #2 was satisfied—but the remedy that he requested was "a new panel." *See* TrialTr.V1 20:11–25. If the pool is not fair or reasonable due to underrepresentation that was caused by systematic exclusion, a new panel from the same pool would be similarly unconstitutional. If Tucker had proven his claim, a new jury pool would be required—which would require a continuance. Tucker was effectively granted that remedy when he challenged the jury pool on his prior trial date. *See* Transcript (6/3/19) 20:12–33:3.

See Duren, 439 U.S. at 360–64; *Peters v. Kiff*, 407 U.S. 493, 496–504 (1972) ("[T]he existence of a constitutional violation does not depend on the circumstances of the person making the claim."); *State v. Shaw*, No. 18–0421, 2019 WL 5790884, at *3 n.2 (Iowa Ct. App. Nov. 6, 2019) (quoting segment from *Plain,* 898 N.W.2d at 822, stating "a defendant must establish membership in a distinctive group"—but then noting "the State correctly identifies that this assertion is contradicted by the United States Supreme Court's Sixth Amendment precedent").

Tucker also satisfied prong #2 of *Lilly*—the representation of African-Americans in this pool was more than one standard deviation below the average level, given the prevalence of African-Americans among Polk County residents who were eligible for jury service. *See Lilly*, 930 N.W.2d at 304. Tucker's jury pool contained 245 people, and nine of them were African-American. *See* TrialTr.V1 22:18–23:10. African-Americans comprise about 5.4% of the jury-eligible residents of Polk County. *See* TrialTr.V1 19:11–16.[3] The State argued that any

[3] Until recently, this was something that needed to be computed from census bureau data with longhand arithmetic. The Iowa State Data Center now maintains a page that imports recent data from the American Community Survey and calculates these figures. *See* STATE DATA CENTER, *Nativity and Citizenship Status by Race and Ethnicity*, https://www.iowadatacenter.org/data/acs/social/citizenship/18over-nativity (Polk County, 2014–2018 data).

analysis should exclude people who did not indicate their race. *See* TrialTr.V1 24:22–26:8. Even excluding those seven potential jurors who did not indicate their race, Tucker could satisfy prong #2 of *Lilly*:

	Jury pool of 245	Jury pool of 238
Average expected # of African-Americans	13.23 people	12.85 people
Standard deviation	3.537	3.487
Difference between actual level (9) and average expected	-4.23 people	-3.85 people
…that result divided by standard deviation	-1.196	-1.104

The trial court did this math correctly. *See* TrialTr.V1 32:21–33:4. And it was correct to analyze *this* jury pool, rather than aggregating other jury pools into a much larger sample that would distort the analysis.

In some recent cases, the NAACP has argued that a portion of the residents in the "two or more races" category should be added to the population figure. But in this case, Tucker's advocacy was that multi-racial people who were on the jury pool should not be counted as members of the distinctive group—and as a result of that advocacy, the trial court never attempted to find out whether any of those people identified as African-American. *See* TrialTr.V1 23:17–24:15. Tucker did not preserve error on any challenge alleging underrepresentation or exclusion of a broader group that includes multi-racial people, nor did he make the record that would be needed to assess that challenge. *See Wilson*, 941 N.W.2d at 593 (rejecting claim for failure to make a record that would enable analysis of level of underrepresentation).

As both the trial court and the Iowa Supreme Court noted, "at least one standard deviation away from the mean" is a very permissive threshold for establishing underrepresentation, and random sampling will naturally produce this kind of result in about 16% of jury pools—which is why it is so important to insist that "the defendant still must trace the disparity to some practice or practices." *See Lilly*, 930 N.W.2d at 304; *accord* TrialTr.V1 32:21–33:9. That is why prong #3 of *Lilly* requires proof that underrepresentation was *caused* by some feature of the juror selection process that systematically excludes members of the distinctive group. *See Lilly*, 930 N.W.2d at 307–08 (holding that prong #3 requires the defendant to identify "a practice that leads to systematic underrepresentation of a distinctive group" and "prove that the practice has caused systematic underrepresentation"). *Lilly* gave this guidance on the kind of proof that could suffice:

> Litigants . . . still have to demonstrate that the underrepresentation was the result of the court's failure to practice effective jury system management. This would almost always require expert testimony concerning the precise point of the juror summoning and qualification process in which members of distinctive groups were excluded from the jury pool and a plausible explanation of how the operation of the jury system resulted in their exclusion. Mere speculation about the possible causes of underrepresentation will not substitute for a credible showing of evidence supporting those allegations.

Id. at 307 (quoting Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 DRAKE L. REV. 761, 790–91 (2011)). Although the defendant in *Lilly* had established that there was some apparent underrepresentation, and that specific source lists had been used to summon jurors, that was not proof of causation:

> [T]he undisputed evidence is that the Iowa Judicial Branch currently uses two lists to develop its juror pools—driver's licenses and nonoperator identifications from the department of transportation, and voter registrations from the secretary of state. Lilly argues that other lists could be used—such as income tax filers, persons receiving unemployment, and persons on housing authority and child support recovery lists. Lilly contends that even when these do not have additional names, they may have more up-to-date addresses. However, Lilly does not explain how failure to use such lists in itself amounts to "systematic exclusion" within the meaning of *Duren*/*Plain*.

Id. at 305; *accord* Iowa Code § 607A.22(1). Rather than finding that Lilly had already proven systematic exclusion through that argument, it remanded the case to give him a chance to establish prong #3 by developing actual proof of causation. *See Lilly*, 930 N.W.2d at 308.

Tucker did not retain or consult an expert, and did not put on evidence of systematic exclusion. *See* TrialTr.V1 27:8–24. Instead, he argued that it was apparent that underinclusive source lists were the cause of any observed underrepresentation on jury pools:

> I am prepared to make an argument solely based upon the fact that we use two sources for our jury pool. We use — voter registration and driver's license, I think, are the two that we use in Iowa.
>
> The problem with only using two of those is the statistical analysis shows that minorities sign up for licenses at a lower rate and also register to vote at a lower rate. So we do have a systematic problem.
>
> There is a Law Review article referenced in *Plain*, as well as *Lilly*, that whole trilogy of cases, by a woman named Paula Hannaford-Agor, A-g-o-r. She is a consultant that actually was hired by State Court Administration, is my understanding, to look at these types of issues for us, to help make our system more effective and fair.
>
> One of her suggestions is that we need to look at multisources of jury pool names outside of the two that are used in not only Polk County but just the state of Iowa, including unemployment data or information, work comp, things of this nature where lower income and minority names will appear at a more statistically accurate amount.
>
> So, Judge, we believe, just on its face, there are issues with the systems we use in Polk County as well as the whole state. . . .

See TrialTr.V1 27:25–29:14. The State responded by explaining that *Lilly* held that actual proof of causation would be needed to establish systematic exclusion. That means Tucker needed to offer something beyond a description of the source lists that were used—he needed to show that using those source lists *causes* underrepresentation, and he did not do that. *See* TrialTr.V1 30:24–31:20. The trial court agreed; it ruled that Tucker had satisfied prong #2, but had failed on prong #3:

> In the *Lilly* case, Mr. Lilly was not able to explain how the failure to use the lists that are currently in place by the judicial branch amounts to systematic exclusion within the meaning of *Duren* and *Plain*.
>
> [T]his Court was not provided any specific evidence that these lists of practices that are mentioned in Law Review articles and as detailed by Mr. Macro, that they would actually improve minority jury representation. This Court doesn't have any proof that any of those ideas actually would improve minority jury representation.
>
> The court in *Lilly* did hold that jury management practices can amount to systematic exclusion, but this Court does not find the allegations amount to evidence of systematic exclusion.
>
> The Court heard the arguments made by Mr. Macro on behalf of Mr. Tucker, that his rights to an impartial jury were violated, but the Court has not found sufficient evidence to prove that.

See TrialTr.V1 32:21–35:3; *see also* TrialTr.V1 40:4–20.

Tucker challenges that ruling. He argues that this was sufficient. *See* Def's Br. at 27–28. He is wrong. He presented no real proof that "[m]inorities sign up for driver's licenses and register to vote at lower rates than non-minorities." *See* Def's Br. at 27. Even if he had, that would not establish that any people were *excluded* from jury service. And while Tucker is correct that Hannaford-Agor's law review article "recommended" using additional source lists, he cannot point to any proof that doing so would reduce underrepresentation (because, as far as the State knows, no such proof exists). *See* TrialTr.V1 32:21–35:3.

It is not the State's burden to identify the causes of apparent underrepresentation, especially in the absence of anything beyond conjecture from the defendant on prong #3. Tucker offered no proof that apparent underrepresentation on his jury pool was caused by systematic exclusion of minority residents from source lists. He failed to carry his burden of proof on prong #3, and he cannot establish any error in the trial court's ruling to that effect.

II. Section 814.7 prohibits this Court from resolving Tucker's ineffective-assistance claim in this appeal, This record would be insufficient to resolve it anyway.

Preservation of Error

Tucker's sentence was entered after the effective date of amendments to section 814.7 that prohibit Iowa appellate courts from considering ineffective-assistance-of-counsel claims on direct appeal from a criminal conviction. *See* Sentencing Order (11/12/19); Iowa Code § 814.7; *State v. Damme*, 944 N.W.2d 98, 103 n.1 (2020).

Tucker points out that he is the appellant in another appeal that raises challenges to the constitutionality of section 814.7, which has already been argued and submitted to the Iowa Supreme Court—and he states that he "has used the same argument" against section 814.7 in both cases. *See* Def's Br. at 29 n.2; *State v. Tucker*, No. 19–2082,

(status: submitted); *cf. Howell v. Bennett*, 103 N.W.2d 94, 96 (Iowa 1960) (noting that Iowa appellate courts can "take judicial notice of [their] own records" of other appeals, including in criminal cases); *accord Farmers' State Sav. Bank of Promise City v. Miles*, 221 N.W. 449, 450 (Iowa 1928) (citing *Dayton v. Pac. Mut. Life Ins. Co.*, 210 N.W. 945, 945 (Iowa 1926)) ("This court will take judicial notice of its own records."). A controlling decision on this issue is likely imminent, and will likely arrive before submission of this appeal.

Additionally, Iowa courts will not strike down a statute if the challenge can be resolved on other grounds. *See State v. Senn*, 882 N.W.2d 1, 32 (Iowa 2016) (Cady, C.J., specially concurring) (citing *State v. Hellstern*, 856 N.W.2d 355, 360 (Iowa 2014)). And Tucker only argues that section 814.7 is unconstitutional as applied to claims "where the appellate record is adequate to determine the claim." *See* Def's Br. at 30–34. Notwithstanding section 814.7, Iowa courts would "resolve the claims on direct appeal only when the record is adequate." *See State v. Thorndike*, 860 N.W.2d 319 (Iowa 2015) (quoting *State v. Clay*, 824 N.W.2d 488, 494 (Iowa 2012)). Consequently, this Court can simply find that the record is not adequate to resolve this claim on direct appeal, and that would moot the constitutional challenge.

Standard of Review

Constitutional challenges, including claims alleging ineffective assistance of counsel, are reviewed de novo. *See id.* at 319–20.

Merits

Tucker's claim is that his counsel was ineffective for failing to present expert testimony to support his fair-cross-section challenge. *See* Def's Br. at 36–41. But the record does not contain any evidence of what expert testimony would have shown, or whether it would have established that systematic exclusion caused underrepresentation.

Tucker is correct that his trial had already been continued to allow him to develop a fair-cross-section challenge,[4] and that counsel

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[4] Ironically, there was no reason to order that continuance because Tucker's claim should have immediately failed on prong #2. At the hearing before Tucker's trial (after the initial continuance), the parties used *adjusted* data, and they agreed that African-Americans comprised 5.4% of the residents of Polk County who were eligible for jury service. *See* TrialTr.V1 19:11–16; TrialTr.V1 22:22–23:6. But on the prior trial date, both parties had used the unadjusted figure: 6.8%. *See* Transcript (6/3/19) at 22:17–25; Transcript (6/3/19) at 26:4–13. That jury pool contained 243 people, and 12 were African-American. *See* Transcript (6/3/19) at 22:17–23:13. Average representation on a pool of 243 would be 13.12 people. Standard deviation would be 3.523. Actual representation minus expected representation would be -1.12. Dividing that by standard deviation produces a Z-Score of -0.318. That result shows that this jury pool was within one standard deviation of the average expected level of representation, and Tucker could have been tried before a jury drawn from that jury pool without any issue. But using the wrong figure led the court to the opposite conclusion.

had mentioned Russ Lovell and David Walker as potential experts. *See* Transcript (6/3/19) at 31:3–23. But the record does not contain any indication of what Lovell or Walker would say, if called as experts. Tucker cannot point to a ruling or decision where a court found that testimony from Lovell or Walker helped show systematic exclusion—to the best of the State's knowledge, no such decision or ruling exists. Indeed, their amicus brief in the appeal following remand in *Lilly* acknowledges that they are not aware of any way to show causation for that particular theory of systematic exclusion. *See* Amicus Brief at 37–39, *State v. Lilly*, No. 20–0617 (status: briefing) (asserting that African-Americans "almost certainly are underrepresented" on these source lists without citing published research or actual evidence, then admitting "[d]efinitive records establishing such underrepresentation seem not to exist"). There is nothing in the record to support a claim that *any* expert would be able to prove systematic exclusion here.

More generally, it is impossible to prove a claim that counsel was ineffective for failing to present expert testimony without proof of what the expert's testimony would have been. *See Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994) (finding ineffective-assistance claims were "too general in nature to allow us to address these allegations,"

and noting that record did not establish "what an investigation would have revealed or how anything discovered would have affected the result obtained below"); *Grayson v. State*, No. 17–0919, 2018 WL 347552, at *1–2 (Iowa Ct. App. Jan. 10, 2018) ("Mere speculation as to the existence of exculpatory evidence is insufficient to show such evidence probably would have changed the outcome of trial."); *Guzman-Perez v. State*, No. 15–0519, 2017 WL 3524714, at *4 (Iowa Ct. App. Aug. 16, 2017) (rejecting a claim that counsel was ineffective for failing to retain an expert to conduct a study on lighting because the record provided "no reason to think that a lighting study would have been of any assistance" or have impacted the result); *Munoz v. State*, No. 12–1368, 2014 WL 69519, at *6 (Iowa Ct. App. Jan. 9, 2014) (rejecting ineffective-assistance claims because of finding that Munoz "has not carried his burden to prove what additional evidence should have been introduced but was not"); *Gear v. State*, No. 08–1150, 2009 WL 1886839, at *3 (Iowa Ct. App. July 2, 2009) (rejecting failure-to-investigate claim and finding that "Gear has presented no evidence—expert or otherwise—in support of his assertion" that investigation would have found favorable evidence); *Jessop v. State*, No. 01–1333, 2002 WL 31761711, at *3 (Iowa Ct. App. Dec. 11, 2002) (rejecting an

ineffective-assistance claim and noting "we find the record lacking in any substantial evidence of what would have been discovered or what the witnesses' testimony would have been had there been no breach"). Tucker has provided nothing beyond speculation regarding what an expert witness might have said about jury selection procedures in Polk County, and he cannot establish *Strickland* prejudice on this record on direct appeal. *See State v. Francis*, No. 18–0831, 2019 WL 2372902, at *3 (Iowa Ct. App. June 5, 2019) (concluding that record on direct appeal was inadequate to resolve claim that counsel was ineffective for failing to retain an expert because "[i]t is unknown if expert testimony would have supported Francis's claims").

If this Court attempted to determine, from this record, whether Tucker established a reasonable probability that presenting testimony from an expert witness would have established systematic exclusion, the result would disappoint Tucker: his claim would fail for a complete absence of proof of what his hypothetical expert would have provided. Even if Tucker is correct that section 814.7 is unconstitutional, this claim would still need to be preserved for PCR proceedings because there is no way to resolve it on this record on direct appeal, except to reject it outright for that complete failure of proof.

III. The trial court did not err in prohibiting Tucker from offering documentary evidence that was not provided during reciprocal discovery, and was only revealed to the State on the second day of trial.

Preservation of Error

The trial court granted the State's request to exclude these new documents that were not provided during reciprocal discovery, over Tucker's argument. Tucker made an offer of proof, and the record on appeal contains the proffered evidence. *See* TrialTr.V2 108:7–118:20; Court's Ex. 3; App. 112. Thus, error was preserved. *See Lamasters*, 821 N.W.2d at 864; *State v. Windsor*, 316 N.W.2d 684, 688 (Iowa 1982).

Standard of Review

Evidentiary rulings are reviewed for abuse of discretion. *See State v. Christensen*, 323 N.W.2d 219, 222 (Iowa 1982). Specifically, "[r]emedies under [Rule 2.14(6)(c) are discretionary in nature, and a court will be reversed only if it abuses its discretion." *See Watson v. State*, No. 11–1833, 2013 WL 99862, at *4 (Iowa Ct. App. Jan. 9, 2013) (citing *State v. Brown*, 397 N.W.2d 689, 698 (Iowa 1986)).

Merits

Long before trial, the parties engaged in reciprocal discovery. The district court ordered Tucker to comply "to the extent set out in Iowa Rule of Criminal Procedure 2.14." *See* Order (1/3/19); App. 7.

That required Tucker to turn over any documents that "are within [his] possession, custody or control . . . and which [he] intends to introduce in evidence at trial." *See* Iowa R. Crim. P. 2.14(3)(a). This required timely compliance, and included an ongoing duty to disclose. *See* Order (1/3/19); App. 7; Iowa R. Crim. P. 2.14(5). But Tucker did not turn over these documents—which pertained to payment of a settlement from an unrelated lawsuit, to explain why he had $650—until the second day of trial. *See* TrialTr.V2 108:7–109:7. A number of remedies for that violation were available, under Rule 2.14(6)(c):

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may upon timely application order such party to permit the discovery or inspection, grant a continuance, or *prohibit the party from introducing any evidence not disclosed*, or it may enter such other order as it deems just under the circumstances.

Iowa R. Crim. P. 2.14(6)(c) (emphasis added). In selecting the proper remedy from among the options in Rule 2.14(6)(c), the trial court may consider: "(1) the circumstances surrounding the violation; (2) the prejudice, if any, resulting from the violation; (3) the feasibility of curing any prejudice; and (4) any other relevant consideration." *See State v. Hamilton*, Nos. 0–308 & 99–613, 2000 WL 1421375, at *2 (Iowa Ct. App. Sept. 27, 2000) (quoting *Brown*, 397 N.W.2d at 698).

After considering the issue, the trial court granted the State's request to prohibit Tucker from introducing that evidence.

> In this case, the State has made timely application. The State has requested that these documents be prohibited from introduction into evidence. In this case, it has been pending for a long time. A continuance does not seem appropriate.
>
> The disclosure of these documents on the second day of trial, without allowing the State to prepare for those documents, it appears to violate the rule. . . .
>
> I think [Tucker's counsel] makes a good point in that Mr. Tucker is allowed to present his defense. There's nothing that prohibits Mr. Tucker from testifying about the settlement. But to submit those documents that were not complied with under a court order or the rules would appear to be — it would impact our whole process of authentication, identification, and preparation that goes into these cases.
>
> This is an important trial. This appears to be unfair surprise, and the Court is going to exclude those documents.

See TrialTr.V2 113:5–115:15. Tucker challenges that ruling, and he argues that a continuance would have been the better remedy. *See* Def's Br. at 45 (quoting *Whitley v. C.R. Pharmacy Srv., Inc.*, 816 N.W.2d 378, 389 (Iowa 2012)). But trial in this case had already been continued multiple times—and the fact that trial had already started meant that Tucker had effectively deprived the State of its ability to tailor its advocacy to the evidence that it had a right to anticipate.

Tucker argues that exclusion was unwarranted, because allowing him to present these documents as evidence would not be prejudicial to the State. *See* Def's Br. at 46–47. But the State explained why it would be prejudiced: it did not have any opportunity to find "witnesses to lay foundation" for any responsive evidence about the timing, amount, and form of payments relating to that settlement. *See* TrialTr.V2 108:15–109:4. Tucker's argument illustrates the problem: he seems to acknowledge that all of these documents would be offered as hearsay to prove the truth of the matters asserted (that payments to Tucker were made, as these documents described), but he argues that "[i]f given the opportunity, counsel would have been able to lay the foundation that the exhibit was a business record." *See* Def's Br. at 43–44. Tucker's failure to turn over these documents until the second day of trial effectively deprived the State of its opportunity to prepare to litigate the applicability of that hearsay exception and the admissibility of those documents, and deprived it of its opportunity to look for evidence that could reveal irregularities or facts that would refute inferences that Tucker wanted to draw from these documents. *See Whitley*, 816 N.W.2d at 386 ("Our rules of discovery exist to avoid the type of surprise that occurred in this case.").

Tucker argues that he was prejudiced because exclusion of this evidence deprived him of "the opportunity to rebut the state's case as to intent to distribute marijuana with credible evidence." *See* Def's Br. at 47–48. But Tucker was permitted to testify about the settlement, and he could point to his statements in the recorded footage where he had mentioned it. *See* TrialTr.V2 118:21–119:14; TrialTr.V3 44:3–47:9; State's Ex. 2. Of course, Tucker's testimony was not credible—he said that he "had no marijuana," despite the fact that it was found inside his underwear and he was clearly aware of its presence. *See* TrialTr.V3 33:15–35:2; TrialTr.V3 47:16–48:16; *but see* State's Ex. 2. Tucker seems to imply that he might not have testified if not for this adverse evidentiary ruling—he argues that "[he] could have testified on the preliminary foundation issues without waiving his right to testify or not testify under the Fifth Amendment." *See* Def's Br. at 43–44 (citing Iowa R. Evid. 5.104(d)). But that exposes two other problems with Tucker's challenge and claim of prejudice. First, Tucker could not have laid foundation for admission of these documents as business records in the regular course of business—and he had not listed any witnesses who could have laid the missing foundation about the regular course of business for entities that purportedly generated these documents.

See State v. Reynolds, 746 N.W.2d 837–38 (Iowa 2008) (finding that error reports were inadmissible because "there is no evidence in the record from any person with knowledge as to how the Federal Reserve error reports were created or as to the reliability of the error reporting system in general"). Thus, it would be correct to exclude this evidence anyway, and exclusion of this evidence for a different reason cannot create reversible error. *See DeVoss v. State*, 648 N.W.2d 56, 62–63 (Iowa 2002) (explaining that rulings on admissibility of evidence may be affirmed on any ground that appears from the record, even if that ground was not urged below). Second, Tucker's claim that admitting these documents would have obviated the need for his own testimony might make sense if he had merely testified about the source of that $650 in cash to refute the inference that he had just sold marijuana, but settlement documents could never have replaced his testimony that he did not know about the bag of marijuana in his underwear. *See* TrialTr.V3 33:15–35:2; TrialTr.V3 47:16–48:16. Tucker would still need to testify to present that defense, and the jury would still reach the same conclusion about his objectively bizarre testimony: Tucker chose to lie, because telling the truth would have proved that he was guilty as charged. *Cf. State v. Odem*, 322 N.W.2d 43, 47 (Iowa 1982).

Tucker did not propose a continuance as an alternative, below. *See* TrialTr.V2 108:7–118:20. The trial court still considered whether it should grant a continuance, and it found that would be inappropriate because this case "has been pending for a long time." *See* TrialTr.V2 114:18–22. Additionally, it would have been unfair to interrupt trial after the State had already started presenting evidence. That was one of the factors that the Iowa Supreme Court noted in *Christensen*, in upholding a ruling that excluded undisclosed alibi evidence:

> . . . [A] delay in the proceeding would create a substantial time interval between the presentation of the State's evidence and the defendant's evidence of alibi. This not only disrupts the judicial process but may also affect the jurors and the outcome of the trial. This is so because a continuous sequence of testimony would ensure the evidence does not grow stale during an interval followed by fresh evidence immediately prior to jury deliberation.

See Christensen, 323 N.W.2d at 224. Additionally, *Christensen* helps establish that Tucker's testimony makes it impossible for him to show prejudicial error, even if he could establish that this evidence should not have been excluded. *See id.* (finding exclusion of alibi evidence was neither an abuse of discretion nor prejudicial error because the defendant testified and "his testimony did not refer to the alibi," so "[i]t is doubtful that the jury would have believed the testimony of an alibi witness under these circumstances").

Finally, Tucker attempts to deflect blame to his attorneys for failing to pass along these documents that he had already given them, whenever his counsel withdrew and was replaced. *See* Def's Br. at 46; TrialTr.V2 109:9–18. There is no proof that this is true. In any event, Tucker's decision to surprise the State with evidence supporting his defense in violation of reciprocal discovery would not be excused by his decision to surprise his own trial counsel with that same evidence, as well. Indeed, this effectively moots Tucker's challenge because his trial counsel could not possibly have been prepared to lay the required foundation to admit these documents over a hearsay objection.

Tucker cannot establish that it was an abuse of discretion to exclude this evidence, which should have been disclosed to the State in advance of the *first* anticipated trial date, months earlier—instead of being concealed until partway through the presentation of evidence. This was "a reasonable course of action" under "the circumstances existing at the time the decision was made." *See Whitley*, 816 N.W.2d at 389–90. And even if Tucker could establish that these documents should not have been excluded as a sanction under Rule 2.14(6)(c), it would not matter because he could not have laid foundation for their admission, and any error would be harmless. Thus, his challenge fails.

IV. The trial court did not abuse its discretion in excluding extraneous portions of the footage of Tucker's arrest.

Preservation of Error

Tucker moved for admission of the full video. The trial court considered and rejected his motion. That ruling preserved error. *See Lamasters*, 821 N.W.2d at 864; *Windsor*, 316 N.W.2d at 688.

Standard of Review

Again, rulings on admissibility of evidence are reviewed for abuse of discretion. *See, e.g.*, *State v. Belken*, 633 N.W.2d 786, 793 (Iowa 2001); *State v. Austin*, 585 N.W.2d 241, 243 (Iowa 1998).

Merits

State's Exhibit 2 was footage from Officer Garrett's body camera with certain redactions. Tucker moved to admit the unredacted video; he asserted it was important to admit evidence of Tucker's statements about being shot by police in the past, to establish Tucker's antipathy towards police officers and explain his conduct. *See* TrialTr.V3 19:10–20:1 ("I think he gets to explain that I've had terrible experiences with the police and that's why I behaved that way."). The State resisted and argued that it was only being presented "to garner sympathy," and it also noted Tucker's statements would be hearsay, if offered by Tucker. *See* TrialTr.V3 4:17–19:8. The court excluded the unredacted video:

> The fact that the use of the tape is designed to talk about an officer shooting — which is clearly not relevant to the drug possession or possession-with-intent-to-deliver case. . . .
>
> [I]n looking at the conditions for admission of this tape through Mr. Tucker — and that's the key piece here, it's through Mr. Tucker — first of all, it has to be relevant for the jury to find a fact of consequence more or less probable.
>
> And so when we are dealing with drug possession, or intent to deliver, or interference with official acts, I do not see how talking about an officer shooting, how that tends to make a fact of consequence more or less probable. So we have a relevance issue right off the bat under 5.401 and 5.402.
>
> We then have the hearsay problem coming through Mr. Tucker, even though Mr. Tucker is one of the subjects on the video. To come in through him would be problematic and there would be a hearsay violation.
>
> Finally, when we are looking at the conditions for admission of evidence, we have to look at the probative value versus prejudicial effect under 5.403. And this Court does not find probative value in discussing an officer shooting as it relates to Mr. Tucker.
>
> It appears to me that the purpose of that — the use of that evidence might be for an improper purpose.
>
> [. . .]
>
> I think that's what Mr. Tucker wants, is either wants sympathy or the jury to hear that he's had a previous interaction with police. And that's one of the things that we try to keep out so that the jury can stay focused on the facts at hand, on the case at hand, and to really focus in on the elements that the State has alleged that Mr. Tucker has done in this case.

See TrialTr.V3 14:10–18:20. Tucker is challenging that ruling.

Tucker argues that admission was required under the rule of completeness, because he established that the redacted video footage was "necessary to a proper understanding of the *admissible primary evidence*" that had already been admitted. *See* Def's Br. at 51 (quoting *State v. Huser*, 894 N.W.2d 472, 509 (Iowa 2017)). Tucker describes the State's theory as an inference that "his reaction to a search of his person while he was handcuffed . . . led [the officers] to believe Tucker was distributing marijuana." *See* Def's Br. at 51–52. This argument is flawed on two levels. First, that was not the State's advocacy. Instead, Tucker's reaction to the search was only relevant to show that he knew he was carrying marijuana. His reaction changed at the moment that officers began to search the specific part of his person where he was concealing the marijuana, and he did not have that reaction during any part of his interaction with police that had preceded that moment. *See* State's Ex. 2; TrialTr.V2 88:24–90:2. The complete video would not help refute that theory—it would only support it. That means that Tucker's argument that this video was "necessary" to understand the evidence already submitted is incorrect, on the facts of this case, and he cannot establish that the trial court abused its discretion in finding that Rule 5.106 did not require admission of the unredacted video.

Second, Tucker was attempting to use Rule 5.106 to admit these specific out-of-court statements for the truth of the matters asserted (in violation of Rule 5.802), which had a potential for unfair prejudice that would substantially outweigh their probative value (in violation of Rule 5.403). *See* TrialTr.V3 14:10–18:20. The trial court made a separate ruling on Tucker's proffered testimony about the purported shooting event—it held that Tucker could not testify about that event because it was not relevant to the issue of whether he possessed this marijuana or whether he possessed it with intent to distribute. *See* TrialTr.V3 18:24–20:16. Rule 5.106 may provide an exception to rules against hearsay evidence, because it allows introduction of evidence from the same recording to put the admissible evidence in context. But Rule 5.106 does not permit admission of the additional statements *for a hearsay purpose*, dependent on belief in the truth of the matters asserted. *See, e.g.*, *Huser*, 894 N.W.2d at 509 ("[W]e view rule 5.106 as not permitting admission of other hearsay conversations that have no bearing on the [admitted] conversation itself."); *State v. Davis*, No. 13–1099, 2014 WL 5243343, at *6–7 (Iowa Ct. App. Oct. 15, 2014) (noting that Rule 5.106 did not permit admission of an interrogator's statements for truth of the matters asserted during the interrogation).

Statements about Tucker's prior encounters with police would only be relevant if they were believed and taken as true, and that means his statements were offered for a hearsay purpose: not to prove the effect of his statements on the officers (or on Tucker), but as assertions that offered a tenuous explanation for Tucker's behavior if they were true and would be irrelevant if they were false. *See, e.g.*, *State v. Wells*, 522 N.W.2d 304, 308 n.1 (Iowa Ct. App. 1994) ("A statement is offered to prove the truth of its assertion if the substance of the statement must be believed by the jury to have true relevance in the case."). Therefore, the hearsay evidence that Tucker wanted to admit was not admissible under Rule 5.106. Moreover, beyond the hearsay issue, it would still be correct to exclude those statements under Rule 5.403. *See Davis*, 2014 WL 5243343, at *7 (explaining that "the recorded statements, like all relevant evidence, are subject to the rule 5.403 balancing test that compares the probative value of the statements to their danger of unfair prejudice and confusing the jury" even if Rule 5.106 applies). Tucker does not challenge the separate ruling that barred him from testifying about those prior interactions with police, which provides an independently sufficient ground to affirm this ruling. *See DeVoss*, 648 N.W.2d at 62–63; TrialTr.V3 18:24–20:16.

Tucker recognizes the significance of the video: "when officers realized Tucker had something in his shorts, he began to yell for help, causing a scene and repeatedly asking the officers while they were grabbing him." *See* Def's Br. at 50 (citing State's Ex. 2 at 3:15–5:00). For Tucker's statements on the unredacted video to explain that, they would need to be accepted as true—which meant he was trying to use Rule 5.106 as an end-run around the rule against hearsay. Admitting this evidence would also create a side-inquiry into a prior event that would be unfairly prejudicial and distract the jury from determining whether Tucker possessed this marijuana with intent to distribute—which meant he was trying to use Rule 5.106 as an end-run around Rule 5.403's balancing analysis. Neither of those are permissible. *See Huser*, 894 N.W.2d at 509 (quoting *United States v. Castro-Cabrera*, 534 F.Supp.2d 1156, 1161 (C.D. Cal. 2008)) (noting Rule 5.106 "cannot be used as an 'end run around the usual rules of admissibility.'"). And even ignoring those grounds for the trial court's ruling, Tucker cannot establish that redacted portions of this video could help to explain his reaction to the *imminent discovery of his marijuana*—which was the point where his behavior changed and became evidence that he knew that he was carrying marijuana. *See* State's Ex. 2 at 3:15–5:00.

It is worth noting the facial implausibility of Tucker's narrative, as a final point on harmless error. If Tucker was afraid of unprovoked police violence, why would he react by jumping away and screaming, which can only escalate the situation? And then, Tucker immediately calmed down, as soon as the officers took his marijuana. *See* Court's Ex. 4, at 6:01–6:15. He was clearly reacting out of fear that his marijuana would be found, and not out of fear of being shot—that theory was flatly inconsistent with Tucker's actual behavior, with regards to both timing and logic. Admitting this evidence could not possibly have changed the outcome, so any error would be harmless. *See Davis*, 2014 WL 5243343, at *7 (citing Iowa R. Evid. 5.103(a)).

V. The evidence was sufficient to establish that Tucker possessed this marijuana with intent to distribute.

Preservation of Error

Tucker moved for judgment of acquittal on this element. The trial court overruled that motion. *See* TrialTr.V2 176:21–186:18; TrialTr.V3 50:4–57:4. That ruling preserved error. *See State v. Williams*, 695 N.W.2d 23, 27–28 (Iowa 2005).

Standard of Review

Review is for correction of errors at law, *See Huser*, 894 N.W.2d at 490 (citing *State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012)).

Merits

On a challenge to sufficiency of the evidence, an appellate court will consider evidence in the trial record "in the light most favorable to the State, including all reasonable inferences that may be fairly drawn from the evidence." *See id.* (quoting *Sanford*, 814 N.W.2d at 615). In ruling on a sufficiency challenge, Iowa courts will "view the evidence in the light most favorable to the verdict and accept as established all reasonable inferences tending to support it." *See State v. Gay*, 526 N.W.2d 294, 295 (Iowa 1995). The record in this case was sufficient to support a reasonable inference that Tucker had just sold marijuana during the transaction that officers had just seen, in the parking lot of the Burger King. And even if Tucker had *purchased* marijuana during that transaction, the record would support the alternative inference that Tucker had purchased a "mid-level dealer" amount of marijuana, with the intent of distributing it to users in smaller sales.

Tucker is correct that officers did not find scales, baggies, or other indicia of marijuana re-packaging in his car. *See* Def's Br. at 54. But they did not find indicia of marijuana *use*, either. *See* TrialTr.V2 56:3–57:12. An ounce is not a small amount of marijuana—users will typically buy an eighth- or quarter-ounce from a street-level dealer, or

even smaller portions like grams. *See* TrialTr.V2 69:7–15; TrialTr.V2 153:7–154:11. Likewise, $650 is not a small amount of money—and it would correspond to the proceeds from selling somewhere between two to four ounces of marijuana to a mid-level dealer. *See* TrialTr.V2 170:21–23. A reasonable fact-finder could infer that Tucker had that large amount of cash in his center console because he had received it from selling marijuana during that transaction that police observed.

It is worth noting that Tucker's settlement documents would not diminish the strength of that inference. He offered evidence that his lawyer issued him a check for $3,923.68 on July 26, 2018—which was two days before this incident. *See* Court's Ex. 3, at 2, 8; App. 113, 119. But there is no proof that he deposited that check or withdrew cash. And even if Tucker had offered evidence to that effect, that would not defeat the obvious explanation for why Tucker would *carry* $650 in large bills while driving around Des Moines around midnight. After all, proof that a person was gainfully employed and was receiving weekly paychecks would not stop a reasonable fact-finder from applying common sense to make a connection between their possession of that amount of cash, their possession of mid-level dealer quantities of illicit drugs, and their participation in a hand-to-hand transaction in a parking lot.

Tucker argues that there was no evidence of controlled buys, and that other kinds of evidence that are often found in cases where a defendant is convicted of possession with intent to distribute were absent in this case. *See* Def's Br. at 53–55. But Iowa courts have found sufficient evidence of intent to distribute drugs from possession of some amount of those drugs, together with a large amount of cash:

> Although one might characterize the quantity of drugs in this case as relatively small, when combined with the cash found on Adams, a trier of fact could reasonably infer Adams had already sold a quantity of drugs, thereby explaining both the small amount of drugs and the large amount of cash. . . . [W]e think the record evidence is substantial and supports the trial court's finding of an intent to deliver. *See United States v. Ramirez*, 608 F.2d 1261, 1264 (9th Cir.1979) (four or five grams of cocaine is sufficient to prove intent, where other evidence of intent exists); *Williams v. State*, [409 S.E.2d 649, 650 (Ga. 1991)] (sufficient evidence of possession with intent to distribute: defendant had 2.7 grams of cocaine and $874 on his person).

State v. Adams, 554 N.W.2d 686, 692 (Iowa 1996). Tucker describes *Adams* as requiring "large amounts of *unexplained* cash." *See* Def's Br. at 54–55 (citing *Adams*, 554 N.W.2d at 694). But possession of a large amount of cash without a reasonable explanation could be given similar weight—and Tucker's explanation that he had just purchased this convertible was unsupported by any evidence of a recent cash sale at a price that would have left $650 remaining from that settlement.

If this was a purchase, the presence of so much additional cash would suggest that Tucker had either considered buying or intended to buy much more marijuana than the ounce that he ended up with. Nobody planning to purchase marijuana for personal use would need to bring an exorbitant amount of money to the transaction—and yet, if Tucker purchased this ounce of marijuana, that would mean that he arrived at the Burger King parking lot with somewhere between $800 and $950 in cash in his possession. *See* TrialTr.V2 170:21–23.

Tucker cites *State v. Grant* for the proposition that evidence of re-packaging in smaller quantities is important in determining if a defendant possessed drugs with intent to distribute. *See* Def's Br. at 54 (citing *State v. Grant*, 722 N.W.2d 645, 648 (Iowa 2006)). But *Grant* explained that, for mid-level dealers in a "higher food chain" who sell to street-level dealers, those transactions involve drugs that are packaged in their bulk units; the street-level dealers subsequently repackage those drugs into individual dosage units for street-level sale. *See Grant*, 722 N.W.2d at 647. Similar evidence about the practice of mid-level dealers was presented in this case, to support an inference that purchasing an ounce of marijuana was strong evidence of intent to subdivide and redistribute that marijuana in street-level sales. *See*

TrialTr.V2 154:19–155:9 (testifying that street-level dealers would sell "a gram to a few grams at a time" and that mid-level dealers would sell "ounces to quarter to half pound" at a time). Moreover, *Grant* lingered on the repackaging to defeat the inference of personal use that arose from the indicia of use, including the "tooter" straw. *See Grant*, 722 N.W.2d at 646. Here, there were no indicia of personal use—and the State's veteran investigator testified that "if you're a user, you usually have those things together" with the stash of drugs. *See* TrialTr.V2 165:21–166:8; *see also* TrialTr.V2 57:4–12. And if Tucker had planned to ingest these drugs, Tucker would likely have hidden them in a place that would not contaminate them with sweat from his genitals.

This case is similar to *State v. Skinner*—although this case does not involve interstate transport of drugs, this is still a situation where absence of additional evidence of dealing (like repackaging materials) does not defeat the inference that police had caught a mid-level dealer in the act of performing his function in the chain of distribution.

> The cases cited by the defendant are distinguishable from the circumstances in this case because they involve evidence found in buildings where drugs were being sold or packaged for sale. The defendant was arrested as he was transporting the drugs . . . . In the cases he cites, one would expect to find scales for weighing the drugs as they are divided into smaller packages for sale and the smaller baggies for packaging them. One might also expect to find

> sums of money evidencing the sales transactions. In the case before us the defendant clearly was not packaging and distributing the drugs on the bus, so one would not expect to find scales or smaller baggies. He also did not have any paraphernalia such as cigarette papers or roach clips indicative of personal use. A rational fact finder could infer from the amount of drugs, their bulk packaging for transport, . . . and the absence of any paraphernalia indicative of personal use that the defendant was transporting the drugs . . . for distribution.

State v. Skinner, No. 03–0777, 2004 WL 144201, at *2 (Iowa Ct. App. Jan. 28, 2004). Similarly, even if a fact-finder believed that officers may have seen Tucker purchasing this ounce of marijuana, that would still support a finding that he acquired it with intent to distribute it.

In the end, the record does not need to resolve the question of whether Tucker was a mid-level dealer who was arrested after he had just picked up his supply, or a supplier of those mid-level dealers who was arrested when he had just one more stop left to make. All that matters is that the trial record would enable a rational fact-finder to conclude, beyond a reasonable doubt, that the true explanation for what happened was one of those two scenarios where Tucker had possessed marijuana with intent to distribute, and not some other alternative explanation where he possessed it for personal use. This record is sufficient to enable that finding, and Tucker's challenge fails.

CONCLUSION

The State respectfully requests that this Court reject Tucker's challenges and affirm his conviction.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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