IN THE IOWA SUPREME COURT

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NO. 21-1946
CRIMINAL

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**KIRK HOWSARE & AUSTIN HOWSARE,**

**APPELLANTS,**

**v.**

**IOWA DISTRICT COURT FOR POLK COUNTY,**

**APPELLEE.**

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APPEAL FROM THE IOWA DISTRICT COURT OF POLK COUNTY
HONORABLE JUDGE GREGORY BRANDT

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# APPELLANTS' FINAL BRIEF AND ARGUMENT

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## ROUTING STATEMENT AND REQUEST FOR ORAL ARGUMENT

This is a petition for writ of certiorari regarding a widespread and illegal district court practice in detaining criminal defendants without bond, in violation of the Iowa Code, Iowa Constitution, and U.S. Constitution. Retention by the Supreme Court is appropriate because this case presents both a substantial question of the constitutionality of the district court's practices and a substantial issue of first impression, while also having broad public importance that requires ultimate determination by the Supreme Court. Appellants request oral argument.

## STATEMENT OF THE CASE

This Petition seeks pretrial review of an insidious ex parte practice in Polk County that denies bailable defendants their right to bail upon arrest pursuant to warrant and prior to initial appearance solely upon the State's assertion that a no contact order will later be requested at initial appearance as a release condition. This practice of denying bond upon arrest and until initial appearance on the face of the arrest warrant to persons situated similar to the Howsares finds no support in Iowa Statutes, let alone the Iowa Constitution Article I, Section 12 which guarantees bond to almost all defendants. Iowa Code Section 804.3 could not be any clearer in requiring bond and release conditions be set and endorsed on the arrest warrant to be effective upon arrest. Even the claim that a desire for a no contact order to be entered carries no force because Section 804.3 directs that the Court endorse such a release condition on the warrant, and there was nothing preventing the Court from doing so.

This "no bond" practice in Iowa's most populous county is the type of practice that has so far evaded Iowa Supreme Court review because these orders for arrest warrants which expressly state "no bond until initial appearance" are obtained on an ex parte basis by the Polk County Attorney, and by the time a defendant even knows of it and has counsel, the defendant almost always has bonded out of jail following their initial appearance wherein a bond would have

been set and a no contact order entered. In this case defendants requested dismissal because the imprisonment period in this simple misdemeanor exceeded any likely sentence and the ex parte[1] no bond order essentially imposed punishment in advance of any adjudication of guilt without any lawful basis. Dismissal would seem appropriate for a simple misdemeanor initiated via an unlawful ex parte process where the defendant was held in custody for nearly 24 hours. Defendants in these cases, as here, have been held in custody often for 24 hours or more due to these no bond orders. In this case, the most senior district associate judge made clear his intent to see the practice continue unless directed to stop. In fact, undersigned counsel has been made aware as of the writing of this brief that the Polk County Attorney is still seeking such no bond warrants for bailable offenses.

This writ is intended to obtain from the Iowa Supreme Court a definitive ruling on the question of "no bond" arrest warrants for bailable offenses such as

[1] An arrest warrant is properly obtained ex parte, but when a prosecutor requests an ex parte no bond warrant, they do so at their own peril, especially when they do not advise the court of the requirement that bond be endorsed on the warrant. Setting aside the Court's obligation to follow the law, a prosecutor has a special obligation to not seek relief from a Court on an ex parte basis without a good faith basis in the law and that duty has to be especially high when they seek arrest and imprisonment. In this circumstance, it is not enough that the Polk County Attorney believes there is a basis to request a no contact order; they must also have a good faith basis for requesting the complete denial of bail while deferring their request until initial appearance.

the simple misdemeanor charge at issue in this case, particularly when the sole stated basis for the no bond warrant is the assertion that a no contact order will be sought later at the initial appearance and that defendant must be held after arrest with no bond set until that request is to be made, the order entered (if the Court then deems it appropriate), at an in-custody initial appearance. The contention that the Polk County Attorney and Polk County Court could believe it lawful to hold someone in custody after arrest solely because the County Attorney represents they want to seek a no contact order later at an initial appearance has no legal underpinning. It is a naked claim of authority without even the thinnest of legal argument to support it, unless the refrain, "that is the practice in Polk County" is authority.

The Polk County practice violates Iowa law and a ruling on this writ would make that clear and bring an end to an illegal district court practice. This is precisely the purpose of this Court's writ power. *See* Iowa Rules of Appellate Procedure 6.107(1)(a)(original certiorari action for lower court acting illegally); 6.1001(1)(writ proper in furtherance of this Court's supervisory and administrative control over inferior tribunals).

## STATEMENT OF THE FACTS

On September 10, 2021, identical complaints were sworn to by a law enforcement officer asserting that Appellants had committed a simple misdemeanor assault in violation of Iowa Code Section 708.2(6) a month earlier on August 13, 2021 as follows:

> This defendant, along with another defendant did assault S.B. by intending to place her in fear of immediate physical contact that would be painful, injurious, insulting, and offensive to her by while engaged in a professional meeting, intentionally following S.B. into an elevator shouting profanity and telling her she could not leave,[2] forcing S.B. to redirect her exit because S.B. had not provided the defendant with paperwork said to be part of the business meeting.

(A[3]6-7, 9-10). The complaint identified a home address for each defendant. (A6-7, 9-10). On September 10 the County Attorney also submitted a form document captioned "County Attorney Preliminary Complaint Review." (A5, 8). In that

[2] The alleged victim was an attorney representing a real estate buyer's lender at a real estate closing in West Des Moines. The Howsares are real estate agents who were representing the seller in the closing. The Howsares needed a copy of the executed closing documents to take to their client's new home purchase closing which was scheduled to promptly follow the sale of their home, and the lender's attorney refused to furnish them an executed copy of their own closing papers until after she had returned to her office in Ames, jeopardizing the seller's new home purchase closing that same day.

[3] "A" refers to the Appendix.

document the County Attorney approved the filing of the complaint and attached a requested arrest warrant. The Complaint Review[4] form then stated:

> With regard to a bond amount, the State requests that:
>
> > The State requests defendant be held without bond until initial appearance, so a *No Contact Order* may be entered.

(A5, 8). No explanation for not proposing a No Contact Order or no contact release condition was offered as part of the request for no bond or later issuance of a no contact order, nor was an explanation offered later in response to the dismissal request. On September 13 the magistrate judge found probable cause in the complaint and then approved the State's proposed warrant[5], stating:

> You are commanded forthwith to arrest said defendant and take him/her before the nearest, most accessible magistrate without unnecessary delay pursuant to Section 804.21 of the Iowa Criminal Code. ***No bond until initial appearance as No Contact Order is requested.***

(A11-14)(emphasis added).

In the 7 weeks following issuance of the warrant, neither the Court or County Attorney had prepared or issued a no contact order to be served upon the Howsares.

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[4] Notably absent from the Complaint Review Form is an option for a summons as opposed to an arrest warrant.

[5] We know the warrant electronically signed by the magistrate on September 13 was the one submitted by the State with their complaint review form on September 10 because the warrant reflects in type it was issued on September 10, the date the State proposed it in anticipation of the Court's immediate approval.

The Howsares were not arrested until 1:50 p.m. on November 2, 2021, a Tuesday. (A87-88). The Howsares were not taken to "the nearest most accessible magistrate" but instead were taken to the Polk County Jail. The Howsares immediately sought to post bond at 2:14 p.m. when they arrived at the Polk County Jail (A64, 87-88). The jailer would not release them, even under the amount set in the bond schedule, because the warrant specifically denied bond until they saw a judge. (A64). The Polk County Jail is outfitted at great taxpayer expense with a courtroom for proceedings to be conducted with in-custody defendants. It also has audio-visual equipment for remote proceedings. Yet, the Howsares were not then taken to see a judge at the jail courtroom or Polk County Courthouse where any number of judges should have been available during the work day, whether in-person or via audio-visual connection. They were booked into the Polk County Jail and held overnight until they saw District Associate Judge Brandt the following morning at 10:10 a.m. No evidence supports the necessity of the 20-hour delay between the time of arrest and being brought before the "nearest most accessible" judge. Upon seeing Judge Brandt, a no contact order was issued and a bond of $100 was set. (A15-20). The bond was immediately posted when the paperwork got to the front area of the Polk County Jail. In the afternoon, the Howsares were finally released from the Polk County Jail, a period approaching 24 hours, all to effectuate the request for and issuance of a no contact order.

On November 10 the Howsares filed a motion to dismiss and supplemented it on November 12. (A31-38, 39-44, 51-55). In their filings, they argued that the warrant:

1) violated Iowa Code Section 804.3 which required the Court to set bail and endorse any release conditions on the warrant because this was a bailable offense and that the Iowa Code only allowed for holding defendants without bond pending a no contact order and until initial appearance when the charges were those specified in Iowa Code section 664A.3(2) (offenses under sections 236.11, 236.12 and 236A.12),

2) that the no bond warrant violated the Iowa Constitutional right to bail under Article 1, Section 12,

3) that the Howsares' post-arrest detention without bond for approximately 20 hours prior to seeing the nearest, most accessible judge, was "unnecessary delay" in violation of Iowa Code Section 804.21(1),

4) the arrest and 24-hour detention was in violation of their rights under Article 1 Section 8 of the Iowa Constitution and the Fourth Amendment to not be unreasonably and unnecessarily seized and held in custody without adequate lawful cause, and

5) even assuming a magistrate or judge had discretion to set a no bond warrant such as this, the magistrate abused his discretion in doing so under the

facts and circumstances of this case, including by not issuing a summons as opposed to an arrest warrant that put the elder Howsare in the COVID-infested Polk County Jail for 24 hours.

The State resisted the motion. (A45-50). The crux of the State's argument was that when the magistrate issued the warrant and set no bond until initial appearance because a no contact order was going to be requested, the magistrate was complying with Code Section 804.3 which required the Court set a bond and endorse any release conditions on the warrant itself. (A45-50, 66). *In other words, the State argued the Court complied with its obligation to set bond and release conditions on the warrant itself by declining to do so until after initial appearance.* The State argued also the Court did not abuse its "discretion" by doing so. Not surprisingly, the State's resistance recited no statute or other authority for this creative reading of the statutes at issue.

At the hearing on December 1, the Court pointed out just how common this no bond practice had been in Polk County as justification for its legality and found that the practice was wholly appropriate and lawful. (A56-59, 82-85). The Court asserted that issuing the no contact order and explaining and emphasizing its importance to an arrestee in person was a "compelling interest" of the Court that justified arresting the Howsares and holding them in custody until the Court got around to seeing them some 20 hours post-arrest. (A84-85). The Court viewed the

requirement that the defendant be brought before the nearest most accessible magistrate without unnecessary delay as really meaning that when a judge got around to seeing the defendant in custody in the ordinary course of Polk County processes was good enough. Essentially, as with the Court's view that it felt it necessary to read the no contact order to each defendant while shackled at the feet of the judge, the Court believed that the requirement to bring an arrestee before the Court without unnecessary delay was to be viewed from the perspective of convenience to the Court, not from the perspective of a presumptively innocent arrested citizen with rights who may have a job at stake, a small child at home, other important obligations, or health concerns impacted by incarceration in the covid-infested Polk County Jail[6].

[6] The Polk County Jail actually shut down for many months during Covid and would not allow in-person visits by attorneys, inmate family members, or others because of disease risk. At age 67 Kirk Howsare was in a Covid high risk category.

## ARGUMENT

### Issues Presented for Review

**1. PRESERVATION OF ERROR.**

Error was preserved when the Howsares filed a Motion to Dismiss (November 10, 2021), Supplement to Motion to Dismiss (November 12, 2021), and Reply to the State's Resistance to Motion to Dismiss (December 1, 2021). The District Court denied the Motion to Dismiss on the record (December 1, 2021), finding that it did have the power to hold defendants without bond in this case, stating:

> [I]n this particular case, to say that Magistrate Lipman abused his discretion in issuing this particular type of warrant, the Court finds that is not based on any justification either. There is nothing that prevents the Court in this Court's determination to issue a warrant that would hold somebody until such time as the Court is able to personally address that individual as to the nature of a no contact order . . . And so consequently, the Court finds that the motion to dismiss is not based in – well, the Court's going to deny the motion to dismiss.
> (12/1/21 Hrg. Tr. at 25-26).

**2. STANDARD OF REVIEW.**

"In a certiorari case, the district court's ruling is reviewed for correction of errors at law." *State Pub. Defender v. Iowa Dist. Ct.*, 744 N.W.2d 321, 321 (Iowa 2008). "A writ of certiorari lies where a lower board, tribunal, or court has exceeded its jurisdiction or otherwise acted illegally . . . . 'Illegality exists when the court's findings lack substantial evidentiary support, or when the court has not

properly applied the law.'" *Id.* (quoting *State Pub. Defendant v. Iowa Dist. Ct.*, 721 N.W.2d 570, 572 (Iowa 2006)).

### A. Whether An Arrest Warrant for These Bailable Simple Misdemeanor Offenses May Legally Deny Bond Altogether?

Article I, Section 12 of the Iowa Constitution provides, "All persons shall, before conviction, be bailable, by sufficient sureties, except for capital offenses where the proof is evident, or the presumption great." Iowa Const. Art. I, § 12. To carry out that Constitutional requirement, the legislature has enacted Section 804.3, which is the latest iteration of a practice in Iowa dating back to the late 1800s.

The Howsares believe Section 804.3 is determinative on this question:

> **804.3 Order for bail--endorsed on warrant.**
>
> If the offense stated in the warrant be bailable, the magistrate issuing it **must make an endorsement thereon as follows**: "Let the defendant, **when arrested**, be (admitted to bail in the sum of . . . dollars) or (stating other conditions of release)."

(bold supplied). The statute is explicit in its requirement that for bailable offenses, such as these simple misdemeanors, the warrant itself must provide bail or release conditions, or both, that would be available to the arrestee "when arrested." The warrants here violated the clear language by providing "no bail" to these defendants when arrested.

Section 804.3 has a heading "order for bail—endorsed on warrant" that tells us the statutory section subject matter concerns endorsing bail on the warrant.

"Although the title of the statute cannot change the plain meaning of the statutory text, it can be considered in interpreting the text." *State v. Hall*, 969 N.W.2d 299, 307 (Iowa 2022). In the statutory text the legislature went so far as to quote the specific required language to be used in doing so. The legislature used the words "*must make an endorsement thereon as follows*" to reflect the bail endorsement requirement and the Court's obligation to follow it. The use of the word "must" in the statute means the imposition of a requirement, not something that is optional or discretionary. *See* Iowa Code Section 4.1(30)("The word "must" states a requirement"). An Order on a warrant for a bailable offense that expressly denies bail altogether upon arrest flies in the face of Section 804.3's mandate to endorse bail and/or release conditions on the warrant itself. *For a bailable offense as we have here, Section 804.3* ***requires*** *that the Court endorse on the warrant an amount of bail or other release conditions available to a defendant* ***when arrested***. The use of the term "must" in Section 804.3 defeats the contention that setting bail or release conditions to be available upon arrest is discretionary with the Court for bailable offenses:

> "Shall" and "must" are distinguished by our legislature in Iowa Code chapter 4 (1991), Construction of Statutes. "Shall" imposes a duty; "must" states a requirement. Iowa Code § 4.1(36)(a), (b). "Duty" and "requirement," however, are not defined in the Iowa Code. "Duty" is a "legal or moral obligation. Obligatory conduct or service. Mandatory obligation to perform." *Black's Law Dictionary* 505 (6th ed. 1990). "To require" is to "direct, order, demand, instruct, command, claim, compel, request, need, exact." *Id.* at 1172. **Both "duty" and "requirement" speak**

> **in terms of command and obligation, excluding the idea of discretion. Both direct some type of behavior that is obligatory in nature.** *Cf. State ex rel. Wright v. Board of Health*, 233 Iowa 872, 875, 10 N.W.2d 561, 563 (Iowa 1943) ("must" or "shall" impose a duty). As a matter of statutory construction, "shall" and "must" are often treated as synonyms. *See* 27A Words & Phrases, "*Must*" 688 (1961); *Black's Law Dictionary* at 1375 ("['Shall'] in ordinary usage means 'must' and is inconsistent with the concept of discretion."). We find our rules of construction for "shall" to be instructive in our determination of the force of "must" in the Cerro Gordo County, Iowa, Zoning Ordinance.

*Willett v. Cerro Gordo Cty. Zoning Bd. of Adjustment*, 490 N.W.2d 556, 559 (Iowa 1992). Had the legislature wanted to allow a Court to deny bail on the warrant endorsement, it would have used the word "may" not "must."

The Appellee agrees the Order withheld bail, in other words, denied bail altogether upon arrest. The Order said "no bail" after all, and the Appellant's efforts to bail out promptly the afternoon of arrest were denied. Every bailable defendant subject to an arrest warrant is entitled to have bond set on the warrant, to have release conditions set, or both bond and release conditions set, on the warrant to be effective "upon arrest," not some later point in time. An order that denies bond on the warrant is not an Order that can be argued as complying with Section 804.3 because it does not set bail or state release conditions, or both upon arrest.

### B. The desire of the Prosecutor at the Time an Arrest Warrant is Sought to Later Seek a No Contact Order Does Not Change the Right to Bail or Release on Conditions upon Arrest for the Offenses Here.

First, Section 804.3 does not have any general exception to its mandate for circumstances where a prosecutor may wish to have a no contact order set as a release condition, nor does the Iowa Constitution. Section 804.3 directs that any release conditions desired at the time the warrant is sought must be endorsed on the warrant. A no contact requirement can be a permissible release condition pursuant to Iowa Code Section 811.2(1)(a)(5)[7]. Setting no bail until a no contact order is requested, issued, and served violates the plain language of Section 804.3. **If the prosecutor and Court contemplate a no contact condition as a release condition at the time a warrant is sought, that condition is to be endorsed on the warrant together with any bail amount with only a few limited exceptions not in play here that are discussed below.**

Chapter 664A addresses no contact and protective orders in all criminal cases where there is a victim. But, Chapter 664A does not generally alter the right to release upon arrest. The legislature made clear under Chapter 664A that *only if* a charge involving a victim is brought under 236.11, 236.12 or 236A.12 is the defendant required to be held until seeing a magistrate, whereupon a no

[7]Section 811.2(1)(a)(5) provides the court may "[i]mpose any other condition deemed reasonably necessary to assure … the safety of another person or persons *including … a condition that the defendant have no contact with the victim or other persons specified by the court.*" Such a release condition is defined as a "protective order" under Chapter 664A.1(2) such that no further separate, "stand alone" 664A Order would be necessary.

contact/protective order is to be entered. *See* Iowa Code Section 664A.3(2). Section 664A.3(2) provides:

> Notwithstanding chapters 804 and 805, a person taken into custody pursuant to section 236.11 or 236A .12 or arrested pursuant to section 236.12 may be released on bail or otherwise only after initial appearance before a magistrate as provided in chapter 804 and the rules of criminal procedure or section 236.11 or 236A .12, whichever is applicable.

The Howsares were not charged under any of the sections identified in Section 664A.3(2) and it is no authority for the State or Court. The above language created a special narrow statutory[8] exception to the requirement in Chapter 804 that a defendant arrested for a bailable offense be allowed bail upon arrest and prior to seeing a magistrate. It specifically leaves release of other persons in advance of initial appearance to the century-plus practice codified in Chapters 804 and 805. The express inclusion of 236.11, 236.12 and 236A.12 offenses as those to be denied bail in advance of initial appearance carries with it the exclusion of other offenses under settled law of statutory construction, reenforced by the "notwithstanding" clause. *Marcus v. Young*, 538 N.W.2d 285, 289 (Iowa 1995)(expressio unius est exclusio alterius); *State v. Beach*, 630 N.W.2d 598, 600 (Iowa 2001)(same). The application of this settled rule of statutory

[8] Defendants do not concede that Section 664A.3(2) does not violate the Iowa Constitution's bail guarantee. That question need not be reached because the statutes applicable to these offenses do guarantee bail upon arrest, especially pursuant to arrest warrants as we have here.

construction to release for other offenders not charged under 236 or 236A was emphasized by the use of the phrase *"[n]otwithstanding chapters 804*[9] *and 805*[10]*"* as they provide for release in advance of initial appearance. Had the legislature wanted to generally deny bail to arrestees in advance of initial appearance whenever a prosecutor wanted a no contact order, it would not have limited the language in 664A.3(2) to very specific offenses, and it surely would not have used the word "notwithstanding." Section 664A.3(2) only serves to reenforce and bolster the Howsares' position.

Release prior to initial appearance, at least on misdemeanors, has been the law of Iowa since at least the late 1800s. *See State v. Benzion*, 44 NW 709 (Iowa 1890).

The bail code provisions generally for those charged with bailable offenses, other than those charged under 236.11, 236.12 and 236A.12, does not require those arrested to see a magistrate before being released. *See* Iowa Code Sections 804.21(1) and 804.22(2) and 804.21(6). Sections 804.21(1) and Sections 804.21(6) state:

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[9] Section 804.21(6) provides for release of a person arrested upon a warrant in advance of initial appearance *by posting the bond endorsed on the warrant*. Section 804.22(2) provides that persons arrested without a warrant may bond out in advance of initial appearance and 804.21(1) provides also for release on pretrial release guidelines or a uniform bond schedule in advance of initial appearance.

[10] Chapter 805 addresses release for scheduled violations and uniform citations.

> 1. A person arrested in obedience to a warrant shall be taken without unnecessary delay before the nearest or most accessible magistrate. The officer shall at the same time deliver to the magistrate the warrant with the officer's return endorsed on it and subscribed by the officer with the officer 's official title. ***However, this section, and sections 804.22 and 804.23, do not preclude the release of an arrested person within the period of time the person would otherwise remain incarcerated while waiting to be taken before a magistrate*** if the release is pursuant to pretrial release guidelines or a bond schedule promulgated by the judicial council, unless the person is charged with manufacture, delivery, possession with intent to manufacture or deliver, or distribution of methamphetamine. If, however, a person is released pursuant to pretrial release guidelines, a magistrate must, within twenty-four hours of the release, or as soon as practicable on the next subsequent working day of the court, either approve in writing of the release, or disapprove of the release and issue a warrant for the person's arrest.
>
> 6. ***This section does not prevent the release of the arrested person pending initial appearance upon the furnishing of bail in the amount endorsed on the warrant.***[11] The initial appearance of a person so released shall be scheduled for a time not more than thirty days after the date of release.

Persons charged with the offenses in this case have the right to be able to bail out in advance of seeing a magistrate. The County Attorney and the Court have no right to create their own Polk County warrant forms, or seek or enter Orders contrary to law, or create some practice that is claimed to support the repeated violation of the right to bail and release upon arrest.

If the Court wishes to set a no contact term as a release condition on a defendant arrested pursuant to warrant on a bailable offense such as this, the Court

[11] This section also supports the Howsares' view that Section 804.3 requires the bond amount to be endorsed on the warrant.

is to set bail and notate the no contact condition on the warrant endorsement. *See* Iowa Code Section 804.3. The Court also may issue a no contact order under Chapter 664A and that order may be served at the time of the arrest warrant, either in its complete form or by a "short form" notice under Chapter 664A.4A on a form available from the State Court Administrator.

### C. The Custodial Detention Here Violated the Statutory, Federal Constitutional Fourth Amendment Rights, and Article I Section 8 of the Iowa Constitution Rights of These Defendants Because They Were Not Taken Before An Available Judge Without Unnecessary Delay, They Were Denied Their Statutory and Constitutional Right to Bail Upon Arrest, and the Duration of Their Detention Exceeded that Necessary to Effectuate its Sole Purpose—to Serve a No Contact Order Upon Them.

Although defendants believe the above argument is dispositive, this argument would independently and additionally explain the problem with what occurred. Numerous provisions of law address what is to happen when an arrest warrant is sought and a person is arrested.

As quoted above, under Section 804.3 a person arrested pursuant to a warrant is entitled to have bond and release conditions endorsed on the warrant itself, said terms being effective and available when arrested[12]. Then, under Section 804.21(1) a person arrested pursuant to warrant, if they have not been

[12] A person arrested on a warrant is appropriately subject to typical routine booking procedures prior to release as part of the arrest process, but apart from that, they are to have afforded to them release conditions and/or a bond at that time, if the arrest is for a bailable offense.

released on endorsed bond terms first, is required to be "taken without unnecessary delay before the nearest or most accessible magistrate." This phrase "taken before" can be satisfied via an "audiovisual closed-circuit system." I.R.Cr.P. 2.27(1). The phrase "unnecessary delay" means "*any unexcused delay longer than 24 hours and consists of a shorter period whenever a magistrate is accessible and available*." I.R.Cr.P. 2.1(2)(d). It is uncontroverted that a magistrate, or several, were available and accessible at the time of the 1:50 p.m. arrest, but that defendants were taken to the Polk County Jail and not afforded their right to see a judge for some 20 hours, all without any justification for the delay. And, because the Order said no bond until initial appearance, they were specifically denied their right to bond under the Iowa Constitution and statutes.

The above provisions inform the law of Iowa as it relates to the tort of false imprisonment. An action for false imprisonment lies for an unreasonable delay in bringing an arrestee before the magistrate. False imprisonment can also be made out if there is an "***unreasonable delay in giving the arrestee the opportunity to post bond.***" *See Valadez v. City of Des Moines*, 324 N.W.2d 475, 477 (Iowa 1982). The central element in both forms of false imprisonment is whether the detention is unlawful, and the action may lie without regard to the lawfulness of the arrest itself. *Id.; Andersen v Spencer*, 294 N.W. 904, 905 (Iowa 1940)(recognizing tort where arrestee was held without bond from evening on

being jailed until about noon the following day when released). These propositions are supported by a significant body of law that is well annotated. Habeeb, W., Annot., *Delay in taking before magistrate or denial of opportunity to give bail as supporting action for false imprisonment*, 98 A.L.R.2d 966 at 1031; (1965 & Supp. 2022); Tinsely, J., *False imprisonment—failure to take arrestee before magistrate without unreasonable or unnecessary delay*, 26 Am. Jur. Proof of Facts 2d Sec. 617 (1981 & Supp. 2022); Speiser, S., et al, *Arrests—unreasonable or unnecessary delay in taking arrestee before magistrate*, 8 American Law of Torts Sec. 27:15 (2022). While this is not a false imprisonment tort case, the prima facie elements of that tort only arise when there has been a violation of law as it relates to the timing of presentment or making bail available. Defendants believe their circumstances present a prima facie case of statutory violations that make their detention in jail unlawful as there is no statutory authority to deny bond to a person arrested for a bailable offense, and there is no statutory authority to detain them in an anticipation of a future no contact order being entered. Moreover, there was no valid basis to hold them as long as they were before they saw a judge via video or in-person as the court was in session when they were arrested and the courthouse and any number of judges were available. This appears to be a black and white case of false imprisonment after arrest under one or both theories expressed in *Valadez.*

It should go without saying that a Court in the United States could not issue a warrant to arrest and detain a person solely to serve a yet to be issued judicial order and require on that warrant that the person be held in custody until the order could be issued and served in a court proceeding. Who in their right mind would believe such a thing lawful? There are procedures for service of no contact protective orders, and none of those procedures authorize an arrest, let alone a 20-hour detention period in jail to effectuate entry of an Order and service. This is such an obvious proposition that a search for authority supporting it does not exist because nobody would be so astray in their thinking to do such a thing.

The County Attorney and the Court rely on a transparent pretext to claim such authority. That pretext is that the defendants were being arrested for a criminal offense with a victim. That arrest authority is relied upon as the basis to detain the arrested person until seen by the Court whereupon a no contact order would presumably be requested and issued if found appropriate at that time. Saying the *arrest* was valid does not bless the denial of bail and 20-hour incarceration and deprivation of liberty that followed. The argument of the State in this regard is of no help to them because you cannot lawfully deny bail to a person lawfully arrested for a bailable offense in order to give time to request, obtain, and serve them with a no contact order any more than they can arrest them solely for the purpose of serving a no contact order that has yet to be issued. And, even

assuming some little detention post-arrest and prior to release was warranted in order to get a no contact order or release condition served, and to take bail, if any, it does not take 20 hours to do so, and there is nothing that requires the defendant see a judge to have that happen. There was no justification offered, no reason of necessity presented, that would justify holding defendants from their arrest at 1:50 p.m. until 10:10 a.m. the following morning when first presented to the Court. The Judges in the State of Iowa and Polk County are public servants, after all, and they should be serving the public first and foremost. Nothing in this record supports the necessity of a 20-hour delay, particularly for the sole reason indicated. Put it this way, if a Court could arrest a defendant to serve a no contact order following arrest, then the reasonableness of the post-arrest detention must be closely scrutinized because the trial court would have to be able to show some reason why there would not have been such a no contact order done prior to arrest for service upon arrest, the Court would also have to be able to show that it could not have very promptly issued the form order no contact order upon arrest, the Court would also have to show why the delay in setting any bond at all for 20 hours was reasonable, and the Court would also have to be able to show why it was necessary to await initial appearance to set a bond.

*The Polk County approach has at least two distinct infirmities—first, the belief that a no contact order should or could only be issued in person and read to*

*the incarcerated defendant, and second the belief that it could deny bond altogether until initial appearance even if a no contact order were issued sooner. This is not a case where the warrant said that defendant could be released on a specified bond following service of a no contact order; this is a case where the Court denied bond altogether and stated the reason that such denial was attributable to the Court's desire to consider a no contact order at the initial appearance while defendant was in custody without bond.*

In the Fourth Amendment and Article 1 Section 8 search and seizure context the legality of a person's detention, including particularly its duration, must be circumscribed to the activities necessary to complete the mission justifying the detention in the first instance. *See Rodriguez v. United States*, 575 U.S. 348 (2015); *In re: Pardee*, 872 N.W.2d 384 (2015). In *Rodriguez* the Court was looking at the detention of a motorist during a traffic stop being exploited as a pretext to pursue something else that did not justify the initial traffic stop. The Court held that the detention became constitutionally unlawful when activity outside the scope of the stop measurably extended its duration from that necessary to complete the stop as originally justified. What the State would be claiming here would be that because we can arrest the Howsares for their simple assault alleged crimes, we have the right to detain them to issue a no contact order some 20 hours later even though we could not have arrested them and held them for 20 hours

merely to secure and serve the no contact order. If the arrest was justified as a way to initiate a simple misdemeanor prosecution, then the Court and State were not free to exploit that arrest to pursue some other purpose (preparation and issuance of a no contact order) that could not itself justify the arrest in the first instance. That makes the arrest a mere pretextual predicate for the unjustifiable detention.

Basically, the State's argument is like that rejected in *Rodriguez* where the claim was that since an officer can stop the motorist for a traffic violation, they can do anything they want post-stop so long as the total duration is reasonable in some generalized sense. However, as explained in *Rodriguez*, if the "mission"[13] of the detention of the Howsares from the point of arrest until appearance was to serve them with a no contact order, then it is incumbent on the prosecutor and Court to diligently pursue that mission. Section 804.21(1) contemplates this diligence when it requires the arrestee to be brought before the "nearest and most accessible magistrate" without "unnecessary delay." After arrest, there was no diligent pursuit of the "mission" of serving a no contact order and the 20-hour delay was completely unnecessary and avoidable. This activity violated their State and Federal constitutional right to be free from unreasonable search and seizure.

[13] Defendants believe that was an impermissible reason to arrest, let alone detain them. Arresting someone for an impermissible reason is an abuse of judicial authority, particularly when the court had available the power of summons and service of a no contact order with the summons.

First, if a no contact order was so necessary, a summons and a no contact order release condition should, in the exercise of due diligence, have been ordered and promptly served. Second, the prosecutor and Court could have accomplished that no contact order "mission" by simply following Section 804.3 and specified a no contact as a condition of release on the warrant. It was not necessary to deviate from Section 804.3. In fact, deviating from Section 804.3's endorsement requirement delayed the issuance of a no contact order by at least 20 hours after arrest because it should have been endorsed on the warrant and served with the warrant. Third, even assuming not issuing a no contact order at the time of the warrant was acceptable, the delay in entering such an order in the many weeks after the warrant and prior to arrest was not necessary or justifiable. It is also noteworthy that even if a no contact order had been entered in advance of arrest, defendants would still have not been able to get released because the Order denied bond even in that event. Fourth, if it was indeed "necessary" for the Court to personally serve a no contact order and explain it to the Howsares, then the Court should have done so promptly following their arrest on the afternoon of November 2 when the Court was in session and available during the work day. While that may be inconvenient to the Court or the jail, that inconvenience hardly compares to requiring the Howsares to sit in jail for 20 hours for the Court to perform what appears to be a gratuitous exercise not required by law. And, Section 804.21(1)

requires defendant be brought before the Court without unnecessary delay following arrest, at least during normal court hours. So, the inconvenience to the Court and Sheriff complying with the statute is part of their job, not some unwelcome burden.

**D. Remedy**

When we are presented with a violation of rights that results in pretrial imposition of imprisonment in violation of law for such as minor alleged offense as blocking an elevator or arguing which is most likely being mislabeled an "assault", there must be a remedy in the criminal case itself that is swift and efficient lest the Court and County Attorney get the idea they can continue the practice and only face some theoretical civil liability. A prosecutor should not get a free ex parte penalty shot upon the defendant by seeking and securing an unlawful imprisonment order for such a petty offense. What we have here is a good opportunity to right a wrong by directing that these actions be dismissed in the interests of justice using this Court's inherent supervisory powers over the lower tribunal. The manner by which these prosecutions were initiated---through the procurement of illegal no bond arrest orders-- should be sufficient to void them through dismissal lest the practice be further supported and allowed to continue unabated in other cases free of fear of a remedy. Put it more concisely, there is a need to deter the Polk County Attorney and Polk County Court from further

violations of law that are not accomplished by a mere legal ruling in favor of the Howsares on a legal point. They spent longer imprisoned on these illegal warrants than they almost certainly would ever have spent for the underlying alleged "offense" if convicted. Whether under I.R.Cr.P. 33 in the interests of justice, or as a sanction or penalty for wrongfully initiating these cases and getting illegal relief at the outset, dismissal is proportionate and just.

## CONCLUSION

For the reasons stated herein, the Howsares request that this Court review this case now and issue a writ declaring the previous no bond warrants illegal as a general matter and in the particular circumstances of this case, and further directing that these matters be dismissed in the interests of justice and fairness, or for such lesser relief as deemed appropriate.

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## CERTIFICATE OF FILING

The undersigned does hereby certify that he electronically filed Appellants' Final Brief with the Clerk of the Iowa Supreme Court by using the EDMS filing system on the 21st day of July, 2022.

## CERTIFICATE OF SERVICE

On the 21st day of July, 2022, the undersigned party served Appellants' Final Brief on all other parties to this appeal by using the EDMS filing system.

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS**

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 7,078 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This 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 Office Word 2013 in Times New Roman in 14 point font size.

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