IN THE IOWA SUPREME COURT

NO. 21-1946
CRIMINAL

KIRK HOWSARE & AUSTIN HOWSARE,

APPELLANTS,

v.

IOWA DISTRICT COURT FOR POLK COUNTY,

APPELLEE.

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

APPELLANTS' REPLY BRIEF

STOWERS & NELSEN PLC
Dean Stowers
West Glen Town Center
650 S. Prairie View Drive, Suite 130
West Des Moines, IA 50266
Telephone: (515) 224-7446
Fax: (515) 225-6215
Email: dean@stowersnelsen.com
ATTORNEY FOR APPELLANTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE ISSUES

A. NO STATUTORY AUTHORITY EXISTS TO HAVE ARRESTED THESE DEFENDANTS AND DENIED THEM BAIL WHEN ARRESTED AND PRIOR TO INITIAL APPEARANCE SOLELY TO CONTEMPLATE A STATE REQUEST FOR A NO CONTACT ORDER AS A RELEASE CONDITION

B. THE STATE'S CONTENTION THAT A "CHAPTER 664A" NO CONTACT ORDER COULD ONLY BE ENTERED AT INITIAL APPEARANCE IS DUBIOUS AT BEST

SUMMARY

After reading the State's argument one could get confused and distracted from what this Certiorari matter is all about. The issue here is this: *whether the court acted illegally when it entered an order on the arrest warrant completely denying any bail or release to these defendants "when arrested" and until a custodial initial appearance "as a no contact order is requested."*

The entire issue in this case arises from ***not*** *entering a no contact order as a release condition as part of the warrant issuance when the County Attorney, in their application for warrant, advised the magistrate that they were requesting a no contact order. Rather than doing that simplest of things--setting bail and a no contact release condition-- just as the Iowa Code requires, Polk County has come up with some illegal concept that they may withhold entry of a no contact order, arrest someone, and direct that they be held without bond of any kind at all until they first appear at a custodial initial appearance whereupon the presiding judge would presumably take up the request of the State to issue a no contact order as a release condition, and only then set bail. Polk County has it backwards.*

ARGUMENT

A. NO STATUTORY AUTHORITY EXISTS TO HAVE ARRESTED THESE DEFENDANTS AND DENIED THEM BAIL WHEN ARRESTED AND PRIOR TO INITIAL APPEARANCE SOLELY TO CONTEMPLATE A STATE REQUEST FOR A NO CONTACT ORDER AS A RELEASE CONDITION.

The State cites to no authority supporting the request of the County Attorney in their "Complaint Review" form that "defendant be held without bond until initial appearance, so a No Contact Order may be entered." (A[1]5, 8). No authority for that request was cited. When the issue was raised at the trial court in the motion to dismiss, the County Attorney again cited no authority. The State's argument at the trial court was that denying bond until initial appearance "so a no contact order could be entered" somehow complied with the statutory requirement under Section 804.3 to endorse such a release condition on the warrant itself. When asked to rule on the matter, the district associate court's position was essentially that these orders were common practice in Polk County, as if that was sufficient.

The statute requires that an arrestee "when arrested" be able to be released after typical arrest processing before initial appearance upon an endorsed bond and/or conditions of release. Section 804.3 is clear:

[1] "A" refers to the Appendix.

> **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)."

To "admit" a defendant to bail means to give them a means to be released on bail in the amount or on conditions endorsed on the warrant. Section 804.3 does not itself[2] allow for denial of release when arrested and in advance of initial appearance altogether as this warrant did.

The State spends a good deal of its time and ink pointing out the efficacy and reasonableness of no contact orders as release conditions. That argument about the propriety of a no contact order release condition in this case misses the point entirely. The issue here concerns the *timing* and whether the Court may deny release altogether to a defendant "when arrested" so that the condition of release could be taken up *later* at an in custody initial appearance. The statute plainly requires bail and/or any release conditions be endorsed on the warrant and available to the arrestee "***when** arrested*."

Section 804.3 fully accommodated the State's desire for a no contact order at the time the warrant was requested, and Section 804.3 actually *required* ("must

[2] Certain specific charges identified by the legislature create an exception to this general statutory rule of bail and release in advance of initial appearance, but simple assaults are not among those. These "no bond" until appearance offenses are catalogued in this Court's uniform bond schedule order.

make an endorsement") the Court to endorse the no contact release condition on the warrant, or an incorporated/referenced no contact order. *As pointed out in our opening brief, the legislative language "must" did not give the magistrate discretion to deny bail altogether for these charges or wait to a later time to endorse bail and/or release conditions.* (Appellants' brief pp.21-22). Nothing allows the County Attorney to defer their request for a no contact order until initial appearance, while entirely denying bail and release when arrested until the request might be made at initial appearance. Section 804.3 does not give the County Attorney or the Court issuing the warrant the option to bypass setting release conditions and/or a bail amount on the warrant to be available to the defendant "when arrested." There is no option to hold a defendant without bond until initial appearance for these offenses. The no bond order was illegal in these cases.

What's worse is that the failure to have a no contact release condition endorsed on the warrant or incorporated by reference appears to be a matter of dilatory conduct by the prosecutor and Court coupled with an abuse of their positions in not preparing or entering the no contact order when the warrant was sought—opting instead to incarcerate defendants unnecessarily as part of a local illegal practice whenever the Polk County Attorney seeks a no contact order and

are presented with an arrest warrant.[3] The way this works is that the County Attorney gets a sentence of up to 24 hours without a due process adversarial proceeding of any kind just by asking and getting a magistrate to sign one of these no bond orders. That is a pretty extraordinary power to exercise without one whit of legal support. The Polk County practice has gone so far as to create their own form requests for this relief and their own warrant forms setting "no bond" that vary from Section 804.3's clear terms. The Polk County Attorney and the District and lower courts in Polk County are to follow State law, and they are not free to make up their own rules and procedures that directly abridge their obligations under the Iowa Code. This is why a writ is the appropriate remedy.

B. THE STATE'S CONTENTION THAT A "CHAPTER 664A" NO CONTACT ORDER COULD ONLY BE ENTERED AT INITIAL APPEARANCE IS DUBIOUS AT BEST.

On pages 14 and 15 of their brief the State argues that the Court could not enter a no contact order "under Chapter 664A" unless there was an initial appearance following arrest as some type of explanation for why the denial of bail after arrest until initial appearance was justified. Although irrelevant to the legality

[3] If these defendants were arrested *without* an arrest warrant, they could have bonded out in advance of initial appearance by posting bond in the amount set on the uniform bond schedule, and a no contact order would not have been entered prior to release. The County Attorney could have asked for such a condition to be entered after release, and the Court could have imposed such a condition at, or in advance of, any initial appearance held after release. The lack of rational sense in the Polk County policy will be discussed below.

of the no bond order, the point bears response. The State concedes on page 15 as it must that the Court could have imposed as a condition of release under Section 811.2(1)(a)(5) a no contact requirement, but suggests such a court ordered release condition is a "mere bond condition" as if of little import as compared to a "Chapter 664A Order" of no contact. The State draws some grand distinction between the two no contact order provisions. But, the underlying point the State baldly makes is actually misguided and apparently wrong. As is often the case with inaccurate statements made with breeze, sorting out the fallacy of the claim takes a bit more subtlety.

1. <u>Is an initial appearance somehow required for a No Contact Order</u>?

The State draws as its source for the claim that an initial appearance is required for a "Chapter 664A" No Contact Order, but not a "mere" no contact release condition, Section 664A.3(1), which provides:

> 1. When a person is taken into custody for contempt proceedings pursuant to section 236.11, taken into custody pursuant to section 236A.12, or arrested for any public offense referred to in section 664A.2, subsection 1, and the person is brought before a magistrate for initial appearance, the magistrate shall enter a no-contact order if the magistrate finds both of the following:
> a. Probable cause exists to believe that any public offense referred to in section 664A.2, subsection 1, or a violation of a no-contact order, protective order, or consent agreement has occurred.
> b. The presence of or contact with the defendant poses a threat to the safety of the alleged victim, persons residing with the alleged victim, or members of the alleged victim's family

This section merely provides that ***if*** a person is arrested ***and*** appears for initial appearance, then the magistrate is to impose a no contact order if both subsections "a" and "b" are found. It does not require a defendant be held in custody until initial appearance and does not limit a court in its ability to issue a Chapter 664A no contact order to initial appearances. The very next subparagraph in section 664A.3 goes on to make clear:

> 2. 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.

Subparagraph 2 actually specifies that "notwithstanding" the general rule that defendants are to be admitted to bail in advance of initial appearance following arrest, certain defendants may *not* be released in advance of initial appearance. Consequently***, the legislature contemplated that certain defendants would be released in advance of initial appearance and would not be served with a no contact order in custody, let alone personally at the time the order was issued***. In Section 664A.4A the legislature provided:

1. In lieu of personal service of a no-contact order or a protective order on a person whose activities are restrained by the order, a sheriff of any county in this state or any peace officer or corrections officer in this state may serve the person with a short-form notification pursuant to this section to effectuate service of an *unserved no-contact order* or protective order.

This section makes clear that the ***legislature contemplated issuance of no contact orders other than in the personal presence of the defendant***, and set forth a process for service of such previously unserved orders in the field by law enforcement officers in subsection 2:

> 2. Service of a short-form notification under this section shall be allowed during traffic stops and other contacts with the person by a sheriff, peace officer, or corrections officer in this state in the course of performing official duties. *The person may be detained for a reasonable period of time to complete the short-form notification process.*

One contact with a person where service of the notification could occur would be as part of execution of an arrest warrant. The legislature even understood that it would not be permissible to fully arrest someone and take them into custody for 20 hours solely to serve notice of a no contact order. *But, nothing allows detention or arrest or denial of bail to consider a State request for an NCO*.

2. <u>Is there a meaningful difference between a no contact order release condition under Section 811.2(1)(a)(5) and a "Chapter 664A" No Contact Order</u>? What's even more perplexing about the State's argument that a no contact order imposed as a "mere" release condition is not of the same force as a "Chapter 664A" no contact order is that the distracting and irrelevant position appears to be facially contradicted by Chapter 664A itself.

A no contact order issued in a criminal case is in fact defined as a no contact order for purposes of Chapter 664A, and Chapter 664A applies to such orders. Section 664A.2 addresses the scope of the Chapter:

> 1. ***This chapter applies*** *to no-contact orders issued for* violations or alleged violations of sections 708.2A, 708.7, 708.11, 709.2, 709.3, and 709.4, and *any other public offense for which there is a victim*.

A simple assault as is alleged here is a public offense for which there is a victim. The Chapter 664A.1 definition of "no contact order" is expansive:

> 1. ***"No-contact order" means a court order issued in a criminal proceeding requiring the defendant to have no contact with the alleged victim***, persons residing with the alleged victim, or members of the alleged victim's immediate family, and to refrain from harassing the alleged victim, persons residing with the alleged victim, or members of the alleged victim's family.

So, the definition of no contact order in 664A is not specific to an order that in some way references Chapter 664A or any subsection, and Chapter 664A seems to facially apply to all orders that direct there to be no contact with the alleged victim. For example, the 7-day minimum contempt sentence provision in section 664A.7 appears to apply, contrary to the State's argument that it doesn't:

> If convicted of or held in contempt for a violation of a no-contact order or a modified no-contact order for a public offense referred to in section 664A.2, subsection 1, … the person shall be confined in the county jail for a minimum of seven days.

In other words, just a cursory reading suggests that if the court had endorsed on the warrant a no contact provision as Section 804.3 requires, then Chapter 664A

would apply to that Order. There is no clear meaningful distinction between a no contact order issued as a release condition and one that perhaps specifically references Chapter 664A, as best as the appellants can tell. But, if there is some arguable difference, nothing whatsoever prohibited the court from endorsing as a condition of release on the warrant that defendant have no contact with the victim, stating the order was entered under Section 811.2 and Chapter 664A, or from issuing a fuller "form" 664A order as a release condition and endorsing that release condition on the warrant. The entire "point" of the State's argument is a red herring and based on a dubious conclusion that there is some difference between a no contact "release condition" order and an order specifically referencing Chapter 664A.

But, even assuming some distinction between a "no contact release condition" under Section 811.2(1)(a)(5) and Chapter 664A, the State has conceded the Howsares point that the Court had every ability to endorse no contact as a release condition on the warrant, and nothing about Chapter 664A served as an impediment to complying with the requirement to set release conditions and/or a bond available when arrested. Nor did Chapter 664A in any way justify the Court not complying with Section 804.3 at the time it issued the warrant. The Court was not restricted in issuing an ex parte Chapter 664A no contact order at the time the warrant was sought, and had no obligation to await initial appearance to issue a

Chapter 664A no contact order any more than it had the discretion to wait past the time of issuing the warrant until it endorsed a no contact release condition.

3. The Comparison to a Material Witness Warrant Favors the Howsares. The State's attempt to compare arrest and detention without bail to a material witness warrant is misguided, citing In re Marshall, 805 N.W.2d 145, 157 (Iowa 2011). The attempted analogy does not favor the State. A material witness warrant or arrest is something allowed under particular circumstances set forth in a particular statute, Iowa Code Section 804.11. First, the witness must be a witness to a felony, and arrest is not available for misdemeanor offense witnesses. Second, there must be a showing that the witness is unlikely to be subject to subpoena for particularized reasons. The statute does not generally allow felony witnesses to be arrested. Generally, the statute is employed when witnesses are substantially reluctant or in flight from service. Third, the arrest and detention should last no longer than necessary to effectuate service of the subpoena, which is the sole authorized purpose for the arrest. Fourth, the right to bail is not the same for material witnesses who have not been charged with a crime as it is for those charged with bailable crimes.

Marshall actually supports just about everything these Petitioners here are saying in obvious ways. First, this is a simple misdemeanor case, not a felony. Second, there is no statute allowing for custodial incarceration without bond for the

purpose of serving an already entered no contact order, let alone to merely contemplate a request for one. The Statute 664A.4A(2) allows detention only for a reasonable time to effectuate law enforcement service of a No Contact Order. Third, the no bail order was not based on any particularized circumstances of these defendants, but as part of a policy to do so whenever a No Contact Order was going to be requested. Following a fixed policy is not an exercise in discretion[4], even assuming the magistrate had discretion to deny bond altogether. Moreover, all the Court had at that point, a month after the incident, was a statement by the County Attorney that they wanted to seek a no contact order later and there was nothing preventing an Order from being issued when the warrant was sought. Nothing suggests any reason to believe the Petitioners would not avail themselves of service or abide by the release condition.

4**. <u>The illogical and counter effectual Polk County policy</u>**. The policy of no bond until initial appearance due to a request for a no contact order adopted in Polk County is illogical and counter to its intended effect. Allegedly, this policy is to insure prompt personal notice of the entry of a no contact order. In Polk County, they have simply jettisoned the Iowa Code provisions setting forth bond rights to persons when arrested and procedures for service of unserved Chapter

[4] <u>See State v. Jackson</u>, 204 N.S.2d 915, 917 (Iowa 1973); <u>State v. Hildebrand</u>, 280 N.W.2d 393, 396 (Iowa 1976); <u>Farley v. Glanton</u>, 280 N.W.2d 411, 415 (Iowa 1979)

664A orders in favor of a custodial notice procedure with no statutory basis whatsoever. But, if one examines how the situation works overall, the policy is ill conceived if it's true purpose is as claimed because it does not accomplish the goal.

First, defendants arrested *without* a warrant for the same offenses as we have here, presumably while still close in time to the alleged assault and more likely in a heated state, would be eligible for immediate release pursuant to the uniform bond schedule set by this Court. In that case, no order of protection would even be entered prior to release. Nobody is claiming Polk County has the authority to overrule this Court's Orders on bond schedules applicable when the Court is not in session, but maybe that is next. The Iowa Supreme Court has issued a uniform bond schedule order applicable throughout the State that would provide for ready release of such persons by posting a bond with no release conditions. In issuing the uniform bond schedule, this Court was in fact following the law of Iowa which provides that with specified exceptions persons are eligible for release on bond following warrantless arrest and in advance of initial appearance. If one reads the State's brief, they intimate that Polk County could institute a local practice denying bail to defendants arrested without a warrant while the Court is not in session where a no contact order might be in play.

Second, if one thinks about the alternatives available at the time the Court was presented with the complaint 4 weeks after the alleged assault, if the goal was

to get a no contact order served and entered, then the way to do that would be to present a no contact order to be entered and served, not seek an arrest warrant to be executed at some later time, here some 7 weeks later. The simple and most effective procedure for prompt notice to defendants would have been to issue a summons to be served with a no contact order also being served and then set a date for court proceedings to commence. Serving a summons at the listed home address for the defendants would certainly not take 7 weeks and would be an expeditious way to give notice and initiate proceedings. If a warrant of arrest was deemed necessary, then to get notice of a no contact order as quickly as possible, the way to do that would again be to have the no contact order done prior to arrest for service with the warrant upon arrest, not some 20 hours post arrest. So, when presented with the excuse-making that came from the County Attorney and the District Associate Court for this no-bond procedure, the procedure does not actually serve the goal that is claimed as well as the statutory alternatives. One can point to a separate abuse of power in securing ex parte punishment in advance of trial as what is really the intention in these circumstances. It is well understood an actor's intent can be inferred from the natural and probable results of actions. Punishing the Howsares by denying bail and holding them in custody, which anyone would understand as a punishment because statutes dictate release, is fairly inferred as the goal of the Polk County policy. In other words, this policy has the

effect of ex parte punishment, and given the proffered explanation for the policy is riddled with illogical holes, it is fairly inferred its goal is to effectuate ex parte punishment.

5. <u>Dismissal Could be an appropriate Remedy in these circumstances</u>.

Defendant has cited the dismissal rule that allows the court to dismiss in the interests of justice. There is also the case law cited by the State itself that recognizes there may be cases where dismissal is appropriate. These are simple misdemeanors, and the idea that the court would not have the ability to dismiss these cases for having incarcerated these defendants for a day, illegally, and without any opportunity to be heard on these flimsy complaints is just counter logical. Nobody can give the 20+ hours of custody back to the Howsares, but they sure can dismiss these cases as a reflection of the injustice of the no bail orders. If the judge had the power by stroke of a pen to incarcerate these defendants without bail for nearly 24 hours solely on the County Attorney's request, then the symmetric remedy is dismissal since that power lacked any legal basis. At least what the Howsares request is supported by the interests of justice. In any event, the lower court never reached the merits because it found no issue with its own practice. So, if this court will not enter dismissal, then it should remand for the trial court to evaluate the request.

CONCLUSION

There must be a limit to bond upon arrest denials, and the legislature has spoken to those limits as has this Court. If this Court were to let these no bond orders stand, one has to ask where the end of such a thing would be. At any point where a judge is presented with a warrant, the judge could simply deny bond until initial appearance based on some notion that the judge wanted to impress the seriousness of the charge upon defendant (per the District Associate Judge's view of the need to explain the No Contact Order personally). Or, perhaps a judge would simply feel that a defendant should be seen after arrest by a judge before bonding out as a matter of disagreement with the Code, and would therefore instruct the local jail to disregard the uniform bond schedule, or would deny bail on a warrant until initial appearance because they have some perceived authority to do as they see fit in their own locality. The ramifications of Counties or judicial districts setting up their own procedures when there is a Code and a uniform bond schedule are troublesome. *Does this Court really want to open the door to the Polk County Court issuing a directive to the jail that no arrestee should be released in cases where an NCO might be sought, essentially overruling this court's bond schedule order for those defendants? Do we really want Polk County, or any other County for that matter, to have its own rules and procedures*

governing arrest and release that vary from what the statutes of the State of Iowa direct?

Where this Court must land on these issues is where the State legislature has said and where this Court has said, not where each County wants to be for its own stated reasons. We live in one State with one Iowa Code and one Supreme Court, not 99 fiefdoms and countless judges setting or denying bonds as they see fit. The Statewide rule is this: citizens arrested for offenses that are bailable and not one of the few requiring initial appearance prior to release, are entitled to be released from custody in advance of initial appearance upon bond set in the uniform bond schedule of this Court or upon bond and conditions endorsed on the warrant. That is what the legislature has said and what this Court has said, and Polk County needs to comply with the statutes of Iowa and Orders of this Court.

STOWERS & NELSEN PLC
West Glen Town Center
650 South Prairie View Drive, Suite 130
West Des Moines, IA 50266
Phone: (515) 224-7446
Fax: (515) 225-6215
Email: dean@stowersnelsen.com

By: /s/ Dean Stowers
Dean Stowers, AT0007680
ATTORNEY FOR APPELLANTS
Kirk Howsare & Austin Howsare

CERTIFICATE OF FILING

The undersigned does hereby certify that he electronically filed Appellants' Reply 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' Reply Brief on all other parties to this appeal by using the EDMS filing system.

Kyle Hanson
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, IA 50319

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 4,323 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.

STOWERS & NELSEN PLC
West Glen Town Center
650 South Prairie View Drive, Suite 130
West Des Moines, IA 50266
Phone: (515) 224-7446
Fax: (515) 225-6215

By: /s/ Dean Stowers
Dean Stowers