IN THE IOWA SUPREME COURT

SUPREME COURT NO. 20-0914

STATE OF IOWA,

Plaintiff-Appellee,

vs.

ALEXANDER SHANTEE THOMAS ROSS,

Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR MADISON COUNTY
THE HONORABLE MARTHA MERTZ, JUDGE

APPELLANT'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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PROOF OF SERVICE

On September 17, 2021, I, the undersigned, did serve the within Appellant's Final Brief and Request for Oral Argument on all other parties to this appeal by efiling it through the EDMS system and mailing one (1) copy thereof to the Defendant:

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CERTIFICATE OF FILING

I hereby certify that I did file the within Final Brief and Request for Oral Argument with the Clerk of Supreme Court, Iowa Judicial Branch Building, 1111 E. Court Avenue, Des Moines, Iowa 50319 by efiling it through the EDMS system on September 17, 2021.

/s/ John C. Heinicke
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STATEMENT OF THE CASE

Nature of the Case: This is an appeal from the judgment and conviction entered in the Iowa District Court for Madison County following jury trial in case number FECR109178. Alexander Shantee Thomas Ross was convicted of two Counts of Sexual Abuse in the Second Degree, alleging that Mr. Ross abused his girlfriend's two young daughters. Despite insufficient evidence that contradicted the statements made by the girls, reliance on improper factors at sentencing, and the district court giving improper jury instructions regarding non-corroboration, the district court sentenced Ross to serve two consecutive, twenty-five year terms, with 70% mandatory minimum served prior to release. For the reasons, the Appellant has filed this direct appeal and seeks the intervention of the Court of Appeals.

Course of Proceedings: Alexander Shantee Thomas Ross was charged with three counts of Sexual Abuse in the Second Degree by way of Trial Information on July 3rd, 2019. (Trial Info. 7/3/2019; App. Vol. II 7. An Amended Trial Information was filed on October 29th, 2019. (Amended Trial Info. 10/29/2019; App. Vol. II, 10). The district court set trial to begin on January 29th, 2020. (Order Setting Trial 12/2/2019; App. Vol. II, 13). Trial was continued until March 11th, 2020, by the district court based upon a joint motion by the parties. (Order to Continue 1/17/2020; App. Vol. II, 15). Defense counsel filed a Motion in Limine on February 29th, 2020, requesting that certain facts be excluded at trial, specifically, that the Defendant's

prior criminal convictions and prior juvenile record should be excluded at trial; the district court set the motion to be heard at the commencement of trial. (Motion in Limine 2/29/2020 and Other Order 3/2/2020; App. Vol. II, 17, 20). The State filed a Second Amended Trial Information on 3/12/2020, which dismissed one of the three counts of Sexual Abuse in the Second Degree. (Second Amended T.I. 3/12/2020; App. Vol. II, 23).

On the first day of trial, the Defendant was not present due to a car accident involving his wife and daughter the night before the commencement of trial, resulting in his daughter suffering a collapsed lung. Trial Tr. Day One, pg. 5. The following day, trial commenced, and the district court ruled on the parties' motions in limine, at which time the court granted the Defense's motion as to prior convictions and his juvenile record. *Id.* at 8-9. The jury was selected and opening statements were also made on the second day of trial. *See Id.* On the third day of trial, the Defendant communicated to his attorney that he had been ill all night and was on his way to urgent care. Trial Tr. Day Three, pg. 4, lines 10-21. Following resistance by the State, the district court ordered that the Defendant must bring proof of medical treatment to the court as an offer of proof that he was, in fact, ill, or the Defendant's pre-trial release be revoked, and a warrant would be entered for his arrest. (Order 3/13/2020; App. Vol. II, 26). The district court indicated that trial would commence the following Monday, regardless of the Defendant's presence.

Trial Tr. Day Three, pg. 9, lines 7-12. The Defendant was not present, and trial did commence the following Monday. Trial Tr. Day Four, pg. 6.

The Appellant was found guilty of both counts of Sexual Abuse in the Second Degree following jury deliberation. Trial Tr. Day Five, pg. 74, Lines 2-11. Appellant was sentenced to an "indeterminate term not to exceed twenty-five years" for each count he was convicted of, to run consecutively, with a minimum of 70% served before he is eligible for parole or work release. Tr. Sentencing pgs. 17-18, 20. The Appellant filed his Amended Notice of Appeal on July 9, 2020. (Amended Notice of Appeal; App. Vol. II, 65).

Facts: In its opening argument, the State indicated that this case was about "white, sticky, gooey, and wet." Trial Tr. Day 2, pg. 244, line 14. Coincidentally, these are the same words the State used to coach the main witnesses in the case at hand. *See* Trial Tr. Day Four, pg. 44.

During her testimony, L.C. testified that she knew what sex was and that Alex had "touched her in her front part," and "on her bottom." Trial Tr. Day Four, pg. 29-30. L.C. continued on to say she "thought" she remembered the first time it happened, but that "it was a long time ago," and stated that it had happened more than once. *Id.* at 31. L.C. could not recall how many times "Alex" had touched her, but asserted it was more than ten. *Id.* at 32. L.C. stated that the Appellant had put his "thing in her bottom," that this had happened more than once, and that it "hurted a

lot." *Id.* at 33-34. L.C. further indicated that the Defendant had put his penis in her vagina. *Id.* at 35. It was further alleged that "white stuff came out of his penis" and "it was very gooey and very disgusting." *Id.* L.C. claimed that she told her mother about this. *Id.* at 36. L.C. indicated that her mother spoke to Alex concerning the allegations, but he did not stop the alleged abuse. *Id.* at 37.

At trial, the State was leading with its questions, assisting the witness with adjectives to describe the "white stuff" mentioned in earlier testimony. *Id.* at 44. In fact, after several leading questions, the district court sustained an objection by Defense counsel, who claimed that the State was leading the witness:

> Q: Okay. You describe it—that stuff that came out of Alex's penis as white and sticky?
> A: Yeah.
> Q: Or white and gooey; is that right?
> A: Yeah.
> Q: Was it also wet and sticky?
> Ms. Forsyth: I'm going to object to—he's leading.
> The Court: Sustained.

Id. The alleged location of the incidents reportedly varied between the living room, L.C.'s room, and her parents' room. *Id.* at 43.

Further into her testimony, L.C. explains that she also reported the alleged abuse to her grandmother in Colorado, who told her that she herself had been a victim of sexual abuse as a child. *Id.* at 37, During "special talks" L.C. had with her grandmother, L.C. was influenced and instructed by her grandmother to make the allegations that underlie the charges in the instant case. *See Id.* at 50. During one of

these special talks, L.C. stated, "Well, when me and her were talking, she had something like that happen to her, too. And she know what it felt like and so she—she just wanted me to know to stay strong and tell the people that are going to help you so that they can out him in jail." *Id.* L.C. insisted that she told her mother about the alleged abuse twice, and that nothing had had been done, despite her earlier testimony that her mother had spoken to Alex about the allegations. *Id.* at 37, 53. The discrepancy was confirmed in her later testimony:

> Q: Did you ever tell—when you were telling people what happened, did you ever say that your mom believed you and told Alex not to do it again?
> A: I did tell them that.
> Q: So did that happen?
> A: No.

Id. at 56. Her testimony regarding "screaming" was also called into question, to which L.C. stated, "Yeah, I—I screamed for—once before—one second [. . .]" *Id.*

K.C. was the next witness called to the stand to testify. Trial Tr. Day Four, pg. 65. K.C. stated that the Appellant had touched her "in her lower area," but indicated that she knew the appropriate terminology for her body. *Id.* at 72. After stating that she knew the terminology for her anatomy, K.C. refused to state the word for what she was describing, and refused to point to the area she was referring to for the jury, despite being asked to do so several times by the State. *Id.* at 71-72. In later testimony, K.C. indicated that she was given "sweets" and "toys" after he would "touch" her, specifically, suckers, despite her diabetes diagnosis. *Id.* at 81-82. K.C.

also testified that she reported the alleged abuse to her mother on several occasions and that her mother did nothing. *Id.* at 87. When asked if her grandmother informed K.C. of a similar incident or incidents that happened to her grandmother when she was younger, K.C. stated that this had taken place, and she did not know if this was before or after she disclosed the alleged abuse to her. *Id.* at 88.

L.C.'s later testimony indicated that she could see her mother and the Appellant in their bedroom during potentially private times:

> Q: Okay. Have you ever seen your mom or Alex naked?
> A: Sometimes when I would wake up in the morning and ask to watch TV.
> Q: Would you go in their bedroom?
> A: No. I could just see them through the crack.
> Q: The crack of what?
> A: Of the kitchen.
> Q: Okay. So there's a crack in the kitchen that you can see into their bedroom?
> A: Yes.
> Q: And you saw your mom and Alex in there naked?
> A: Yes.

Id. at 92. If K.C. was able to observe the adult couple engaged in consensual sexual acts in the privacy of their bedroom, it is clear that, while living in the same home, L.C. would have observed the same sexual interactions.

The alleged victims' mother testified at trial regarding her perceptions of the allegations presented.

L.C. indicated the she referred to Mr. Ross as her stepdad. Trial Tr. Day Four, pg. 41, line 2-3. Her mother's testimony indicated L.C.'s level of comfort with the

man she claimed as her stepfather: "Like, [L.C.]—[L.C.] loved him. I never at one point in time seen where she felt uncomfortable around him over the years. Like, this is—was Dad from the time that they were one and six months old. So--." Trial Tr. Day Four, pg. 147, lines 21-25. L.C.'s mother further testified about the Appellant serving as L.C.'s father figure:

> A: [L.C.]—Alex taught [L.C.] how to ride a bike. Alex taught [L.C.] how to understand her multiplication facts when she got to that point. Alex did homework with her. He made it into games. Alex did—Alex taught her how to throw a softball. Alex taught her how to bat. Alex taught her pretty much everything a dad is supposed to teach their daughter.
> Q: How about [K.C.]? What type of things, if any, did he teach her?
> A: The same. They'd be out in the yard for hours kicking a soccer ball around in front and backyard. He'd try to teach her some defense because she was just so—so she about getting in there and getting it. Taught her how to—bought her her first bat and ball and glove. Took her to every one of her softball games when I did have to work. And when I did—did not work, we all went as a family. Taught her how to swim. Taught [L.C.] how to swim. They sang on the karaoke machine. There's countless videos of those.

Id. at 148-49. L.C.'s mother also testified that she never thought that the Appellant would hurt the children. *Id.* at 157.

Concerning the girls' grandmother and the potential impact her influence may have had on their testimony, L.C.'s mother stated, "My mom hasn't like him for a very long time." *Id.* When asked about her mother's possible motivations for supplying the girls with such a story, the following exchange took place:

> Q: In your opinion, do you think she wanted the—you and the girls to stay in Colorado with her?

> A: I know she did because she told me that if I brough my ass back with my kids to Iowa, that she was going to make sure they went into foster care and that I could not have them. That was she put me and my kids out of her house.

Id. L.C.'s mother also testified that she was never informed by either of her daughters that they had been abused, and insisted that she would have called the police far earlier than they were called if those reports had been made as stated by both witnesses. *Id.* at 158.

Upon further questioning, L.C.'s mother stated that in addition to never receiving a report of abuse from her daughters, she never observed any evidence of abuse in the bedding or clothing of either girl, despite being the one who does all of the laundry and bedding changes in the household. *Id.* at 164. The girls were never seen for a forensic examination of their anatomy, despite attempting to do so in Colorado. *Id.* 165.

The district court offered the following instruction on the State's burden of proof in the case at hand:

> The burden is on the State to prove Alexander Shantee-Thomas Ross guilty beyond a reasonable doubt.
>
> A reasonable doubt is one that fairly and naturally arises from the evidence or lack of evidence produced by the State.
>
> If, after full consideration of all the evidence, you are firmly convinced of the Defendant's guilt, then you have no reasonable doubt and you should find the Defendant guilty.
>
> But if, after full and fair consideration of all the evidence or lack of evidence produced by the State, you are not firmly convinced of the Defendant's guilt, then you have a reasonable doubt and you should find the Defendant not guilty.

(Jury Instruction No. 9; App. Vol. II, 38). The district court instructed the jury in Instructions No. 16 and 17 with a non-corroboration instruction:

> You should evaluate the testimony of [L.C.] the same way you evaluate the testimony of any other witness. The law does not require that the testimony of [L.C.] be corroborated in order to prove that she was sexually abused. You may find the Defendant guilty of Sexual Abuse if [L.C.]'s testimony convinces you of guilt beyond a reasonable doubt.

(Jury Instruction No. 16; App. Vol. II, 45). The same instruction was given regarding the testimony of K.C. (Jury Instruction No. 17; App. Vol. II, 46).

The PSI ordered by the district court made reference to at sentencing, the district court stated, "On the other hand, it's hard for this Court to consider what we're going to accomplish in fifty years that can't be accomplished in twenty-five." Tr. of Sentencing pg. 19, lines 19-22. The district court went on to say, "And so at this point, the Court has considered what has been told to it by the attorneys, what's the contents of the PSI otherwise, and my observations during the trial." *Id.* at pg. 20, lines 1-4. Appellant was sentenced to an "indeterminate term not to exceed twenty-five years" for each count he was convicted of, to run consecutively, with a minimum of 70% served before he is eligible for parole or work release. Tr. Sentencing pgs. 17-18, 20.

Additional facts will be cited as necessary in the Argument.

ROUTING STATEMENT

Because this case involves the application of existing legal principles to the facts herein, transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.401(3)(b).

ARGUMENT

I. THERE WAS INSUFFICIENT EVIDENCE FOR THE JURY TO FIND ROSS GUILTY OF TWO COUNTS OF SEXUAL ABUSE IN THE SECOND DEGREE.

Standard of review: On sufficiency of evidence claims, the standard of review is for correction of errors at law. *State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005). A jury's verdict is upheld if substantial evidence supports it. *Id.* "Evidence is substantial if it would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt." *State v. Quinn*, 691 N.W.2d 403, 407 (Iowa 2005). "Substantial evidence does more than raise suspicion or speculation. We consider all record evidence not just the evidence supporting guilt when making sufficiency-of-the-evidence determinations. However, in making such determinations, we also view the 'evidence in the light most favorable to the State, including legitimate inferences and presumptions that may fairly and reasonably be deduced from the record evidence.'" *State v. Williams*, 695 N.W.2d at 27 quoting *State v. Quinn*, 691 N.W.2d at 407. *See also State v. Henderson*, 696 N.W.2d 5, 7 (Iowa 2005).

Preservation of error: Error was preserved with a timely made motion for judgment of acquittal. (Trial Tr. Day Five, pg. 28).

Merits: "709.3 Sexual abuse in the second degree. 1. A person commits sexual abuse in the second degree when the person commits sexual abuse under any of the following circumstances: [. . .] b. The other person is under the age of twelve." (Iowa Code § 709.3(1)(b) (2018)). "Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt." *State v. Legear*, 346 N.W.2d 21, 23 (Iowa 1984). "The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record." *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984). "We consider all evidence at trial, not just the evidence that supports guilt." *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980). "This court has gone its full length to protect the right of jury trial against encroachment by the courts under any guise, and one of the rights of jury trial is the right to have the credibility of the witness determined by the jury." *State v. Smith*, 508 N.W.2d 101, 103. "The sufficiency of corroboration testimony is normally a question of fact for the jury." *State v. Harrington*, 284 N.W.2d 244, 248 (Iowa 1979).

"When read separately or together, the accounts of alleged abuse are inconsistent, self-contradictory, lacking in experiential detail, and attimes, border

on the absurd." *State v. Smith*, 508 N.W.2d at 103. It is clear that both girls in the case at hand lived in a home where they could easily observe sexual activity between their parents:

> Q: Okay. Have you ever seen your mom or Alex naked?
> A [K.C.]: Sometimes when I would wake up in the morning and ask to watch TV.
> Q: Would you go in their bedroom?
> A: No. I could just see them through the crack.
> Q: The crack of what?
> A: Of the kitchen.
> Q: Okay. So there's a crack in the kitchen that you can see into their bedroom?
> A: Yes.
> Q: And you saw your mom and Alex in there naked?
> A: Yes.

Id. at 92. If K.C. was able to observe the adult couple engaged in consensual sexual acts in the privacy of their bedroom, it is clear that, while living in the same home, L.C. would have observed the same sexual interactions. When taken in conjunction with the conflicting testimony and unwillingness on each girl's part to answer, it is clear that the evidence was not substantial enough to withstand a verdict of guilty.

L.C. explains that she also reported the alleged abuse to her grandmother in Colorado, who told her that she herself had been a victim of sexual abuse as a child. *Id.* at 37, During "special talks" L.C. had with her grandmother, L.C. was influenced and instructed by her grandmother to make the allegations that underlie the charges in the instant case. *See Id.* at 50. During one of these special talks, L.C. stated, "Well, when me and her were talking, she had something like that happen to her, too. And

she know what it felt like and so she—she just wanted me to know to stay strong and tell the people that are going to help you so that they can out him in jail." *Id.* It is clear that the girls were coached by their grandmother and that the grandmother had a clear interest in keeping the girls with her in Colorado.

In conclusion, it is clear that there was insufficient evidence presented by the State to meet their burden of proof. No evidence was presented to suggest that either girl had been subjected to sexual abuse of the type and frequency of that described in the alleged victims' testimony. The girls themselves contradicted each other with their descriptions of these occurrences of alleged abuse. Further, it appears that both were coached by their grandmother, who, by revealing her own childhood abuse and her wish for her grandchildren to stay in Colorado, and who was clearly biased in her desired outcome. The State did not meet their burden of proof, and as such, these convictions cannot stand.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY RELYING UPON IMPROPER FACTORS AT SENTENCING.

Standard of review: Review of a sentence imposed in a criminal case is for correction of errors at law. Iowa R. App. P. 4; *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002). "We apply an abuse of discretion standard when the sentence challenged was within the statutory limits." *State v. Seats*, 865 N.W.2d 545, 552 (Iowa 2015). "We will find an abuse of discretion when 'the district court exercises its discretion on grounds or for reasons that were clearly untenable or

unreasonable.'" *State v. Headley*, 926 N.W.2d 545, 549 (Iowa 2019) (*citing State v. Thompson*, 856 N.W.2d 915, 918 (Iowa 2014)).

Preservation of error: Ross' challenge claiming his sentence is illegal may be brought at any time, and is not subject to normal error preservation rules. *State v. Bruegger*, 773 N.W.2d 862 (Iowa 2009).

Merits: It is improper under the sentencing guidelines in Iowa Code §§ 901.1 – 901.5,and a violation of Ross' procedural and substantive due process rights, as well as his confrontation rights, as those rights are protected by the Iowa and United States Constitutions, for the trial court to have considered. The sentencing court is to consider pertinent information, which is the purpose of the presentence investigation, and such categories of information are listed in Iowa Code § 901.3. Iowa Code section 901.2(1) authorizes the district court to receive "any information which may be offered which is relevant to the question of sentencing." Iowa Code section 901.5 authorized the court to "receive and examin[e] all pertinent information, including the presentence investigation report." Iowa Code section 901.3(1)(a) authorizes a presentence investigator to inquire into the "defendant's characteristics, family and financial circumstances, needs and potentialities."

While it is true that the rules purport to allow the court to "consider information from other sources," that statement is limited in its application. *See*,

e.g., *State v. Formaro*, 638 N.W.2d 720 (Iowa 2002) ("It is a well-established rule that a sentencing court may not rely upon additional, unproven, and unprosecuted charges unless . . ."). It is improper for the Court to say it would not consider juvenile matters but then also say it considered the statement of counsel which included the juvenile matters. This serves as one example of a type of information that maynot properly be considered. Accordingly, Mr. Ross prays this Court to vacate his sentence and remand the matter for resentencing.

III. THE TRIAL COURT ERRED IN GIVING INSTRUCTION NOS. 16 & 17, THE NONCORROBORATION INSTRUCTION.

Standard of Review: Jury instructions are reviewed for correction of errors at law. *State v. Benson*, 919 N.W.2d 237, 241-2 (Iowa 2018). *See Haskenhoff v. Homeland Energy Solutions, L.L.C.*, 487 N.W.2d 346, 348 (Iowa 1992) ("Instructional error 'does not merit reversal unless it results in prejudice.' Prejudicial error results when instructions materially misstate the law or have misled the jury. Jury instructions must be considered 'in their entirety' when assessing prejudice. 'We assume prejudice unless the record affirmatively establishes that there was no prejudice.'")

Preservation of Error: Ross preserved error by filing an Amended Notice of Appeal from the Judgment Entry. (Amended Notice of Appeal 7/9/2020; App. p. 65).

Merits: Iowa Code section 709.6 specifically provides that "[n]o instruction shall be given in a trial for sexual abuse cautioning the jury to use a different standard relating to a victim's testimony than that of any other witness to that offense or any other offense." The use of Instruction Nos. 16 & 17 resulted in prejudicial error to Ross and requires reversal of his convictions and a remand for a new trial.

First, the non-corroboration instruction is not a uniform instruction and has not been approved by the Iowa State Bar Association's Uniform Jury Instruction committee. Although trial courts are not bound by the uniform instructions, *State v. Harrington*, 284 N.W.2d 244, 250 (Iowa 1979), there is a distinct preference in giving uniform instructions to be followed by the trial courts. *State v. Weaver*, 405 N.W.2d 852, 855 (Iowa 1987). The trial court in the case at bar did not use a uniform instruction. Second, the effect of Instruction Nos. 16 & 17 is to highlight the testimony of the child victims and emphasize that testimony does not have to be corroborated.

The use of Instruction Nos. 16 & 17 does create a different standard for the child victims by telling the jury that their testimony need not be corroborated. This is in direct contravention to Iowa Code section 709.6. Third, the reliance on *State v. Barnhardt*, 919 N.W.2d 637, 2018 WL 2230938 (Table 2018) as authority for the use of the non-corroboration instruction is misplaced. The *Barnhardt* opinion is not a reported opinion. "Unpublished opinions or decisions shall not constitute

controlling legal authority." Iowa Rule of Appellate Procedure 6.904(2)(c). Moreover, the premise upon which *Barnhardt* was based is not applicable in the case at bar. The *Barnhardt* opinion cites to two law review articles written by an Iowa Assistant Attorney General which refer to "' . . . implicit effects of institutionalized sexism and anti-victim bias [that] persists in the hearts and minds of jurors.'" *State v. Barnhardt*, 919 N.W.2d 637, 2018 WL 2230936 (Table 2018).

Prospective jurors in the case at bar were specifically told by the prosecutor about the lack of corroborating evidence, the lack of DNA evidence, lack of other witnesses during voir dire and the prospective jurors understood that corroborating evidence was not required. There was thus no need for an additional instruction that only served to highlight the testimony of the child victims and instruct the jurors that that testimony need not have corroborating evidence to the exclusion of the other evidence.

CONCLUSION

For all of the reasons stated above, Defendant-Appellant Alexander Shantee Thomas Ross respectfully requests that this Court reverse the judgment and sentence of the district court and remand this case for a new trial for the two counts of sexual abuse in the second degree.

NOTICE OF ORAL ARGUMENT

Notice is hereby given that upon submission of this cause, counsel for appellant hereby desires to be heard in oral argument.

ATTORNEY COST CERTIFICATE

I hereby certify that the cost of printing the foregoing Appellant's Final Brief and Request for Oral Argument was the sum of $2.60.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS.

1. This Final Brief complies with the type-volume limitation of Ia. R. App. P. 6.903(1)(g)(1) because the Final Brief contains 5392 words.
2. This Final Brief complies with the typeface requirements of Ia. R. App. P. 6.903(1)(e) and the type-style requirements of Ia. R. App. P. 6.903(1)(f) because this Final Brief has been prepared in a proportionally spaced typeface using Time New Roman in 14-point font.

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