IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff–Appellee, v. DARIUS LEJUAN WADE, Defendant–Appellant.	S. CT. NO. 22–1650

APPEAL FROM THE IOWA DISTRICT COURT
FOR BUCHANAN COUNTY
THE HONORABLE KELLYANN M. LEKAR, JUDGE

APPELLANT'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED NOVEMBER 8, 2023

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CERTIFICATE OF SERVICE

On the 27th day of November, 2023, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant–Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Darius LeJuan Wade, Sr., 1913 Hawthorne Ave., Waterloo, IA 50702.

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QUESTIONS PRESENTED FOR REVIEW

Did the Court of Appeals correctly conclude Iowa Code section 907.7(1) authorizes the district court to sentence a defendant to a "range or a specific length for probation, so long as it f[alls] between two and five years" or does the statutory language require the sentencing court fix a definite term of years for probation, which the court can later modify where appropriate?

Did the Court of Appeals err in determining there was sufficient evidence the defendant knowingly possessed or transported a firearm when he was not the exclusive user of the vehicle, the gun was found inside a backpack, the defendant did not act suspiciously or evasively during the traffic stop, and other evidence in the record supported his assertion it was his girlfriend's work bag and she typically transferred the gun to her purse after work?

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STATEMENT IN SUPPORT OF FURTHER REVIEW

Defendant–Appellant Darius LeJuan Wade asks the Court to accept further review because this case presents an important question of law that has not been, but should be settled by the Supreme Court. *See* Iowa R. App. P. 6.1103(1)(b)(2) (2021). Specifically, this Court's guidance is necessary in interpreting Iowa Code section 907.7(1), and by extension, the district court's authority for setting the length of a probationary term. Iowa Code section 907.7(1) states: "The length of the probation shall be for a period as the court *shall fix* but not to exceed five years if the offense is a felony or not to exceed two years if the offense is a misdemeanor. . . . ." Iowa Code § 907.7(1) (2021) (emphasis added).

Wade argues the plain language of the statute, specifically the phrase "shall fix," mandates the district court firmly determine the amount of years of the probationary period at the time of sentencing. *See State v. Chang*, 587 N.W.2d 459, 461 (Iowa 1998) (citation omitted) ("When a statue is plain and its meaning clear, courts are not permitted

to search for meaning beyond its express terms."). In contrast, the Court of Appeals concluded the statutory language authorized the district court to order that Wade be on probation for a range of years (i.e. two to five years). *See* (Opinion pp. 8–9). In doing so, the Court cited several other cases in which the district court had sentenced a defendant to a range of years of probation. (Opinion p. 9). Notably, the defendant did not challenge the district's authority to impose such a range in any of the cited cases; nor did any of these cases ask the Court to interpret the language of section 907.7(1). *See State v. Fleshner*, No. 22–1035, 2023 WL 5601794, at *1 (Iowa Ct. App. Aug. 30, 2023) (unpublished table decision) (simply noting the initial sentencing court placed the defendant on probation for two to five years); *State v. Arnold*, No. 20-0915, 2021 WL 4592837, at *1 (Iowa Ct. App. Oct. 6, 2021) (unpublished table decision) (same).

It does not appear that the Supreme Court has ever interpreted this statutory language, and the opinion in this case seems to be the first time the Court of Appeals has

addressed this argument. However, as the opinions the Court of Appeals cited in support of its decision indicate, district courts have frequently ordered a defendant to complete a range of years of probation, rather than fixing a set term, as Wade asserts is required by the statute. Accordingly, Wade asks this Court to accept further review and determine whether the statutory language of section 907.7(1) authorizes the sentencing court to order a range of years or whether it requires the court to set a fixed term for probation, which can later be modified in accordance with the statute. *See, e.g.*, Iowa Code § 907.7(1) (2021) (allowing the court to extend the probationary period for up to one year beyond the maximum period); *id.* § 907.7(3) (allowing the court to "*subsequently* reduce the length of probation if the court determines that the purposes of probation have been fulfilled" and the defendant has paid their financial obligations in the case) (emphasis added).

Additionally, the Court of Appeals has entered a decision in conflict with a decision of the Supreme Court: *State v.*

Kemp, 688 N.W.2d 785 (Iowa 2004). *See* Iowa R. App. P. 6.1103(1)(b)(1) (2019). In *State v. Kemp*, this Court listed the several factors the appellate court examines when it considers whether sufficient evidence supporting constructive possession of contraband exists. *See Kemp*, 688 N.W.2d at 789. The Court of Appeals erred in finding there was a reasonable inference that Wade knew of the firearm's presence in the closed backpack of his truck and then knowingly transported or possessed the gun.

For the reasons above, Defendant–Appellant Darius LeJuan Wade respectfully requests this Court grant further review of the Court of Appeals' decision on November 8, 2023.

STATEMENT OF THE CASE

Nature of the Case: Defendant–Appellant Darius LeJuan Wade seeks further review of the Court of Appeals decision affirming his convictions, sentences, and judgment following a bench trial and verdict finding him guilty of

possession of a firearm by a felon as a habitual offender and operating while intoxicated, second offense.

Facts: On October 1, 2021, around 1:00 a.m., Jesup Police Officer Brandon French observed a Dodge Durango speeding. (Trial p.12 L.19–p.15 L.14). French pulled the Durango over. (Trial p.15 L.16–20). Wade was the driver of the Durango and its only occupant. (Trial p.18 L.1–16). Wade gave the officer his driver's license, which he removed from his wallet in his pocket. (Trial p.18 L.17–p.19 L.11, p.59 L.1–18) (Ex. A 0:52–01:45).

French testified while he was standing at the window, he smelled the odor of burnt marijuana coming from the Durango. (Trial p.19 L.8–17). French had Wade come back to his police cruiser. (Trial p.19 L.23–p.20 L.15) (Ex. A 0:4:48–05:30). French testified he smelled both "a strong odor of marijuana" and "the odor of ethyl alcoholic beverage" coming from Wade, as Wade sat in the police car. (Trial p.21 L.3–13). Based on the odor of the marijuana, French searched the Durango. (Trial p.22 L.1–11).

Prior to searching the vehicle, French asked Wade if he had any contraband in the vehicle; Wade denied there were any drugs in the truck. (Trial p.61 L.19–p.62 L.20) (Ex. A 0:6:15–07:15). French found a backpack in the front passenger seat. (Trial p.23 L.2–9). In the backpack, French discovered a loaded 9mm handgun. (Trial p.23 L.4–9). A metal wallet that had Wade's expired driver's license[1] in it was also in the backpack. (Trial p.23 L.2–9, p.68 L.7–p.69 L.10, p.101 L.17–22). French brought the gun back to his police car to secure it. (Trial p.23 L.21–p.24 L.1).

During the search, Wade was in the police car's backseat. (Trial p.22 L.12–16). He was on the phone with his partner, Kasandra Baldwin. (Trial p.24 L.10–13). When French returned to the police car and asked Wade about why he had a gun, Wade replied that it was "his old lady's". (Ex. A 16:50–

[1] At trial, French could not remember if it was a paper or plastic license; the video shows it was a temporary license, which is printed on paper and in black-and-white ink. (Trial p.68 L.7–p.69 L.10) (Ex. A p.13:22–13:30).

17:12). Wade said "Shit, they found it" into the phone. (Trial p.24 L.11–13) (Ex. A 16:50–17:12).

Wade admitted to French that he was a felon. (Trial p.24 L.2–7). Wade denied knowing that the gun was inside the backpack, "I didn't know it was in my backpack. If it was in my backpack, it shouldn't have been in my truck." (Trial p.24 L.16–19) (Ex. A. 18:20–18:37). French testified that he had not yet told Wade where exactly in the truck French found the gun when Wade made this statement. (Trial p.24 L.16–19, p.32 L.4–12). French placed Wade under arrest for felon in possession of a firearm. (Trial p.32 L.13–22).

Wade and his partner, Kasandra Baldwin, testified in his defense. (Trial p.85 L.7–20, p.104 L.10–p.106 L.15). Wade testified the recovered gun did not belong to him. (Trial p.91 L.14–20). Baldwin was the gun's owner. (Trial p.91 L.19–23). Baldwin had a valid permit to carry. (Trial p.91 L.22–24, p.107 L.4–24) (Def. Ex. 1) (App. p. 10). Baldwin testified she carried one of the two guns she owned at all times; it was not uncommon for Baldwin to take a gun with her to work. (Trial

p.92 L.9–14, p.106 L.19–p.107 L.3). Baldwin would typically put the gun in the backpack, along with food to eat during her shift at work. (Trial p.93 L.21–p.94 L.1, p.101 L.23–p.102 L.5). However, Baldwin carried the gun in her purse when she was not working. (Trial p.96 L.17–24, p.103 L.3–18, p.111 L.11–22).

Baldwin had driven the Durango to work the night before the traffic stop. (Trial p.92 L.2–8). Wade owned two trucks; whoever needed a vehicle generally just used whichever truck was parked in front. (Trial p.96 L.1–10). Wade denied placing the gun in the backpack, and Baldwin testified she had put it in the backpack and left the backpack in the truck. (Trial p.91 L.25–p.92 L.4, p.109L.3–10). Wade testified that if he had known the gun was in the backpack, he would not have had the backpack with him in truck because he knew he could not legally possess a firearm. (Trial p.92 L.22–p.93 L.11). Wade readily admitted he was a felon. (Trial p.97 L.8–p.97 L.19).

Wade stated he had used the backpack in the past. He explained that he and Baldwin sometimes used it to carry items for recreational activities, like fishing or boating. (Trial p.94 L.10–23). Wade explained the wallet in the backpack was an old one he no longer used; he kept his fishing license in it. (Trial p.94 L.13–17). He testified the last time he had used the backpack was on the Fourth of July. (Trial p.94 L.18–23).

Wade was on the phone with Baldwin when French was searching the Durango. (Trial p.99 L.18–12). Wade testified that Baldwin told him that she may have left the gun in the backpack. (Trial p.99 L.18–p.100 L.10). Wade saw French walk out of the vehicle holding Baldwin's gun, and he testified that's when he said "Shit, they found it." (Trial p.99 L.18–23). Baldwin did not recall talking about the gun on the phone but recalled Wade making the statement, "Shit, they found it". (Trial p.109 L.14–22, p.111 L.2–6).

Wade also testified that once he saw the gun in French's hand, he knew the only place it could have been was the backpack. (Trial p.100 L.5–10). Wade testified he did not

think to check the backpack because Baldwin knew he was a felon and could not have a gun; he did not believe she would leave it in his vehicle. (Trial p.103 L.12–18). Baldwin testified she simply forgot that the gun was in the backpack in the truck because she was tired when she returned home from work. (Trial p.109 L.11–13).

ARGUMENT

I. The language of Iowa Code section 907.7(1) requires the district court to fix a definite term of years for probation when sentencing a defendant. Thus, the Court of Appeals erred by concluding the district court was authorized to sentence Wade to a probationary period of two to five years.

Pursuant to its sentencing authority, the district court determined Wade was an appropriate candidate for probation; accordingly, it suspended Wade's prison sentences. (Sentencing p.8 L.3–23) (Sentencing Order) (App. pp. 19–20). However, when it ordered Wade to complete probation, it sentenced him to a "period of supervised probation of two to five years." (Sentencing p.8 L.16–17). The written order confirmed this range of years, stating: "the defendant is placed

on formal probation . . . to the 1st Judicial District Department of Correctional Services . . . for a period of 2 - 5 years . . . .” (Sentencing Order) (App. pp. 19–20). By failing to set a definite term of years for the probationary period, the district court entered an illegal sentence.

Iowa Code section 907.7(1) provides: “The length of the probation shall be for a period as the court *shall fix* but not to exceed five years if the offense is a felony or not to exceed two years if the offense is a misdemeanor. . . . .” Iowa Code § 907.7(1) (2021) (emphasis added). When the Court interprets a statute, it considers the plain meaning of the statutory language. *State v. Nall*, 894 N.W.2d 514, 518 (Iowa 2017) (citations omitted); *State v. Hearn*, 797 N.W.2d 577, 583 (Iowa 2011) (“The starting point of interpreting a statue is analysis of the language chosen by the legislature.”). The Court has said, “‘[w]e do not inquire what the legislature meant; we ask only what the statute means.’” *Doe*, 943 N.W.2d at 610 (citation omitted). The Court “seek[s] to determine the ordinary and fair meaning of the statutory language at issue.” *Id.* (citations

omitted). When it undertakes to determine the meaning of the language at issue, the Court takes "into consideration the language's relationship to other provisions of the same statute and other provisions of related statutes." *Id.* (citations omitted).

It does not appear that the legislature defined the word "fix" in the context of a district court's sentencing discretion. When the legislature has not given a definition for a term, the Court gives "words their ordinary meaning." *State v. Davis*, 922 N.W.2d 326, 330 (Iowa 2019) (citations omitted). Several dictionaries define the word "fix" as firmly establishing or setting something. *See, e.g.*, *Fix*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/fix (last updated May 10, 2023) (defining the verb as "to make firm, stable or stationary" and "to set or place definitely" and noting fix is derived from the Latin *fixus*, meaning "firmly established, unchangeable"); *Fix*, Collins Dictionary, https://www.collinsdictionary.com/us/dictionary/english/fix (last visited May 18, 2023) (defining fix as "to make firm", "to

arrange or establish definitely; set", and giving the example "to fix the date of a wedding"); *Fix*, The Britannica Dictionary, https://www.britannica.com/dictionary/fix (last visited May 18, 2023) (defining fix as "to set or place (something) definitely"); *Fix*, The American Heritage Dictionary, https://ahdictionary.com/word/search.html?q=fix (last visited May 18, 2023) (defining the word as "to set or place definitely; establish"). Examining the definitions of fix, as outlined above, the ordinary meaning of the word fix, particularly when related to a time period, means to definitely set the date or time.

Thus, applying the plain language of Iowa Code section 907.1, at the time of sentencing, the district court must firmly set a definite amount of years that Wade will serve on probation. *See State v. Chang*, 587 N.W.2d 459, 461 (Iowa 1998) (citation omitted) ("When a statue is plain and its meaning clear, courts are not permitted to search for meaning beyond its express terms."). Accordingly, Iowa Code section 907.1 does not authorize the district court to order Wade to

complete a range from two to five years of probation—an indefinite time period. Nor does the statutory provision authorize the sentencing court to delegate the decision of how long a defendant's probationary period will be to the Department of Correctional Services, which is essentially what the district court's sentencing ruling does. *Cf. Klouda v. Sixth Judicial Dist. Dept. Corr. Serv.*, 642 N.W.2d 255 (Iowa 2002) (finding statutes that transferred judiciary sentencing powers and allowed administrative law judges to determine whether a defendant violated or fulfilled their probationary terms violated the separation-of-powers clause of the Iowa Constitution). Rather, the statute requires the sentencing court fix a defendant's probationary period for a specific length of time within the authorized range (e.g., two years). *See State v. Blanchette*, No. 11–1602, 2012 WL 2411919, *1 (Iowa Ct. App. June 27, 2012) (unpublished table decision) (citations omitted) ("A sentencing court determines the proper length of probation.").

Moreover, other statutory language in section 907.7 provides support for the proposition that a sentencing court must determine and set an exact length of time for the probationary period at the time of the sentencing hearing. In particular, Iowa Code section 907.7.(4) states,

> In determining the length of the probation, the court shall determine what period is most likely to provide maximum opportunity for the rehabilitation of the defendant, to allow enough time to determine whether or not rehabilitation has been successful, and to protect the community from further offenses by the defendant and others.

Iowa Code § 907.7(1) (2021). The fact that the sentencing court must consider these factors to determine the *appropriate length* of the probationary period supports Wade's conclusion that the statutory language does not authorize the sentencing court to order a range of years, but instead requires a definite term.

Additionally, both Iowa Code section 907.7(1) and 907.7(3) provide the court with the authority to modify the initially ordered length of the probationary term. Iowa Code section 907.7(1) allows the court to extend probation for up to

one year, while subsection 3 allows the court to subsequently reduce the length of probation. *See* Iowa Code § 907.7(1), (3). By providing the court with avenues by which it can subsequently modify the initial probationary term where appropriate, these subsections also support the conclusion that the statutory language requires the district court to set a fixed, definite term of years for probation at the time the defendant is initially sentenced.

The plain language of the statute requires that the district court set a definite, fixed term of years for probation. Therefore, the district court entered an illegal sentence when it instead ordered Wade to complete a term of two to five years of probation. *See State v. Letscher*, 888 N.W.2d 880 (Iowa 2016) (citation omitted) ("[A] sentence is illegal if it is not authorized by statute."). Accordingly, this Court should vacate that portion of Wade's sentencing order and remand for the sentencing court to consider an exact length of years for the probationary period, consistent with Iowa Code section 907.7.

II. The Court of Appeals erred in finding sufficient evidence supported Wade's conviction for possession of a firearm by a felon, as a habitual offender.

In relevant part, Iowa Code section 724.26(1) provides:

> A person who is convicted of a felony in a state or federal court . . . and who knowingly has under the person's dominion and control or possession, receives, or transports or causes to be transported a firearm or offensive weapon is guilty of a class "D" felony.

Iowa Code § 724.26(1) (2021). Thus, in this case, the State had to prove that Wade knowingly received, transported, caused to be transported, or had dominion and control over a firearm. *See id.*; *see also* Iowa State Bar Ass'n, Iowa Criminal Jury Instruction 2400.7 (June 2020). The Court of Appeals incorrectly determined the State did so.

Possession can be either actual or constructive. *State v. Maghee*, 573 N.W.2d 1, 10 (Iowa 1997) (citation omitted). Actual possession occurs when "the contraband is found on [the defendant's] person or when substantial evidence supports a finding it was on his or her person 'at one time.'" *State v. Thomas*, 847 N.W.2d 438, 442 (Iowa 2014) (quoting

State v. Vance, 790 N.W.2d 775, 784 (Iowa 2010)). Whereas constructive possession is a judicial construct that allows one to infer a defendant possessed the contraband based on the location and other circumstances. *Id.* at 443.

"The existence of constructive possession turns on the peculiar facts of each case." *Webb*, 648 N.W.2d at 79 (citing *State v. Harris*, 647 So.2d 337, 339 (La. 1994)). To establish constructive possession, the State must prove two things: knowledge and "the authority or right to maintain control" of the contraband. *State v. Reed*, 875 N.W.2d 693, 705 (Iowa 2016). There are several factors that the Court examines to determine whether a defendant had constructive possession of contraband.[2] *Kemp*, 688 N.W.2d at 789. These factors are:

> (1) incriminating statements made by the defendant, (2) incriminating actions of the defendant upon the police's discovery of [the contraband] among or near the defendant's personal belongings, (3) the defendant's fingerprints on the [the contraband], and (4) any other circumstances linking the defendant to the [contraband].

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[2] "Although the doctrine of constructive possession evolved in drug-possession cases" the Court applies "the same principles in firearm cases." *Reed*, 875 N.W.2d at 705 (citation omitted).

Id. (citing *State v. Cashen*, 666 N.W.2d 566, 571 (Iowa 2003)). In cases that involve motor vehicles, the Court also considers the following factors:

> (1) was the contraband in plain view, (2) was it with the defendant's personal effects, (3) was it found on the same side of the car seat or next to the defendant, (4) was the defendant the owner of the vehicle, and (5) was there suspicious activity by the defendant.

Id. (citing *State v. Atkinson*, 620 N.W.2d 1, 4 (Iowa 2000)). No one factor is dispositive; the Court considers all of the facts and circumstances in the case. *See Cashen*, 666 N.W.2d at 571 ("Even if some of these facts are present, we are still required to determine whether all of the facts and circumstances . . . allow a reasonable inference that the defendant knew of the [contrabands'] presence and had control and dominion over the contraband."). When one considers all the facts and weighs the factors set forth by the Court in *State v. Kemp*, there is insubstantial evidence to prove Wade knowingly transported or possessed a firearm.

Wade was the only occupant of the truck at the time of the stop, and he is the registered owner. (Trial p.18 L.1–16).

However, the evidence established that Wade did not have exclusive access to the truck; rather, he shared it with Baldwin. (Trial p.96 L.1–10, p.109 L.1–13). *See State v. Taylor*, No. 07–1186, 2009 WL 139502, at *3 (Iowa Ct. App. Jan. 22, 2009) (unpublished table decision) (noting the defendant did not have exclusive access to the vehicle, despite being the sole occupant at the time of the stop). When a defendant does not have exclusive possession of the premises and the property is jointly occupied, "additional proof is needed" to establish both knowledge and possession/control. *See Reed*, 875 N.W.2d at 705; *State v. Bash*, 670 N.W.2d 135, 138 (Iowa 2003) (citing *Webb*, 648 N.W.2d at 79). "Our long-standing rule does not permit an inference . . . based only on the presence of [contraband] in a jointly occupied premises." *State v. Reeves*, 209 N.W.2d 18, 23 (Iowa 1973).

Wade did not make any incriminating statements or commit any incriminating actions. Wade pulled over and did not try to elude or evade the police. *Cf. State v. Carter*, 696 N.W.2d 31, 40 (Iowa 2005) (noting the defendant's suspicious

activity when he failed to immediately pull over, rummaged to the right side of him, and quickly exited the vehicle upon stopping); *State v. Maxwell*, 743 N.W.2d 185, 194 (Iowa 2008) (considering the defendant continued to drive an additional one hundred feet before pulling over, immediately exited the vehicle, and attempted to go inside a residence); *State v. Thomas*, 847 NW.2d 438, 440, 443–44 (Iowa 2014) (considering the fact that the defendant quickly left the room upon seeing the police and engaged in behavior the officer labeled as "misdirection"); *State v. Irving*, No. 21–1839, 2023 WL 1808507, at *3 (Iowa Ct. App. Feb. 8, 2023) (unpublished table decision) (considering that the defendant appeared to be reaching across the seat, did not comply with the officer's orders, and ultimately fled). He did not appear to be overly nervous, exhibit any strange behavior, or become belligerent after learning the vehicle would be searched. *Cf. Carter*, 696 N.W.2d at 40 (noting the defendant acted nervous); *State v. Henderson*, 696 N.W.2d 5, 9 (Iowa 2005) (noting the defendant's "defiant opposition" to the police's presence

"implied guilty knowledge"). Wade did not attempt to give the officer a false name. *Cf. Thomas*, 847 N.W.2d at 439 (noting the defendant gave the officer a false name); *Carter*, 696 N.W.2d at 35 (same).

Nor did Wade make any furtive movements. (Trial p. p.64 L.14–p.65 L.5). Wade made no effort to hide the backpack during the traffic stop. (Trial p. p.64 L.14–p.65 L.5). (0:52–01:45). French repeatedly asked Wade if there was contraband or drugs in the Durango or on Wade's person, and Wade denied there was. (Trial p.29 L.6–13) (Ex. A. 07:15–08:20). French told Wade that as an officer he was pretty easygoing but hated it when people are dishonest with him. (Ex. A 06:15–08:20). Wade continued to deny having drugs or contraband in the Durango, even after French had made those statements about being honest and made it clear he was going to search the truck. (Ex. A 07:15–08:20, 12:15–12:30).

Rather, the record only establishes that Wade exhibited normal behavior for a traffic stop and fully cooperated with the officer throughout the duration of the stop. *Cf. Thomas*, 847

N.W.2d at 443 (finding there was no other logical explanation for the defendant's behavior when he ran into the room containing the contraband, tried to hold the door shut so the officers could not enter, gave a false name, and claimed he ran because he had an outstanding warrant when there was none). Wade answered the officer's questions. He admitted that he was speeding. (Ex. A 0:40–03:57). When confronted about the smell of marijuana, he agreed he probably "reeked of it." (Trial p.29 L.14–17, p.59 L.19–24) (Ex. A 0:6:15–07:15). He admitted to being a felon. (Trial p.24 L.2–7) (Ex. A 16:50–17:00). His actions during the entirety of the traffic stop were reasonable. *Cf. State v. Dewitt*, 811 N.W.2d 460, 476 (Iowa 2012) (considering the defendant's "unreasonable" actions and responses to police conduct as supporting an inference of knowledge and possession).

Nor is Wade's statement to Baldwin on the phone incriminating. French had just informed Wade that he found a gun in the Durango. Even if Wade was mistaken that Baldwin told him she may have left her gun in the car during

their prior conversation, the statement "Shit, they found it" does not incriminate Wade. (Trial p.99 L.18–p.100 L.10, p.109 L.14–22, p.111 L.2–6). When he made that statement, French had already told him he found the gun and Wade was aware he could not legally possess one. (Trial p.92 L.12–p.93 L.11). Thus, his statement is not an unusual response if considered in the context it was made—felon discovering a gun was in his vehicle, when he knows he cannot possess one legally.

Likewise, Wade's statement about the gun being in the backpack without French telling him where it was found is also not by definition incriminating. As Wade and Baldwin both testified, she often carried the gun in the backpack when she went to work. (Trial p.110 L.24–p.112 L.16). Wade knew that Baldwin had gone to work the prior night and driven the Durango. Logically, it makes sense Wade would deduce that is where French located the gun; particularly, because Wade did not see the firearm in the vehicle and testified he never would have driven the truck if he knew the gun was in it. (Trial p.67 L.18–p.68 L.6, p.92 L.11–p.93 L.15). Furthermore,

Wade confirmed that was his thought process in his trial testimony. (Trial p.100 L.5–10).

While the backpack was in plain view, it was closed; thus, the gun itself was not in plain view. (Trial p.68 L.2). The backpack was next to Wade, in the front passenger seat. However, the video shows the truck does not have a backseat or a trunk, only an uncovered bed. (Ex. A). There is nothing in the record that suggests Wade should have or did know the bag was anything other than an item that would not be out of the ordinary to be found in the vehicle. Cf. *State v. Carter*, 696 N.W.2d 31, 40 (Iowa 2005) (noting the plastic baggie was located underneath the ashtray—an odd location for it).

Additionally, the gun was in a backpack that Baldwin admitted to using the night before. While it was not uncommon for Baldwin to use the backpack to carry the gun back and forth from work, she testified that when she was not working, Baldwin removed the gun and carried it in her purse instead. (Trial p.92 L.5–14, p.110 L.24-p.112 L.16). The testimony showed that Wade and Baldwin worked opposite

shifts. (Trial p.92 L.2–8). She was not working when he took the Durango; thus, Wade assumed she had removed the gun to her purse. (Trial p.66 L.14–p.67 L.6, p.103 L.12–18, p.110 L.24-p.112 L.16) ("If it was in my backpack, it shouldn't have been in my truck."). Baldwin testified that the simple presence of the backpack would not have alerted Wade that the gun was in it. (Trial p.111 L.19–22).

Wade did identify the backpack as "my backpack" but explained that he owned it and that he and Baldwin together used it for fishing and boating in the past. (Trial p.93 L.21–p.94 L.23). He noted that the wallet was one he did not use, and it carried his fishing license in it. (Trial p.94 L.13–23). Additionally, contrary to French's testimony, the video shows that the wallet containing Wade's temporary paper license was not in the same compartment as the gun; rather, French found it in a smaller compartment in the front. (Ex. A 13:22–14:45). *See State v. Tyler*, 830 N.W.2d 288, 296–97 (Iowa 2013) (citation omitted) ("In making credibility determinations, we examine extrinsic evidence for contradictions to that

witness's testimony."); *State v. Akers*, No. 17–0577, 2018 WL 1182616, at *3 (Iowa Ct. App. Mar. 7, 2018) (unpublished table decision) (citation omitted) (noting the video contradicted the officer's testimony and comparing the officer's testimony to the court's own scrutiny of the video).

There was no testimony that Wade's fingerprints were found on the gun, its holster, the backpack, or any of its contents. Rather, the contents of the backpack corroborate Wade's and Baldwin's testimony. Both testified Baldwin carried food in the bag to work: the backpack contained candy suckers and animal crackers. (Trial p.93 L.21–p.94 L.1, p.101 L.23–p.102 L.5, p.109 L.1–1) (Ex. A 13:22–14:15).

Based on this record, any finding that Wade *knowingly* possessed or transported the firearm is based on nothing more than speculation, suspicion, or conjecture. *See Webb*, 648 N.W.2d at 76 (citing *Hamilton*, 309 N.W.2d at 479). The evidence presented was insufficient that Wade had knowledge that the gun was present in the backpack, which is required for his conviction under section 724.26(1), either under a

transporting or a possessing alternative of the crime. *See* Iowa Code § 724.26(1). As discussed through the factors of constructive possession above, the State failed to show Wade *knowingly* transported the gun and/or exercised control and dominion over it. Accordingly, this Court should vacate the Court of Appeals' opinion and dismiss Wade's conviction of possession of a firearm by a felon, as a habitual offender.

CONCLUSION

Defendant–Appellant Darius LeJuan Wade respectfully requests the Supreme Court grant his application for further review, vacate the Court of Appeals' decision, reverse his conviction for possession of a firearm as a habitual offender, and remand for the dismissal of that charge. He also asks the Court to vacate the portion of his sentencing order regarding the term of the probationary period and remand for the district court to determine an exact length of years.

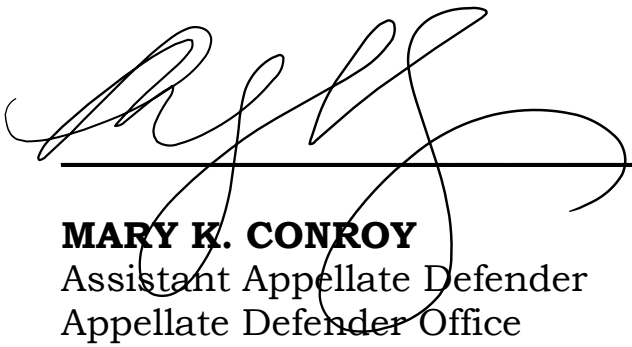
ATTORNEY'S COST CERTIFICATE

The undersigned hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was $2.13, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

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

> [X] this application has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 5,282 words, excluding the parts of the application exempted by Iowa R. App. P. 6.903(1)(g)(1).



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