

IN THE SUPREME COURT OF IOWA

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SUPREME COURT NO. 23-0819  
BLACK HAWK COUNTY NO. SRCR246554

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STATE OF IOWA,  
Plaintiff / Appellee

vs.

SARAH RAE BERG,  
Defendant / Appellant

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APPEAL FROM BLACK HAWK COUNTY DISTRICT COURT  
THE HONORABLE PATRICK WEGMAN, JUDGE

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**APPELLANT'S FINAL BRIEF  
AND REQUEST FOR ORAL ARGUMENT**

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## **CERTIFICATE OF SERVICE AND FILING**

I, Jessica Maffitt, hereby certify that on the 1<sup>st</sup> day of November, 2023, I served the attached Appellant's Final Brief and Request for Oral Argument on the Court and each other party by electronic service or through mailing one copy thereof to the following party:

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## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

### I. THE COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS FOR LACK OF SPEEDY INDICTMENT

*State v. Williams*, 895 N.W.2d 856, 860 (Iowa 2017)

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#### i. **Berg Was Not Indicted for Theft Within the 45 Days of Her Arrest of Initial Appearance**

*State v. Abrahamson*, 746 N.W.2d 270, 273 (Iowa 2008)

*State v. Williams*, 895 N.W.2d 856, 860 (Iowa 2017)

#### ii. **Under the Same Evidence Test, the Theft in the 4<sup>th</sup> Degree and the Unauthorized Use of a Credit Card Charges Constitute the Same Offense**

*State v. Abrahamson*, 746 N.W.2d 270, 273 (Iowa 2008)

*State v. Huffman*, 752 N.W.2d 452, 2008 WL 2039300 (Iowa Ct. App. 2008)

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Iowa Code § 715A.1(a).

Iowa Code § 715A.6(1)(c)

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**iii. In Order to Adequately Protect Berg's Constitutional Right to Speedy Trial, This Case Must be Dismissed**

*State v. Johnson*, 217 N.W.2d 609, 612 (Iowa 1974)

*State v. Abrahamson*, 746 N.W.2d 270, 277 (Iowa 2008)

*Ennenga v. State*, 812 N.W.2d 696, 703 (Iowa 2012)

United States Constitution, Amendment 14

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**II. THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUPPORT THE VERDICT**

*State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996)

*State v. Bash*, 670 N.W.2d 135, 137 (Iowa 2003).

*In re Winship*, 397 U.S. 358, 364 (1970)

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*Davis v. United States*, 160 U.S. 469, 487 (1895)

United States Constitution, Amendment 6



Iowa Const. Art. I, § 9

**i. The Sole Evidence Upon which a Conviction Can be Based  
Is in the Minutes of Testimony**

Iowa Code § 715A.6

Iowa Code § 715A.6(1)(c)

Iowa R. Crim. P. 2.17(2)

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**ii. The Evidence Is Insufficient to Show Berg Committed  
Unauthorized Use of a Credit Card Because the Sole  
Evidence of the Offense Is Berg's Uncorroborated  
Testimony**

*State v. Douglas*, 675 N.W.2d 567, 568–69 (Iowa 2004)

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**iii. The Evidence Is Insufficient to Show Berg Committed  
Unauthorized Use of a Credit Card Because the State Failed  
to Show the Gift Cards Used and Purchased are the Same.**

*Smith v. Under Armour, Inc.*, 593 F. Supp. 2d 1281, 1283 (S.D. Fla. 2008)

## **ROUTING STATEMENT**

Pursuant to Iowa R. App. P. 6.1101(3), this case would be appropriate for consideration by the Iowa Supreme Court as it presents substantial questions of enunciating or changing legal principles.

## **STATEMENT OF THE CASE**

This is an appeal from the October 21, 2022 Order denying Defendant / Appellant Sarah Berg's Motion to Dismiss for Lack of Speedy Indictment. (App. at 15) (Order). On July 22, 2022 a complaint was filed against Berg, accusing her of Theft in the 4th Degree, in violation of Iowa Code Section 714.2(4). (App. at 6) (Complaint). On August 9, 2022, an initial appearance was conducted. (App at 8) (Initial Appearance). On October 3, 2022, Berg filed a motion to dismiss. (App at 11) (Motion to Dismiss for Lack of Speedy Indictment). On October 12, 2022, the State filed a Trial Information charging Berg with Unauthorized Use of a Credit Card Under \$1,000, in violation of Iowa Code § 715A.6(2). (App. at 13) (Trial Information). On October 21, 2022, Berg's motion to dismiss was denied. (App. at 15) (Order dated October 21, 2022). Berg filed a motion to reconsider denial of the motion to dismiss. (App. at 17) (Motion to Reconsider Ruling on Motion to Dismiss). The motion to reconsider was also denied. (App. at 23) (Order

dated November 29, 2022). Berg subsequently waived her right to a jury trial and proceeded to a trial on the minutes. (App at 25) (Findings of Fact, Conclusions of Law, Decision and Order).

This is also an appeal of the March 3, 2023 Findings of Fact, Conclusions of Law, Decision and Order entered by the Honorable Judge Patrick Wegman. Sarah Berg was convicted following a trial on the minutes on January 11, 2023 of Unauthorized Use of a Credit Card Under \$1,000, in violation of Iowa Code § 715A.6(2). (App. at 27) (Findings of Fact, Conclusions of Law, Decision and Order at 3). She was sentenced to 120 days in jail, with all days suspended; \$855 fine suspended; 15% surcharge; and restitution. (App. at 30-31) (Order Judgment and Sentence). Judgement and sentence were entered on May 17, 2023. *Id.* This appeal follows.

### **STATEMENT OF THE FACTS**

On July 21, 2022, police were dispatched to Casey's General Store at 3601 Lafayette, Evansdale, IA. (Confidential App. at 11) (Minutes of Testimony at 6). The officer was advised that he was being dispatched to Casey's regarding an employee theft allegation. *Id.*

The officer arrived at the Casey's and met with the manager, Brandi Dobbs. *Id.* Berg was also present. *Id.* Dobbs stated that video and receipt

records showed that the Berg had, while working at Casey's, activated three gift cards without paying for them. *Id.*

Berg provided a written statement. In the written statement, Berg stated:

I took 2 gift cards. I panicked because I needed to buy groceries for my kids and didn't know what else to do. It was dumb and I shouldn't have done it, but I did it to feed my kids. After I did it, I tried to void it but it didn't work I didn't tell anyone.

*Id* at 20 (Minutes at 15).

The police report attached to the Minutes of Testimony indicates Berg admitted she had activated three gift cards without paying for any of them.

*Id* at 11 (Minutes at 6). This includes a Casey's gift card worth \$75.00, a Visa gift card worth \$200.00 and an Amazon gift card worth \$425.00. *Id.*

The report states Berg admitted that she did not pay for the cards and used them to purchase merchandise elsewhere. *Id.* Included in the Minutes of

Testimony is a document showing that a Casey's gift card in the amount of \$75.00 with an account ending in number 7247 was approved on July 12,

2022, by a cashier named "Sarah." *Id* at 18 (Minutes at 13). Also included in the Minutes of Testimony is a document which shows that on July 13, 2022,

Casey's gift card number ending in number 7247 was used to purchase grocery items and gas in the amount of \$59.67. *Id* at 16 (Minutes at 11).

There was a remaining balance on the Casey's gift card of \$15.33. *Id.*

The court found “[t]he document shows that the defendant had used the card and the card had a remaining balance of \$15.33 after the purchase.” (App. at 26) (Findings of Fact, Conclusions of Law, Decision and Order at 2). However, the record contains no admissions that Berg used any of the cards she obtained at Casey’s, nor any evidence that the card used on July 13, 2022 had the same first 15 digits as the card that was activated on July 12, 2022. *See* (Confidential App. at 6-22) (Minutes of Testimony). It also does not contain any evidence of Berg having been the person who purchased the card. *See id.*

On July 22, 2022 a complaint was filed accusing Berg of Theft in the 4th Degree, in violation of Iowa Code Section 714.2(4). (App. at 6) (Complaint). On August 9, 2022, Berg had an initial appearance. (App at 8) (Initial Appearance). On October 3, 2022, Berg filed a motion to dismiss. (App at 11-12) (Motion to Dismiss for Lack of Speedy Indictment). On October 12, 2022, the State filed a Trial Information charging Berg with Unauthorized Use of a Credit Card Under \$1,000, in violation of Iowa Code § 715A.6(2). (App. at 13) (Trial Information). On October 21, 2022, Berg’s motion to dismiss was denied. (App. at 15) (Order dated October 21, 2022). Berg filed a motion to reconsider denial of the motion to dismiss. (App. at 17-22) (Motion to Reconsider Ruling on Motion to Dismiss). The motion to

reconsider was also denied. (App. at 23) (Order dated November 29, 2022). Berg subsequently waived her right to a jury trial and proceeded to a trial on the minutes of testimony.

On January 11, 2023, following trial, Berg was convicted of Unauthorized Use of a Credit Card Under \$1,000, in violation of Iowa Code § 715A.6(2). (App. at 27) (Findings of Fact, Conclusions of Law, Decision and Order Form at 3). She was sentenced to 120 days in jail, with all days suspended; \$855 fine suspended; 15% surcharge; and restitution. (App. at 30-31) (Order Judgment and Sentence). Judgment and sentence were entered on May 17, 2023. *Id.* This appeal follows.

## **ARGUMENT**

### **I. THE COURT ERRED IN DENYING DEFENDANT’S MOTION TO DISMISS FOR LACK OF SPEEDY INDICTMENT**

#### **A. Error Preservation**

The issue was preserved because Berg filed a motion to dismiss for lack of speedy indictment and also a motion to reconsider the denial of that motion. (App. at 11-12; 17-22) (Motion to Dismiss for Lack of Speedy Indictment; Motion to Reconsider Ruling on Motion to Dismiss). Both were

denied by the court in separate rulings. (App. at 15-16; 23-45) (Order 10/21/2022; Order 11/29/2022).

### **B. Scope and Standard of Appellate Review**

Courts “review interpretations of the speedy indictment rule for errors at law.” *State v. Williams*, 895 N.W.2d 856, 860 (Iowa 2017).

Constitutional claims are reviewed de novo. *State v. Bruegger*, 773 N.W.2d 862, 869 (Iowa 2009).

### **C. Argument**

The right to a speedy trial is protected by both the Iowa and federal Constitutions. U.S. Const. Amend. VI; Iowa Const. Art. I, § 10. “The speedy indictment rule gives effect to the constitutional guarantee of speedy trial.” *Williams*, 895 N.W.2d at 866 (citing *Wing*, 791 N.W.2d at 246; Iowa Const. art. I, § 10). “As a part of the broader right to a speedy trial in all criminal cases, the rule specifically addresses the time frame in which formal charges must be brought against an accused and requires the case be dismissed for noncompliance.” *Id* at 860; Iowa R. Crim. P. 2.33(2)(a).

The speedy indictment rule implements the long-standing public policy of the state of Iowa that “ ‘criminal prosecutions be concluded at the

earliest possible time consistent with a fair trial to both parties.’ ” *State v. Schuessler*, 561 N.W.2d 40, 41–42 (Iowa 1997) (citing *State v. Davis*, 525 N.W.2d 837, 839 (1994) (quoting Iowa R.Crim. P. 27(2))). Specifically, as the Iowa Supreme Court has explained:

The purpose of these protections, both constitutional and statutory, is to relieve one accused of a crime of the hardship of indefinite incarceration awaiting trial or the anxiety of suspended prosecution, if at liberty on bail, and to require courts and peace officers to proceed with the trial of criminal charges with such reasonable promptness as proper administration of justice demands.

*Id.* (citing *State v. Allnutt*, 261 Iowa 897, 901, 156 N.W.2d 266, 268 (1968), *overruled on other grounds in Gorham*, 206 N.W.2d at 913; *Penn-Kennedy*, 862 N.W.2d at 387).

**i. Berg Was Not Indicted for Theft Within the 45 Days of Her Arrest of Initial Appearance**

Under Iowa law, “analysis of whether a charge is barred by a previous speedy trial dismissal requires a two-step process.” *State v. Abrahamson*, 746 N.W.2d 270, 273 (Iowa 2008) (citing *State v. Fisher*, 351 N.W.2d 798, 801 (Iowa 1984)). Iowa courts must “first determine whether the initial charge was dismissed ‘for speedy-trial reasons, not in the ‘furtherance of justice.’ ” ” *Id.*



On August 9, 2022, Berg was brought before the court for an initial appearance for the charge of Theft in the 4<sup>th</sup> Degree charge. (App at 8-10) (Initial Appearance). On October 3, 2022, Berg filed a motion to dismiss for lack of speedy indictment. (App at 11-12) (Motion to Dismiss). At that time, more than 45 days had elapsed since Berg’s initial appearance. To date, no trial information charging Berg with Theft in the 4<sup>th</sup> Degree has been filed.

In Iowa, the 45-day period within which an indictment must occur “commences for an adult only after the defendant has been taken before a magistrate for an initial appearance or a waiver of the initial appearance is filed.” Iowa R. Crim. P. 2.33(2)(a); *see also Williams*, 895 N.W.2d at 867 (holding “[t]he [speedy indictment] rule is triggered from the time a person is taken into custody, but only when the arrest is completed by taking the person before a magistrate for an initial appearance.”).

In this case, there is no question that the trial information was not filed within 45 days of Berg’s initial appearance. Accordingly, the first element of the analysis of whether the charge is barred by a previous speedy trial dismissal has been met.

**ii. Under the Same Evidence Test, the Theft in the 4<sup>th</sup> Degree and the Unauthorized Use of a Credit Card Charges Constitute the Same Offense**

If the case was dismissed for speedy trial reasons, courts then proceed to the second step of the analysis, which requires they “look to whether the subsequent charge is for the ‘same offense’ previously dismissed on speedy trial grounds.” *Abrahamson*, 746 N.W.2d at 273.

The trial court denied Berg’s motion to dismiss on the basis that “the 45-day rule only applies to the charge arrested for or its lesser included.” (Tr of Hearing on Motion to Dismiss at 10). The court went on to state, “I don’t believe that theft fourth is a lesser included of unauthorized use of a credit card, so I think that the defendant’s motion to dismiss does not meet the burden required to be sustained, so the motion will be denied at this time.” *Id.*

However, the Iowa Supreme Court has previously “rejected the State’s argument the appropriate analysis for speedy trial ‘same offense’ issues requires a ‘same elements’ analysis.” *State v. Huffman*, 752 N.W.2d 452, 2008 WL 2039300 (Iowa Ct. App. 2008) (citing at *Abrahamson*, 746 N.W.2d at 276).

For more than 40 years, in determining whether a person’s right to speedy trial has been violated, Iowa courts use the “same offense” test, not a same elements test. *State v. Moritz*, 293 N.W.2d 235, 239 (Iowa 1980). As the Iowa Supreme Court explained, “the ‘same offense’ test applied in the

speedy trial context focuses on whether the “ ‘two offenses are in substance the same, or of the same nature, or same species, so that the evidence which proves one would prove the other.’ ” *Abrahamson*, 746 N.W.2d at 275 (quoting *State v. Moritz*, 293 N.W.2d at 238-39) (Iowa 1980). In this case, the same evidence would be used to prove both Theft in the 4<sup>th</sup> Degree and Unauthorized Use of a Credit Card.

In order to convict Berg of Unauthorized Use of a Credit Card, the State must prove the following:

1. a. A person commits a public offense by using a credit card for the purpose of obtaining property or services with knowledge of any of the following:
  - (1) The credit card is stolen or forged.
  - (2) The credit card has been revoked or canceled.
  - (3) For any other reason the use of the credit card is unauthorized.

Iowa Code § 715A.1(a).

The level of the offense is determined by the dollar amount of the property or services obtained. Iowa Code § 715A.6. in this case, Berg was convicted of Unauthorized Use of a Credit Card Under \$1,500. Iowa Code § 715A.6(1)(c).

The complaint did not specify the subsection of Iowa Code § 714.1 Berg was arrested for allegedly violating. *See* (App at 6) (Complaint at 1). However, it does allege “[o]n or about the above stated date and time, the

Defendant did commit theft in the fourth degree by taking property, gift cards belonging to Caseys, said property having a value exceeding \$300 but not exceeding \$750” [sic]. *Id.* It also alleges “Defendant was an employee of Caseys. She activated three gift cards from the store without paying for the cards. Total for cards was \$700. Defendant then used the cards to purchase merchandise elsewhere. Defendant admitted to doing this.” *Id.* The complaint does specify Berg is alleged to have committed Theft in the 4<sup>th</sup> Degree, which requires, “[t]he theft of property exceeding three hundred dollars in value but not exceeding seven hundred fifty dollars in value”. Iowa Code § 714.2(4).

When the facts necessary to prove both Theft in the 4<sup>th</sup> Degree and Unauthorized Use of a Credit Card Under \$1,500 are compared, it is clear they are the same. For each charge, the State must prove that Berg 1) obtained property of another 2) by using the credit card.

In order for Berg to be convicted of Theft in the 4<sup>th</sup> Degree, the State must prove she took property exceeding \$300 in value. The card itself is of *de minimus* value - it is the use of more than \$300 that has been loaded onto the card that elevates the offense to Theft in the 4<sup>th</sup> Degree. Accordingly, the State would have to prove Berg used the card and that the merchandise she purchased with the card exceeded \$300. If the State cannot prove that, the

most Berg could be convicted of in this charge would be the lesser included offense of Theft in the 5<sup>th</sup> Degree. Iowa Code § 714.2(5).

Moreover, the minutes of testimony only include receipts of purchases from Casey's General Store on a Casey's General Store Gift Card. (App. at 16) (Minutes at 11). There is no evidence that Berg, or anyone else, ever used the Amazon card or Visa card that are alleged to have been stolen. If the purchases occurred on the Casey's gift card, then activating and taking the card would have deprived Casey's of the card itself, but not of the value of the money loaded onto the card. The money loaded on the card would have been retained by Casey's until such time as the card was used. Even then, Casey's would retain the monetary value of the money loaded onto the card, but would be deprived of the merchandise the card was used to purchase. Under the specific allegations in this case, there could be no theft of more than \$300 unless and until the credit card was used. Accordingly, for both Theft in the 4<sup>th</sup> Degree and Unauthorized Use of a Credit Card, the State would have to prove that Berg took property from Casey's *by using* the gift card.

During the hearing on Berg's motion to dismiss, the State argued "[t]he first crime, theft fourth, punishes the act of taking or of manifesting some sort of control over property belonging to another. The offense that's

set forth in the trial information is a Chapter 715A claim for unauthorized use of an electronic card. It punishes the use of a card when it's knowingly stolen or when there's no authorization to do so. That's a crime, an offense that occurs at the time of use rather than the time of the theft. They're distinct charges. So the defense has not met its burden to establish either it's the same offense or that what's being charged is a lesser included." (Tr of Hrg on Motion to Dismiss at 6).

As discussed above, the State's argument is belied by its own decision to charge Theft in the 4<sup>th</sup> Degree. *See* (App at \_) (Complaint at 1). Theft in the 5<sup>th</sup> Degree could be accomplished by the theft of the physical card. *See* Iowa Code § 714.2(5). However, Theft in the 4<sup>th</sup> Degree could only occur if the card is used to purchase merchandise valued at over \$300. *See* Iowa Code § 714.2(5). Because Berg was charged with Theft in the 4<sup>th</sup> Degree based on the value of the merchandise the card is used to purchase, and not the value of the card itself, the State would be required to prove Berg actually used the card in order for it to meet its burden of proving her guilty beyond a reasonable doubt of Theft in the 4<sup>th</sup> Degree.

**iii. In Order to Adequately Protect Berg's Constitutional Right to Speedy Trial, This Case Must be Dismissed**

Speedy trial rules must be vigorously enforced in order to ensure a criminal defendant's constitutional rights are fully protected. As the Iowa

Supreme Court has warned, “[i]f the State is free to commence repeated prosecutions for the same offense following undue delay in going to trial, subject only to the running of the statute of limitations, there is nothing to deter delays at prosecution’s convenience in pushing forward to trial, and defendant’s constitutional right to a speedy trial is rendered largely meaningless.” *State v. Johnson*, 217 N.W.2d 609, 612 (Iowa 1974) (citations omitted).

In rejecting the same elements test in favour the more lenient “same offense” standard articulated in *Moritz*, the Iowa Supreme Court was very concerned about the potential infringement on a defendant’s constitutional rights if the test were too rigid. Specifically, the court was concerned that:

[i]t would permit, if not encourage, the piecemeal prosecution of drug trafficking charges as a means of avoidance of the time-honored constraints of our speedy trial rule. For example, under the State’s interpretation, the dismissal of the conspiracy charge as a penalty for violation of Abrahamson’s right to a speedy trial would be of insubstantial consequence to the State because the manufacturing charge would stand in ready reserve to be charged as a separate offense. Such an interpretation would undermine the salutary purposes of the speedy trial rule.

*Abrahamson*, 746 N.W.2d at 277 (citing *Johnson*, 217 N.W.2d at 612 (“noting the remedy afforded by a dismissal with prejudice for violation of the speedy trial rule assures that the rule will not be rendered meaningless”)).

Likewise, “it is conceivable that the State could, as a matter of strategy, file an information but hold in reserve several alternative offenses in cases involving alleged manufacturing, possession and delivery of controlled substances. In drug trafficking cases involving multiple individuals, the potential array of such offenses available ‘in reserve’ would of course be even greater under the State’s interpretation of the rule, as a conspiracy offense might have been committed in such cases.” *Abrahamson*, 746 N.W.2d at 277 n. 7.

Although *Abrahamson* specifically addressed the drug trafficking statute, the same reasoning applies here. The State would still be able to strategically circumvent a criminal defendant’s constitutional rights by “piecemeal prosecution” without substantial consequence. *Id.*

The purpose of both the criminal procedural rules and the constitutional provisions is to “relieve an accused of the anxiety associated with a suspended prosecution and provide reasonably prompt administration of justice.” *Ennenga v. State*, 812 N.W.2d 696, 703 (Iowa 2012) (citing *State v. Wing*, 791 N.W.2d 243, 246–47 (Iowa 2010) (citations omitted)). Allowing the State to engage in “piecemeal prosecution” would thwart the very purpose of a criminal defendant’s right to speedy trial.



Moreover, “[t]he speedy indictment and speedy trial rules also aim to prevent the harm that arises from the “possible impairment of the accused’s defense due to diminished memories and loss of exculpatory evidence.” This type of harm is the “most serious,” because “the inability of a defendant adequately to prepare his case skews the fairness of the entire system.” *Id.* This also implicates a criminal defendant’s due process rights under United States Constitution, Amendment 14 and Iowa Constitution, Article I, § 9.

Given the compelling need to protect a criminal defendant’s State and federal constitutional rights to a speedy trial, dismissal for a speedy trial violation is absolute. *See e.g. Abrahamson*, 746 N.W.2d 270; *see also Johnson*, 217 N.W.2d at 612. “A dismissal for failure to provide a speedy trial is an absolute dismissal, a discharge with prejudice, prohibiting reinstatement or refile of an information or indictment charging the same offense. *Abrahamson*, 2008, 746 N.W.2d 270; *see also Johnson*, 217 N.W.2d 612 (stating that allowing the State to refile the same charges following a speedy trial violation would “drain [the speedy trial rule] of its force and effectiveness in protecting the accused’s right to a speedy trial.”)

Accordingly, courts must carefully consider whether allowing the State to refile charges for the same conduct is consistent with a criminal defendant’s right to speedy trial.

In this case, the State did not take any action on the charges against Berg until Berg filed a motion to dismiss based on the violation of her right to speedy trial. The State never put forth any good cause for its delay. Berg did nothing to delay her case being brought before the court. The new charge of Unauthorized Use of a Credit Card requires the same proof as the initial charge of Theft in the 4<sup>th</sup> Degree. Under these circumstances, it is clear the State filed new charges for the same conduct in order to circumvent Berg's right to a speedy trial. This constitutes a fundamental violation of Berg's right to speedy trial and due process of law. Accordingly, the Court should vacate Berg's conviction and order dismissal of this case.

## II. THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUPPORT THE VERDICT

### **A. Error Preservation**

The issue was preserved because Berg argued at trial that the evidence presented by the State was insufficient to establish beyond a reasonable doubt that Berg failed to pay for the gift cards or that Berg had used the cards to obtain goods or services. (Tr. of Trial p. 7-10). In an order dated March 3, 2023, the court found Berg guilty of Unauthorized Use of a Credit

Card. (App. at 27) (Findings of Fact, Conclusions of Law, Decision and Order).

Berg specified which elements of the crime were insufficiently supported by the evidence. (Tr. of Trial p. 7-10). Therefore, Berg preserved error on her challenge to the sufficiency of the evidence. *See State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996).

### **B. Scope and Standard of Appellate Review**

The standard of review for challenges to the sufficiency of the evidence is for errors at law. *State v. Bash*, 670 N.W.2d 135, 137 (Iowa 2003). The Court will uphold a verdict if substantial evidence supports it. *Id.* Evidence is considered substantial “if it would convince a rational fact finder the defendant is guilty beyond a reasonable doubt.” *Id.* The Court reviews the evidence, including legitimate inferences and presumptions that may fairly be deduced from the evidence, in the light most favorable to the State. *Id.* The State has the burden to prove each fact necessary to constitute the crime with which the defendant is charged. *Id.* In order to be considered sufficient, “[t]he evidence must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture.” *Id.*

### C. Argument

The Sixth Amendment of the United States Constitution and Article 1, § 9 of the Iowa Constitution guarantee a criminal defendant's right to due process of law. It is one of the basic principles of criminal law that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). If the State can only prove a criminal defendant committed some elements of a crime, but not others, the defendant retains her presumption of innocence, and cannot be convicted of or sentenced for that crime. *Id.* A conviction under such circumstances would violate the defendant's constitutional rights to due process of law. *Id.*

Likewise, the Iowa Supreme Court has long recognized that:

[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' In other words, before it can secure a conviction the State must demonstrate to the jury beyond a reasonable doubt each essential element of the alleged offense. Any lesser standard would deny due process.

*State v. Lewis*, 242 N.W.2d 711, 719 (Iowa 1976) (citations omitted).

The Iowa Supreme Court has long held that it "will not let a finding of guilt stand where there is an absence of proof of any essential element of the

crime charged.” *State v. Hill*, 140 N.W.2d 731, 733 (Iowa 1966) (citing *State v. Stodola*, Iowa, 134 N.W.2d 920, 921; *State v. Myers*, 253 Iowa 271, 274, 111 N.W.2d 660, 662). “A conviction notwithstanding such absence of proof amounts to denial of a fair trial” and accordingly must be reversed. *Id* (citations omitted).

Currently, Berg has been sentenced and is being punished for a crime of which she has not been properly convicted. This is not only unconscionable; it is contrary to every precept of our criminal justice system. Since the founding of this nation, “the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence, or to disprove the facts necessary to establish the crime for which he is indicted.” *Davis v. United States*, 160 U.S. 469, 487 (1895). Instead, “[i]t is on the prosecution from the beginning to the end of the trial, and applies to *every element necessary to constitute the crime.*” *Id* (emphasis added). If the jury does not find an essential element of an offense, the State has failed to meet its burden in its prosecution, and the defendant cannot be punished as though the jury had found that element beyond a reasonable doubt. *Id.*

“Thus, if it appears the State’s evidence, viewed in a light most favorable to it, does not furnish substantial support for the verdict, but fails

to prove an essential element of the crime charged, the case must be reversed.” *Hill*, 140 N.W.2d at 733.

In *State v. Hill*, the Iowa Supreme Court reversed the defendant’s conviction because the defendant was denied his right to a fair trial where he was convicted notwithstanding the absence of proof of an essential element of the crime. 140 N.W.2d at 733.

Here the State failed to present sufficient evidence to prove Berg guilty beyond a reasonable doubt of each element of unauthorized Use of a Credit Card. Accordingly, this case must be reversed and remanded for a new trial.

**i. The Sole Evidence Upon which a Conviction Can be Based Is in the Minutes of Testimony**

The State has the burden of proving each element of the charged offense beyond a reasonable doubt. Iowa Code § 715A.6 provides:

1. a. A person commits a public offense by using a credit card for the purpose of obtaining property or services with knowledge of any of the following:
  - (1) The credit card is stolen or forged.
  - (2) The credit card has been revoked or canceled.
  - (3) For any other reason the use of the credit card is unauthorized.

The level of the offense is determined by the dollar amount of the property or services obtained. Iowa Code § 715A.6. In this case, Berg was convicted of Unauthorized Use of a Credit Card Under \$1,500. Iowa Code § 715A.6(1)(c).

This case proceeded to trial on the minutes of testimony. Iowa R. Crim. P. 2.17(2); (Ap at 25) (Findings of Fact, Conclusions of Law, Decision and Order at 1). When a trial on the minutes is held, the parties may choose to stipulate to inclusion of additional evidence in the record. Iowa R. Crim. P. 2.17. In this case, the parties did not stipulate to inclusion of any additional evidence. Accordingly, the sole evidence available to the court in this matter was the minutes of testimony and attached evidence.

**ii. The Evidence Was Insufficient to Show Berg Committed Unauthorized Use of a Credit Card Because the Sole Evidence of the Offense Is Berg’s Uncorroborated Testimony**

Pursuant to the Iowa Rules of Court, “[t]he confession of the defendant, unless made in open court, will not warrant a conviction unless accompanied with other proof that the defendant committed the offense.” Iowa R. Evid. 2.21. A defendant’s confession must be corroborated by additional evidence. *Id.*

Under Iowa law, “a confession standing alone will not warrant a criminal conviction unless other proof shows the defendant committed the crime.” *State v. Douglas*, 675 N.W.2d 567, 568–69 (Iowa 2004) (citing *State v. Polly*, 657 N.W.2d 462, 466 (Iowa 2003)). “[W]hen the prosecution relies on [such] proof, corroborating evidence independently linking the defendant to the offense is required. *Id* (citing *Polly*, 657 N.W.2d at 466)).

Likewise, under federal law, “our concept of justice that finds no man guilty until proven has led our state and federal courts generally to refuse conviction on testimony concerning confessions of the accused not made by him at the trial of his case. *Opper v. United States*, 348 U.S. 84, 89 (1954) (citations omitted).

Corroborating evidence is necessary to ensure the reliability of evidence and to discourage abusive police practices. *See e.g. Polly*, 657 N.W.2d at 466. As the Iowa Supreme Court has explained:

[t]he need for corroboration is also based in part on the belief that a system of criminal law enforcement which comes to depend on the “confession” will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.

*Id* (citing *Escobedo v. Illinois*, 378 U.S. 478, 488–89 (1964)).



Accordingly, “[t]he requirement of corroborating evidence stems from the incidence of false confessions and the need to prevent ‘errors in convictions based upon untrue confessions alone.’ ” *Id* (citing *Warszower v. United States*, 312 U.S. 342, 345 n. 2 (1941)).

Additionally, “[b]y encouraging the development of more reliable evidence through competent investigation and discouraging dependence on possibly coercive and untrue confessions, this requirement also promotes the use of more desirable investigatory techniques by police.” *Douglas*, 675 N.W.2d at 572 (citation omitted).

In this case, in the minutes of testimony, the only evidence that Berg used a card that had not been paid for is that she stated she had done it. (App at \_) (Minutes of Testimony). That is not sufficient to sustain a conviction. *See Iowa R. Evid. 2.21; Polly*, 657 N.W.2d at 466. Berg’s confession would need to be corroborated by independent evidence in order to sustain a conviction. *Id*. Because it is not, there is insufficient evidence to sustain a conviction. The State has not proven each element of the offense of Unauthorized Use of a Credit Card beyond a reasonable doubt.

Additionally, there is no evidence other than Berg’s admission that she did not lawfully purchase the cards. *Id*. The minutes do contain receipts from the purchase of the cards, but nothing in the receipts shows that the

cards weren't lawfully purchased. (App at 18) (Minutes of Testimony at 13). In fact, the receipts included in the minutes appear to show that the cards were paid for at the time of activation. *Id.*

The minutes do not contain any evidence that Berg ever used the cards. *Id.* The limitation of credit card numbers on the receipts to the last four digits prevents the fact finder from positively identifying the owner or user of the card. *See id.* Likewise, it is impossible to ascertain whether the gift card purchased on July 12, 2022 is the same card as the one used on July 13, 2022.

At trial, the State argued that “[t]he state’s position is use of that card includes the funding of that card using someone else’s money” and so “[t]he card was used when it was funded with the employer’s money.” (App at \_\_) (Tr of Trial at 8). There are several fatal flaws in the State’s reasoning.

First, even under this theory, there is no evidence, other than Berg’s confession, to indicate the card was not lawfully paid for. (App at 6-22) (Minutes of Testimony).

Second, in order to be convicted of Unauthorized Use of a Credit card, a defendant must “us[e] a credit card for the purpose of obtaining property or services”. Iowa Code § 715A.6(1)(a). If the credit card has not been loaded or activated, it cannot be used to acquire any property. If no property has

been acquired, or is even sought to be acquired, it was not used “for the purpose of obtaining property or services”. Iowa Code § 715A.6(1)(a). Thus the State cannot meet its burden of proof under this theory.

Additionally, the statute requires that the defendant “us[ed] a credit card for the purpose of obtaining property or services”. Iowa Code § 715A.6(1)(a). At the time the card is being purchased, it is not in the possession of the defendant to be used. Rather, the most that can be said is that the defendant is obtaining the card itself through improper means. This does not constitute “using a credit card for the purpose of obtaining property or services”. Iowa Code § 715A.6(1)(a). Accordingly, even under the State’s novel theory, it has not met its burden to prove *use* of the card beyond a reasonable doubt.

Finally, the State’s argument is belied by its assertion at the hearing on Berg’s motion to dismiss that Iowa Code § 715A.6 “punishes the use of a card when it’s knowingly stolen or when there’s no authorization to do so. That’s a crime, an offense that occurs at the time of use rather than the time of the theft.” (Tr of Hrg on Motion to Dismiss at 6). Accordingly, the State concedes a violation of Iowa Code § 715A.6(1)(a) only occurs at the time of the use of the card, vitiating its own argument.

There is not sufficient evidence to find Berg guilty beyond a reasonable doubt of each element of Unauthorized Use of a Credit Card. Accordingly, Berg' conviction must be vacated.

**iii. The Evidence Is Insufficient to Show Berg Committed Unauthorized Use of a Credit Card Because the State Failed to Show the Gift Cards Used and Purchased are the Same**

The evidence is also insufficient to show Berg committed Unauthorized Use of a Credit Card because the State failed to show that the gift card that was used and the gift card that was purchased are the same. In its decision finding Berg guilty, the court stated:

Included in the Minutes of Testimony is a document showing that a Casey's gift card in the amount of \$75.00 with an account ending in number 7247 was approved on July 12, 2022, by a cashier named "Sarah." Another document included in the Minutes of Testimony shows that on July 13, 2022, Casey's card number ending in number 7247 was used to purchase grocery items and gas in the amount of \$59.67. The document shows that the defendant had used the card and the card had a remaining balance of \$15.33 after the purchase.

(App at 26) (Findings of Fact, Conclusions of Law, Decision and Order at 2).

The court's analysis ignores the fact that the last four digits of a credit card are used on receipts because it is impossible to identify the card based solely on those numbers. In fact, the Fair and Accurate Credit Transactions

Act prohibits businesses that accept credit cards or debit cards from printing more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction.

15 U.S.C.A. § 1681c.(g)(1). “Congress’s aim in passing FACTA was to reduce the chance that a consumer would be injured (usually through identity theft) by virtue of the inclusion of sensitive information on a credit/debit card receipt.” *Smith v. Under Armour, Inc.*, 593 F. Supp. 2d 1281, 1283 (S.D. Fla. 2008) (citations omitted)). The limitation of credit card numbers on receipts to the last five digits prevents identity theft and other crimes involving credit or debit cards by ensuring that the information on the receipt cannot identify the owner or user of the card. *See id.* Likewise, it is impossible to positively identify that the gift card purchased on July 12, 2022 is the same card as the one used on July 13, 2022.

Accordingly, the court improperly found that the last four digits of the receipts matching met the State’s heavy burden of proof beyond a reasonable doubt that the gift card purchased on July 12, 2022 is the same card that was used on July 13, 2022. Likewise, the court also erroneously found that Berg used the gift card that was purchased on July 12, 2022.

There is not sufficient evidence to find Berg guilty beyond a reasonable doubt of each element of Unauthorized Use of a Credit Card. Accordingly, Berg' conviction must be vacated.

### **CONCLUSION**

Berg's speedy trial rights were violated, which requires a complete dismissal of all charges. The State failed to file a trial information within 45 days of Berg's initial appearance. The State then filed a new charge for the same offense. Accordingly, the Court should reverse the conviction and remand for entry of an order of dismissal.

Alternatively, the Court should find there was insufficient evidence to convict Berg, both insufficient evidence of Berg having failed to pay for the gift cards and insufficient evidence of Berg having used a card that was not lawfully purchased. Accordingly, the Court should reverse the conviction for the charge and remand for entry of an order of dismissal.

### **ATTORNEY'S REQUEST FOR ORAL ARGUMENT**

The Appellant requests the opportunity to present oral argument in this appeal.

## ATTORNEY'S COST CERTIFICATE

I hereby certify that the cost incurred by Benzoni & Maffitt Law Office, P.L.C., for printing the attached Appellant's Brief was \$4.00.

## ATTORNEY'S CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because it contains 6,469 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).
2. 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 it has been prepared in a proportionally spaced typeface using WordPerfect X3 in Times New Roman 14 point font.

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