**IN THE SUPREME COURT OF IOWA**

No. 24-0289

**THERON M. CHRISTENSEN**,
Plaintiff-Appellant,

vs.

**IOWA DISTRICT COURT FOR STORY COUNTY,**
Defendant-Appellee

APPEAL FROM DISTRICT COURT FOR STORY COUNTY
THE HONORABLE STEPHEN A. OWEN
CASE No. OWCR062790

# APPELLANT'S REPLY BRIEF

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## ARGUMENT

Christensen largely rests on the arguments contained in his Appellant's Brief. However, Christensen addresses some of the arguments contained in Appellee's Brief that are factually and legally inaccurate in order to fully advise the Court on the issues before it.

### I. THE COURT IMPROPERLY CONSIDERED PRIOR CONDUCT BY CHRISTENSEN WHEN DETERMINING WHETHER SANCTIONABLE CONDUCT OCCURRED.

This Court should sustain Christensen's writ of certiorari because Appellee failed to address Christensen's arguments regarding the district court improperly considering two prior cases prosecuted by Christensen. In his Appellant's Brief, Christensen detailed five separate assignments of error pertaining to the district court weighing allegedly sanctionable conduct in prior cases Christensen prosecuted on behalf of Story County. *See* Appellant's Brief, at p. 48-55. The Appellee utterly failed to address any of those arguments. *See generally* Appellee's Brief.

Appellee's failure to address Christensen's arguments should be deemed a waiver of those issues. *See* Iowa R. App. P. 6.903(3) (noting appellee briefs generally must comply with the rules detailing requirements for appellant briefs); Iowa R. App. P. 6.903(2)(a)(8)(3) ("Failure to cite authority in support of an issue may be deemed waiver of that issue."). Iowa courts routinely have found parties waived issues on appeal in similar circumstances. *See Ripperger v. Iowa Pub. Info. Bd.*, 967 N.W.2d

540, 553 (Iowa 2021) ("The Board's appellate brief is silent on this issue. We consider the issue waived and decline to reach it in this appeal."); *Kragnes v. City of Des Moines*, 810 N.W.2d 492, 507 n. 12 (Iowa 2012) (finding the appellee waived argument by failing to cite authority in support of position in briefing); *Inghram v. Dairyland Mut. Ins. Co.*, 215 N.W.2d 239, 240 (Iowa 1974) ("To reach the merits of this case would require us to assume a partisan role and undertake the appellant's research and advocacy. This role is one we refuse to assume."); *Irland v. Marengo Mem'l Hosp*., No. 23-1659, 2024 Iowa App. LEXIS 507, at *9-10 (Iowa Ct. App. July 3, 2024) ("[A] party forfeits an issue on appeal when the party fails to cite any authority in support of the issue."); *Miller v. Giese*, No. 23-1435, 2024 Iowa App. LEXIS 540, at *4 (Iowa Ct. App. July 24, 2024) ("Because they failed to offer a substantive argument on this issue, we deem it waived.").

Further, Appellee's waiver of these issues is sufficient grounds on its own to sustain Christensen's writ of certiorari in full and annul the district court's determination that he engaged in sanctionable conduct under Iowa Rule of Civil Procedure 1.413. *See Hearity v. Iowa Dist. Ct.*, 440 N.W.2d 860, 862 (Iowa 1989) (noting the court may annul the underlying proceeding in its entirety upon sustaining a writ of certiorari); *see also* Iowa R. Civ. P. 1.1411 ("Unless otherwise provided by statute, the judgment on certiorari shall be limited to annulling the writ or to sustaining it, in whole or in part, to the extent the proceedings below were illegal or

in excess of jurisdiction."). This Court should sustain Christensen's writ of certiorari and vacate the district court's imposition of sanctions.

## II. CHRISTENSEN DID NOT VIOLATE RULE 1.413 BY FILING THE MOTION IN LIMINE.

### a. Christensen Asserted a Colorable Argument to Exclude the Second Test Result.

Appellee's arguments regarding Christensen's attempt to exclude the second test result are factually and legally misplaced. First, Appellee routinely argues the second test was exculpatory, suggesting that a prosecutor's inability to use a test within the margin of error somehow makes it more likely that the defendant did not operate a vehicle while intoxicated. *See* Appellee's Brief at p. 20. However, the prosecution's inability to use the test does nothing to undermine the validity of the first test—indeed, the record is clear that the test was valid. *See* D0052, Deposition of Ryan Lappe, at p. 16 (10/18/2023); *see also* Iowa R. Evid. 5.401 (establishing the test for relevancy). The .08 test result simply had *no* evidentiary value—the prosecution cannot use it to prove guilt, but the existence of *subsequent* tests below the legal limit does nothing to undermine the validity of a first test above the legal limit when the only expert testimony on the subject attested to the first test's validity. *See* D0035, Response to Request for Sanctions, at p. 3(9/13/2023).

Despite the irrelevance of the second test, the facts presented in this case presented a novel issue—Iowa law does not clearly address whether multiple tests

are entitled to the statutory presumption contained in Iowa Code section 321J.2(12)(a). Both Appellee and the State Public Defender's amicus brief appear to fault Christensen for failing to invoke "magic words" and expressly state that existing case law did not clearly address the issue before the court. *See, e.g.*, State Pub. Def.'s Brief, at p. 10. But Iowa law rarely requires the use of magic words. *See, e.g.*, *State v. Hightower*, 8 N.W.2d 527, 550 (Iowa 2024) ("We do not require parties to utter magic words to avail themselves of rights"); *McGrew v. Otoadese*, 969 N.W.2d 311, 324 (Iowa 2022) ("Notably, we did not require any particular form of disclosure or the use of any magic words, i.e., 'The standard of care is x.'"); *Gray v. Osborn*, 739 N.W.2d 855, 861 (Iowa 2007) ("magic words or terms of art" are not necessary to establish an easement).

Indeed, requiring exacting precision in how an attorney articulates their position runs afoul of the standards imposed by rule 1.413. *See, e.g.*, *Barnhill v. Iowa Dist. Ct.*, 765 N.W.2d 267, 272 (Iowa 2009) (noting the standard for sanctions under rule 1.413 is one of "reasonableness under the circumstances"). Failing to use the phrasing that, in hindsight, might have been more precise is simply not a basis for sanctions. *Schettler v. Iowa Dist. Ct.*, 509 N.W.2d 459, 468 (Iowa 1993) ("The perfect acuity of hindsight has no place in a Rule [1.413] motion for sanctions."). Christensen's motion in limine presented colorable arguments on a novel issue. The court abused its discretion in imposing sanctions.

**b. Dr. Lappe's Opinions were Irrelevant to the Issues Before the Jury.**

Appellee is also incorrect in asserting Christensen's motion was clearly foreclosed by Dr. Lappe's testimony and prior assertions by counsel for Clemons. Certainly, opposing counsel highlighting what they perceive to be a weakness in the filing party's case is insufficient to alert an attorney that a later motion would be frivolous on its face. *See, e.g.*, *Dutton v. Iowa Dist. Ct. for Black Hawk Cty.*, No. 21-1390, 2022 Iowa App. LEXIS 507, at *20 (Iowa Ct. App. June 29, 2022) (noting there needs to be "no reasonable probability" a motion would succeed in order to be considered sanctionable); *In re Kloberdanz*, No. 03-1600, 2004 Iowa App. LEXIS 882, at *7 (Iowa Ct. App. July 28, 2004) (noting rule 1.413 requires only reliance on a "plausible view of the law"). Under Appellee's theory, the only non-sanctionable filing would be joint or unresisted motions.

Moreover, Dr. Lappe's testimony is clear that Iowa law does not support Appellee's position that the second test was more scientifically sound than the first test. *Compare* Appellee' Brief, at p. 21. Rather, Dr. Lappe expressly stated that *he*—not the Department of Criminal Investigations, nor any other state entity—"would like to move" to training officers to conduct a second test if the first test was .10 or below. *See* D0052, at p. 13-14. And Dr. Lappe later himself acknowledged that there was likely confusion related to his testimony and conversations with Christensen. *See* D0053, Ex. B—Emails, at p. 4 (10/18/2023). Dr. Lappe's testimony and prior

comments certainly did not rise to the level of producing "no reasonable probability" that the motion in limine would succeed. *Dutton*, 2022 Iowa App. LEXIS 507, at *20.

**c. Impairment Evidence Was Not Relevant to Proving the Per Se Theory of OWI in This Case.**

Appellee provides no explanation beyond a single conclusory statement that impairment evidence has any relevance to the validity of the first breath test results. As explained above, the only testimony in the record is unequivocal: both tests were valid. *See* D0052, at p. 13-14. And lay persons would have no means of understanding whether a sophisticated machine was functioning properly at the time of the test absent such expert testimony. *See*, *e.g.*, *State v. Boothby*, 951 N.W.2d 859, 866 (Iowa 2020) (quoting Fed. R. Evid. 701 advisory committee note) ("[T]he distinction between lay and expert witness testimony is that lay testimony 'results from a process of reasoning familiar in everyday life,' while expert testimony 'results from a process of reasoning which can be mastered only by specialists in the field.'"). As such, there is no basis for the jury to disregard the first test that established Clemons was operating the vehicle above the legal limit. Having an unquestionably valid test demonstrating Clemons was operating above the legal limit, the State had already established the *per se* theory of operating while intoxicated irrespective of the existence of subsequent testing within the margin of error.

Additionally, Appellee's theory again imposes a standard for sanctionable conduct that greatly exceeds that which is supported by Iowa law. Appellee attempts to differentiate *State v. Myer* and *State v. Warren* by noting that they do not hold as a matter of law that demeanor evidence is *always* irrelevant to a per se theory. *See* Appellee Brief, p. 33. While true, the argument is also a red herring. Attorneys do not need to identify a case that is *exactly* on point when filing motions in order to develop colorable arguments. Rather, rule 1.413 provides ample room for attorneys to take existing precedent and apply it to the unique facts of their case. *Barnhill*, 765 N.W.2d at 279 ("[W]e note rule 1.413 is not meant to stifle the creativity of attorneys or deter attorneys from challenging or attempting to expand existing precedent."). Here, Christensen accurately applied existing precedent to assert a colorable legal position. *See State v. Warren*, 955 N.W.2d 848, 856 (Iowa 2021) (noting per se theories of prosecution "*require* evidence derived from a test, not conduct"); *State v. Myers*, 924 N.W.2d 823, 828 (Iowa 2019) (noting the different forms of evidence each theory utilizes); *see also State v. Hutton*, 796 N.W.2d 898, 904 (Iowa 2011) (emphasis added) ("Iowa law has consistently and clearly distinguished between driving with a blood alcohol content that exceeds the statutory threshold and driving while under the influence of alcohol or drugs."). Appellee's reliance on *one word* within the *Warren* and *Myers* opinions does not transform that colorable position

into sanctionable conduct—its merely a point of disagreement one expects in the adversarial process.

**d. Appellee's Constitutional Arguments Are Red Herrings.**

Appellee continues to assert constitutional violations where none exist. After noting that criminal defendants have the right to present testimony in their defense, Appellee makes the somewhat ludicrous leap to asserting that the State cannot seek to exclude inadmissible exculpatory evidence. *No* precedent supports their position. Prosecutors are able to utilize approved procedural methods, including motions in limine, to exclude inadmissible evidence even if that evidence would be beneficial to the defense. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) (requiring disclosure, not admission, of exculpatory evidence to criminal defendants). The Court should dismiss Appellee's assertions to the contrary out of hand.

**e. Dismissal of the Motion in Limine is Irrelevant.**

It is worth emphasizing that a subsequent dismissal of a motion has no relevance to this Court's analysis under rule 1.413. Iowa law is clear that the proper analysis for sanctions is on the attorney's conduct at the time of the filing. *See Schettler*, 509 N.W.2d at 468. In fact, the Iowa Court of Appeals has expressly found that subsequent dismissals of motions has no relevance to rule 1.413 sanctions. *See Kloberdanz*, 2004 Iowa App. LEXIS 882, at *9-10. As explained previously,

Christensen had ample grounds for filing the motion in limine when it was filed. As such, the Court abused its discretion in finding Christensen violated rule 1.413.

## III. CHRISTENSEN DID NOT ACT WITH AN IMPROPER PURPOSE WHEN DISMISSING THE CASE.

The record unequivocally demonstrates Christensen did not dismiss the charges against Clemons with an improper purpose. Appellee's arguments to the contrary rest on erroneous application of the law and facts. For instance, Appellee argues that Christensen dismissed the case because he sought to avoid a judicial ruling on Officer Shreffler's conduct because such a ruling could result in dismissal of charges against other defendants. That argument is entirely nonsensical. Iowa law does not require an adjudication by the court before a prosecutor's ethical obligations are triggered to disclose exculpatory evidence. *See* Iowa R. Prof'l Cond. 32:3:8 (defining when a prosecutor must disclose exculpatory evidence). A judicial finding would not be binding on other criminal defendants' cases. *See, e.g.*, *Clark v. State*, 955 N.W.2d 459, 465-66 (Iowa 2021) (defining when issue preclusion may apply). Indeed, a finding that Officer Shreffler failed to adequately calibrate his radar in this case would not even necessarily undermine the existence of probable cause in other cases. For instance, probable cause existed in this case regardless of Officer Shreffler's conduct because of the independent observations of Officer Hoffman. *See* D0028, Add. Minutes of Testimony p. 1 (9/12/2023).

In short, Appellee's imputation of malice by Christensen rests entirely on the faulty premise that Christensen sough to avoid damaging other cases. That theory is directly contrary to common sense. To the extent Shreffler's testimony was damaging to the State, the record was already made at his deposition. Clemons' counsel was present for Shreffler's deposition—which was not subject to a protective order of any kind—and could have disclosed the information to whomever he saw fit. There was nothing to cover-up. Rather, as the record clearly shows, Christensen dismissed the case due to a confluence of factors, including Dr. Lappe's inability to conduct a retrograde extrapolation. The Court abused its discretion in finding Christensen violated rule 1.413 and imposing sanctions.

## IV. APPELLEE IS NOT ENTITLED TO INCREASED SANCTION.

Appellee's request for additional sanctions, whether directly or in the form of appellate attorney's fees, is contrary to longstanding Iowa law. First, appellees that decline to file a cross appeal are not entitled to receive greater relief on appeal than they received through the district court. *Fed. Land Bank v. Dunkelberger*, 499 N.W.2d 305, 308 (Iowa Ct. App. 1993); *Iowa Sup. Ct. Atty. Disciplinary Bd. v. Tindal*, 949 N.W.2d 637, 647 (Iowa 2020) (McDonald, J., dissenting in part and concurring in part) ("In the absence of a cross-appeal, even on de novo review, a party may defend the decision being reviewed on any grounds urged below, but a party cannot obtain greater relief than that afforded in the decision being

reviewed."). Appellee did not file a cross appeal in this case. As such, the Court cannot increase the sanction imposed by the district court. Furthermore, even if Appellee had cross appealed, the Court cannot modify the district court order in this case's procedural posture—the Court may only sustain or deny the writ. *See* Iowa R. Civ. P. 1.1411 (noting a court reviewing a district court order via a writ of certiorari "shall not substitute a different or amended decree or order for that being reviewed"); *Hearity*, 440 N.W.2d at 862-63.

Second, Appellee is not entitled to appellate attorney's fees. "The right to recover attorney fees as costs does not exist at common law." *Van Sloun v. Agans Bros., Inc.*, 778 N.W.2d 174, 182 (Iowa 2010). "Generally, attorney fees are not allowable unless authorized by statute or contractual agreement." *FNBC Iowa, Inc. v. Jennessey Group, L.L.C.*, 759 N.W.2d 808, 810 (Iowa Ct. App. 2008). Contrary to Appellee's arguments, Iowa law has long held that a court's inherent authority to manage its docket does not include the ability to sanction counsel or assess attorney's fees. *See Hearity*, 440 N.W.2d at 863. Appellee does not assert any basis to alter the longstanding law on this issue.

Appellee incorrectly suggests that Iowa Code section 619.19(4) authorizes this Court to impose an award of appellate attorney's fees. *See* Appellee's Brief, at p. 61. As an initial matter, it appears section 619.19(4) has never been used by Iowa courts to impose awards of appellate attorney's fees. Additionally, appellate courts

do not have the ability to sanction conduct that occurred before a different court. *See* Appellant's Brief, at p. 48-51 (explaining how rule 1.413 and section 619.19(4) presuppose the court issuing the sanction is the court before whom the sanctionable conduct occurred); Iowa R. Civ. P. 1.1411 (limiting the reviewing courts options in ruling on a writ of certiorari).

Further, section 619.19(4) limits the imposition of attorney's fees to situations where the court makes a finding of sanctionable conduct. Iowa Code § 619.19(4) (noting that if certain conditions are met, "the court…shall impose…an appropriate sanction…including a reasonable attorney fee"). Appellee does not frame their request for appellate attorney's fees as a request for sanctions related to Christensen's appellate motions or briefs. Rather, they merely assert such fees are required due to the burden they face in defending the appeal. Because Appellee has not established sanctionable conduct that occurred before *this* court, section 619.19(4) does not authorize appellate attorney fees because its condition precedent has not been met. Ruling otherwise would subject attorneys to sanctions in two different proceedings for the exact same underlying conduct, create the potential for inconsistent results between the district court and appellate court, and significantly increase the amount of sanctions an attorney faces in the event they choose to exercise their right to an appeal.

Finally, it is worth noting that counsel for Clemons was not required to defend the district court on appeal. While all parties other than the certiorari plaintiff are generally required to defend the district court from a writ of certiorari, the Iowa Rules of Appellate Procedure permit the attorney defending the court to file an application to withdraw. *See* Iowa R. App. P. 6.107(5). As such, counsel for Clemons could have withdrawn from the case and avoided the costs associated with defending the district court. Forcing the appellant to pay fees for an attorney who made the conscious decision to defend the district court would produce a windfall for the party defending the district court while causing a significant chilling effect on a party's willingness to challenge a district court's illegal order.

## CONCLUSION

For the foregoing reasons, Theron Christensen respectfully requests the Court find the district court abused its discretion by finding Christensen engaged in sanctionable conduct, sustain his writ of certiorari, and vacate the district court's order imposing sanctions. In the alternative, Christensen requests the Court find the district court abused its discretion in imposing the amount of sanctions, sustain his writ of certiorari, and remand the case with directions for the Court to properly consider the amount of sanctions to impose.

## CERTIFICATE OF COMPLAINCE

This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(i)(1) because this brief contains 3,130 words, excluding the parts of the Brief exempted by Iowa R. App. P. 6.903(1)(i)(1).

This Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(g) and the type-style requirements of Iowa R. App. P. 6.903(1)(h) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point, Times New Roman.

By: */s/ Jason C. Palmer*

## CERTIFICATE OF FILING AND SERVICE

The undersigned certifies a copy of this Appellant's Reply Brief was filed with the Clerk of the Iowa Supreme Court via EDMS and served on all registered parties by EDMS on the 13th day of September, 2024.

By: */s/ Jason C. Palmer*

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