IN THE SUPREME COURT OF IOWA

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| STATE OF IOWA,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>VANESSA GALE,<br><br>Defendant-Appellant. | Scott County SRCR426545<br><br>Supreme Court No. 23-1786 |

APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY
HONORABLE CHRISTINE DALTON, JUDGE

# APPLICANT'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED DECEMBER 4, 2024

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## QUESTIONS PRESENTED FOR REVIEW

**I. Did the Court of Appeals err in affirming the District Court's ruling on the motion to suppress?**

**II. Can the Court of Appeals uphold an illegal sentence when both parties agree the sentence was illegal?**

**III. When both parties consent to take judicial notice of a prior conviction in a different proceeding, can an appellate court decline to take judicial notice?**

**IV. Can a party consent to an incorrect factual history supporting an illegal sentence which cannot be corrected on direct appeal?**

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## STATEMENT IN SUPPORT OF FURTHER REVIEW

COMES NOW Defendant-Appellant Vanessa Gale, pursuant to Iowa R. App. P. 6.1101(2)(b) and (d), and requests further review of the December 4, 2024, decision of the Court of Appeals. The Court of Appeals erred in upholding the District Court's ruling on Ms. Gale's motion to suppress and failing to correct her illegal sentences.

Ms. Gale was convicted of one count of possession of a controlled substance, methamphetamine 2nd offense in violation of Iowa Code § 124.401(5) (2022) and one count of possession of a controlled substance – marijuana 2nd offense in violation of Iowa Code § 124.401(5) (2022). Ms. Gale had a trial on the minutes and the minutes reflected she had a prior conviction under Iowa Code 124.441(5). (D0010, Minutes at 14, 1/2/23). The minutes list her prior possession conviction with a case number of SRCR023967. (D0010, Minutes at 14). A review of SRCR023967 on Iowa Courts Online demonstrates Ms. Gale pled guilty to possession of Oxycodone without a prescription, in violation of Iowa Code §

155A.21 (2015). (D0032, SRCR023967, Cedar County, Case #07161, Order for Disposition at 1-2, 04/22/2016). This is not a qualifying conviction for sentencing enhancements under Iowa Code § 124.401(5) (2022). Appellee agreed Ms. Gale did not have a proper predicate conviction to enhance her sentences and her sentences were illegal as a result. (Appellee's Brief, pg. 21).

The Court of Appeals declined to correct Ms. Gale's illegal sentences and held 1) the issue should have been raised as a sufficiency of the evidence claim 2) it could not take judicial notice of Ms. Gale's prior conviction, and 3) Ms. Gale consented to the factual record creating her illegal sentences. (Opinion, pg. 6-8). In reaching these conclusions, the Court of Appeals misstated the facts and holdings in State v. Washington, 832 N.W.2d 650, 655-56 (Iowa 2013) and State v. Parker, 747 N.W.2d 196, 212 (Iowa 2008). Notably, the Court of Appeals did not dispute Ms. Gale did not have the proper predicate conviction for enhanced sentences.

Both the Iowa Supreme Court and Iowa Court of Appeals have reviewed whether a predicate conviction satisfies a sentencing

enhancement under an illegal sentencing framework. State v. Gordon, 732 N.W.2d 41, 43-44 (Iowa 2007). State v. Jensen, No. 22-0081, 2022 WL 17828830, at *2 (Iowa Ct. App. Dec. 21, 2022). Ms. Gale's sentences were illegal because a conviction under Iowa Code § 155A.21 (2015) is not a qualifying conviction for a sentencing enhancement under Iowa Code § 124.401(5) (2022). State v. Woody, 613 N.W.2d 215, 217 (Iowa 2000) (holding "[a]n illegal sentence is one that is not permitted by statute").

The Court of Appeals cited Washington to state it could not take judicial notice of Ms. Gale's prior conviction in SRCR023967 because it was a filing in an "entirely different case." (Opinion, fn. 1). However, Washington held an appellate court cannot take judicial notice of a separate case without consent of both parties. Washington, 832 N.W.2d at 655-56. Here, there was consent from both parties to take judicial notice of Ms. Gale's prior conviction. Appellee conceded Ms. Gale's correct prior conviction was for 155A.21 and conceded Ms. Gale received illegal sentences. (Appellee's Brief, pg. 21). Because there was an agreement between

the parties to take judicial notice of a separate case, the Court of Appeals erred by failing to take judicial notice.

The Court of Appeals cited to State v. Parker to support its assertion Ms. Gale "consented to the creation of a record that shows she had a predicate offense that enhanced both charges in this case." (Opinion, pg. 7). Specifically, the Court stated the holding of Parker was "only the record can be considered in determining predicate offenses and, if the information in the record about predicate offenses is inaccurate, the proper avenue for relief is through postconviction-relief proceedings." (Opinion, pg. 7-8). This is a misstatement of the law and the facts in Parker.

Parker addressed whether the defendant's sentence was illegally enhanced as a habitual offender based on two prior convictions which occurred on the same day. Parker, 747 N.W.2d at 211. Parker held "[i]f the record in a case shows the prior convictions are not convictions that meet the required predicate conditions, the imposition of a sentence as a[n] habitual offender is illegal." Id. at 212. The Iowa Supreme Court did not grant relief

because the record disclosed that one of the two prior convictions was for possession of cocaine "as a habitual offender," establishing the defendant was factually a habitual offender. Id. at 211-212. The Court suggested post-conviction relief could be pursued under an ineffective assistance of counsel claim because the defendant's attorney consented to a prior conviction as a habitual offender to establish the defendant was habitual offender. Id. at 212-213. Here, Ms. Gale factually could not be a habitual offender under Iowa Code §§ 124.401(5)(a)- (b) (2022) and the Court of Appeals could have corrected her illegal sentences as a result.

Furthermore, a defendant cannot consent to a factual basis which would create an illegal sentence. State v. Chawech, No. 22–1974, ___ N.W.3d ____, 12 (Iowa, Dec. 20, 2024) (holding "[b]ecause an illegal sentence is void, it is subject to attack *even if* the defendant invited it or even specifically requested it"). State v. Woody, 613 N.W.2d 215, 218 (Iowa 2000) (holding "[n]either party may rely on a plea agreement to uphold an illegal sentence"). See State v. Lathrop, 781 N.W.2d 288, 293 (Iowa 2010). See also State

v. Wilson, 294 N.W.2d 824, 825 (Iowa 1980). State v. Rasmussen, 7 N.W.3d 357, 365 (Iowa 2024) ("[I]t is well established that an illegal sentence cannot be affirmed on the basis of contract, waiver, estoppel, or detrimental reliance."); State v. Green, No. 15– 1657, 2016 WL 3554888, at *1 (Iowa Ct. App. June 29, 2016) ("The fact that he invited—nay, specifically requested—imposition of an illegal sentence does not negate his right to challenge the sentence.").

Allowing a defendant to consent to an illegal sentence would violate both Iowa and Federal Constitutions. Iowa Const. art. 5 § 5. Iowa Const. art. 1 § 17. U.S. Const. Amend. 8. U.S. Const. Amend. 14. State v. Bruegger, 773 N.W.2d 862, 871-72 (Iowa 2009). Hill v. United States, 368 U.S. 424, 430 (1962).

WHEREFORE, Ms. Gale requests this Court grant further review of the Court of Appeals' December 4, 2024 decision.

**Nature of the Case**:

The Defendant-Appellant, Vanessa Gale, appeals her conviction for one count of possession of a controlled substance, methamphetamine 2nd offense in violation of Iowa Code § 124.401(5) (2022) and one count of possession of a controlled substance – marijuana 2nd offense in violation of Iowa Code § 124.401(5) (2022). (D0051, Order for Trial on the Minutes at 1, 10/31/23). A motion to suppress was filed, a hearing was held, and it was denied. (D0034, MTS at 2-6, 4/24/23). (D0046, Order Denying MTS at 3, 9/14/23). Ms. Gale was convicted of both counts after a bench trial on the minutes. (D0051, Order for Trial on the Minutes at 1).

For both counts, the District Court sentenced Ms. Gale to 120 days in the Scott County jail, suspended the sentences, and placed Ms. Gale on a term of probation. (D0052, Judgment and Sentence at 2, 10/31/23). The District Court ordered the sentences run concurrently. (D0052, Judgment and Sentence at 2). Ms. Gale was ordered to pay $855 for Count 1 with a 15 percent surcharge and

$430 for Count 2 with a 15 percent surcharge. (D0052, Judgment and Sentence at 2).

The Court of Appeals erred in holding officers were able to detain Ms. Gale based upon probable cause to arrest a passenger in her parked vehicle and the Court of Appeals erred by failing to correct Ms. Gale's illegal sentences.

**Statement of the Facts**:

Ms. Gale generally accepts as accurate the Court of Appeals' recitation of the facts.

## ARGUMENT

### I. Officer Hughes unlawfully detained Ms. Gale without probable cause or reasonable articulable suspicion.

The Court of Appeals erred in finding the search of Ms. Gale was lawful. (Opinion, pg. 3-5). The Fourth Amendment to the United States Constitution and Article I Section 8 of the Iowa Constitution prohibit unreasonable searches and seizures by the government. State v. Kinkead, 570 N.W.2d 97, 100 (Iowa 1997). For an investigatory stop to comply with the Fourth Amendment, the State must prove by a preponderance of the evidence the officer had

specific and articulable facts that, taken together with rational inferences from those facts, would lead the officer to reasonably believe criminal activity is afoot. Terry v. Ohio, 392 U.S. 1, 21 (1968). State v. Vance, 790 N.W.2d 775, 781 (Iowa 2010). Whether reasonable suspicion exists is reviewed in light of the totality of the circumstances confronting a police officer. Id.

For an officer to have probable cause to stop a vehicle, the individual being stopped must have already committed a crime. State v. Tague, 676 N.W.2d 197, 204 (Iowa 2004). Here, officers did not allege Ms. Gale committed any traffic violations. (D0062, Motion to Suppress Hearing, 15:13-16; 30:1-4; 35:9-10, 9/7/23). For the stop to be lawful, officers would need reasonable articulable suspicion criminal activity was afoot. Terry, 392 U.S. at 21.

The District Court explicitly found the officers did not have reasonable articulable suspicion to stop Ms. Gale because they had a "hunch" about a drug deal which did not amount to reasonable articulable suspicion. (D0046, Order Denying MTS at 3). The Iowa Court of Appeals also acknowledged officers had no probable cause

or reasonable articulable suspicion to stop Ms. Gale as an individual. (Opinion, pg. 5).

However, the Court of Appeals erroneously found the initial seizure of Ms. Gale did not violate her constitutional rights. (Opinion, pg. 4-5). This case is distinguishable from other automobile searches and seizures of drivers and passengers because the initial stop was invalid. Ordinarily when appellate courts evaluate traffic stops for Fourth Amendment violations, the driver commits a traffic violation which provides officers with probable cause to stop the vehicle and seize both the driver and the passengers. State v. Price-Williams, 973 N.W.2d 556, 558-562 (Iowa 2022). See Maryland v. Pringle, 504 U.S. 366, 368 (2003). See also State v. Smith, 683 N.W.2d 542, 544 (Iowa 2004). However, Ms. Gale did not commit any traffic violations which would warrant a stop.

Officers could have easily waited to detain Houston after he left Ms. Gale's vehicle. There was no mention of an exigent circumstance which would allow Ms. Gale to be lawfully detained.

State v. Naujoks, 637 N.W.2d 101 109-110 (Iowa 2001). While Officer Hughes indicated stopping Houston in Ms. Gale's vehicle decreased the "likelihood of flight," his actions did not demonstrate Houston was a flight risk. (D0062, MTS, 23:17-23).

Officers parked after Houston entered the Kwik Star and were able to arrest him as he was walking out but chose not to. (D0062, MTS, 21:2-18). Officers did not immediately respond when Ms. Gale drove Mr. Houston to his vehicle. (D0062, MTS, 22:24-23:16). (State's Ex. 1, Hughes 0-7:40, 0:00-0:30). This demonstrates officers went out of their way to seize Ms. Gale without probable cause or reasonable articulable suspicion.

While appellate courts have held a passenger's criminal activity can provide grounds for a stop, those cases are distinguishable to the facts at hand. Specifically, the Court of Appeals cited to U.S. v. Cardenas-Celestino, 510 F.3d 830, 831 (8th Cir. 2008). (Opinion, pg. 4). This case does not support the officers' action in this case. In Cardenas-Celestino, officers in Missouri had a warrant for a man named Marquez and his residence based upon

probable cause for selling narcotics. Id. As officers were driving up to the house, they saw Marquez exiting the residence with the defendant, Cardenas-Celestino, in a vehicle. Id. Officers pulled over Cardenas-Celestino, who was driving the vehicle, arrested Marquez, and asked Cardenas-Celestino if they could search his house too. Id. at 831-32. The defendant consented to a search of his house. Id. at 832. The issue at trial was about the defendant's consent for officers to search his house. Id. The issue on appeal was whether the traffic stop was valid, but the Federal court found the issue was not raised below and there was no plain error. Id. at 832-34.

Additionally, the Court of Appeals cited to State v. Kreps, 650 N.W.2d 636, 646 (Iowa 2002). Kreps is distinguishable because both the driver and the passenger were engaging in suspicious behavior and evasive conduct. Kreps, 650 N.W.2d at 647-648. The defendant in Kreps did not violate any traffic laws, but was driving quickly and drove in a circle to attempt to evade the officer. Id. The passenger fled the car while it was moving and the Iowa Supreme

Court explained both parties' conduct when taken together constituted reasonable articulable suspicion. Id.

Here, the actions of the Ms. Gale, as the driver, did not rise to either probable cause or reasonable articulable suspicion. Officers could have arrested Houston several minutes earlier and chose not to. (D0062, MTS, 21:2-8; 22:24-23:23). Officer Hughes waiting to arrest Houston is analogous to an officer prolonging a stop. See State v. Flanagan, No. 20-0652, 2021 WL 4593222, at *6 (Iowa Ct. App. Oct. 6, 2021). Officers had the opportunity to arrest Houston without detaining Ms. Gale but chose to detain her in an attempt to investigate an unrelated hunch beyond the scope of the initial stop.

Because the officer failed to approach Houston before he got into Ms. Gale's car and waited to detain Ms. Gale based on a hunch criminal activity was occurring, the probable cause to detain Houston cannot extend to Ms. Gale. As a result, all evidence from the stop should be suppressed. Vance, 790 N.W.2d at 781. Ms. Gale asks this Court reverse the District Court's ruling denying the

motion to suppress and remand the case for further proceedings. State v. Tyler, 830 N.W.2d 288, 298 (Iowa 2013).

## II. The District Court imposed illegal sentences, the parties agreed the sentences were illegal, and the Court of Appeals erred by failing to correct the illegal sentences.

Ms. Gale's sentences for both counts were illegal and not authorized by statute because she did not have a proper predicate conviction which would enhance her convictions. Anderson v. Iowa Dist. Ct., 989 N.W.2d 179, 181 (Iowa 2022). Iowa R. Crim. P. 2.24(5)(b). A defendant can challenge "illegal sentences at any time." Anderson, 989 N.W.2d at 181 (citing State v. Lopez, 907 N.W.2d 112, 122 (Iowa 2018)). "An illegal sentence is void, which permits an appellate court to correct it on appeal without the necessity for the defendant to preserve error by making a proper objection in the district court." Parker, 747 N.W.2d at 212.

Ms. Gale's convictions for second subsequent offenses were illegal and void because she did not have a previous conviction under Iowa Code § 124.401. Ms. Gale was convicted of one count of possession of a controlled substance, methamphetamine 2nd

offense in violation of Iowa Code § 124.401(5) (2022) and one count of possession of a controlled substance – marijuana 2nd offense in violation of Iowa Code § 124.401(5) (2022). (D0051, Order for Trial on the Minutes at 1).

The minutes reflect Ms. Gale had a prior conviction under Iowa Code 124.441(5) with a case number of SRCR023967. (D0010, Minutes at 14). A review of case number SRCR023967 provides Ms. Gale pled guilty pursuant to a plea agreement for possession of Oxycodone, without prescription, in violation of Iowa Code § 155A.21 (2015). (D0032, SRCR023967, Cedar County, Case #07161, Order for Disposition at 1-2). This conviction does not qualify as a predicate conviction to enhance either sentence under Iowa Code Chapter 124.

Iowa Code § 124.401(5)(a) (2022) states:

> A person who commits a violation of this subsection and who has previously been convicted of violating this chapter or chapter 124B or 453B, or chapter 124A as it existed prior to July 1, 2017, is guilty of an aggravated misdemeanor.

(emphasis added). Ms. Gale was not convicted of violating Chapter 124, 124A, 124B, or 453B. (D0032, SRCR023967, Order for

Disposition, at 1-2, 04/22/2016). Therefore, she could not be convicted of a second offense under this subsection for possession of methamphetamine.

Similarly, Iowa Code § 124.401(5)(b) (2022) states:

> If the controlled substance is marijuana and the person has been previously convicted of a violation of this subsection in which the controlled substance was marijuana, the punishment shall be as provided in section 903.1, subsection 1, paragraph "b".

(emphasis added). Ms. Gale was not previously convicted of violating Iowa Code § 124.401(5)(b). (D0032, SRCR023967, Order for Disposition, at 1-2, 04/22/2016). Because Ms. Gale's prior conviction for possession of oxycodone was under Iowa Code § 155A.21, she cannot be convicted and sentenced for second subsequent offenses under Iowa Code §§ 124.401(5)(a) and (b) (2022).

On appeal, Appellee conceded Ms. Gale's sentences were illegal because she did not have the correct prior conviction to enhance her sentences and agreed to remand her case for resentencing. (Appellee's Brief, pg. 20-21). The Court of Appeals declined to

correct the error and incorrectly stated the issue was sufficiency of the evidence and not an illegal sentence, it could not take judicial notice of Ms. Gale's prior conviction, and Ms. Gale consented to the false record. (Opinion, pg. 6-8).

**i. The Court of Appeals erred by holding Ms. Gale's claim was an issue of sufficiency of the evidence and not an illegal sentence.**

The Court of Appeals held Ms. Gale's argument on appeal was an issue of sufficiency of the evidence rather than an illegal sentence. (Opinion, pg. 6). A defendant may challenge an illegal sentence "at any time" and "[a]n illegal sentence is one that is not permitted by statute." State v. Woody, 613 N.W.2d 215, 217 (Iowa 2000). State v. Bruegger, 773 N.W.2d 862, 872 (Iowa 2009) (holding when a claim is raised the sentence itself is inherently illegal, it may be addressed at any time and does not need to be addressed "under the guise of an ineffective-assistance-of-counsel claim").

Appellate Courts review whether a predicate conviction satisfies a sentencing enhancement under an illegal sentencing framework. State v. Gordon, 732 N.W.2d 41, 43-44 (Iowa 2007)

(stating "[t]his court has applied these principles [referring to illegal sentencing] to an enhanced sentence entered under an erroneous conclusion that the defendant was a habitual offender). State v. Jensen, No. 22-0081, 2022 WL 17828830, at *2 (Iowa Ct. App. Dec. 21, 2022) (holding failure to prove a predicate conviction for a sentencing enhancement amounted to an illegal sentence). State v. Parker, 747 N.W.2d at 212 ("The law does not permit a defendant to be sentenced as a[n] habitual offender if the prior convictions relied upon are not felonies or do not occur in the required sequence"). State v. Chawech, No. 22–1974, ___ N.W.3d ____, 8-12 (Iowa, Dec. 20, 2024) (reviewing error preservation requirements for sentencing issues and holding error preservation does not apply to illegal sentencing challenges even when the defendant specifically requested an illegal sentence).

The minutes correctly stated the case number for Ms. Gale's prior conviction, but incorrectly stated her conviction. (D0010, Minutes at 14). (D0032, SRCR023967, Cedar County, Case #07161, Order for Disposition at 1-2). Because Ms. Gale did not have the

prior conviction under Iowa Code §§ 124.401(5)(a) and (b) (2022), her sentences were not permitted by law and were illegal sentences. Therefore, the Court of Appeals erred by failing to correct her illegal sentences.

**ii. The Court of Appeals can take judicial notice of Ms. Gale's prior conviction because there was an agreement by both parties.**

"Judicial notice may be taken at any stage of the proceeding." Iowa R. Evid. 5.201(f). State v. Sorensen, 436 N.W.2d 358, 363 (Iowa 1989). "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Iowa R. Evid. 5.201(b). Ms. Gale's prior conviction meets the definition of judicial notice because it is a readily determined fact whose accuracy cannot reasonably questioned. See State v. Hopper, No. 15-1855, 2017 WL 936085, at *3 (Iowa Ct. App. Mar. 8, 2017) (holding "Iowa Courts

Online provides adjudicative facts, the accuracy of which cannot reasonably be questioned").

The Court of Appeals incorrectly stated the law in State v. Washington, 832 N.W.2d 650 (Iowa 2013). (Opinion, fn. 1). The Court of Appeals declined to take judicial notice of Ms. Gale's prior conviction because it was in "an entirely different case" and cited to Washington to support its assertion. (Opinion, fn. 1).

In Washington, the Iowa Supreme Court reviewed whether the court could take judicial notice of other cases to compare sentences when deciding an abuse of discretion claim. Washington, 832 N.W.2d at 656. The defendant wanted the appellate court to review sentences in other cases, but the State resisted because the sentences themselves did not provide enough context. Id. The Iowa Supreme Court held "[t]he general rule is that it is not proper for the court to consider or take judicial notice of the records of the same court in a different proceeding **without an agreement of the parties.**" Id. at 655-656 (citing Leuchtenmacher v. Farm Bureau Mut. Ins. Co., 460 N.W.2d 858, 861 (Iowa 1990)) (emphasis added).

Here, there was an agreement of the parties for the Court of Appeals to take judicial notice of SRCR023967. Ms. Gale argued the Court should take judicial notice of SRCR023967. (Appellant's Brief, pg. 21-26). Appellee stated "Gale is correct that the Cedar County conviction in SRCR023967 listed in the minutes of testimony was a violation of 155A.21, possession of a prescription drug—oxycodone—without a prescription." (Appellee's Brief, pg. 21). Appellee conceded this amounted to illegal sentences and asked for the case to be remanded for resentencing. (Appellee's Brief, pg. 21).

While it is generally improper for an appellate court to take judicial notice of records from a different proceeding without consent from both parties, the Court of Appeals was permitted to take judicial notice of Ms. Gale's prior conviction because both parties consented. Washington, 832 N.W.2d at 655-656. State v. Jones, No. 22-1506, 2023 WL 2909074, at footnote 3 (Iowa Ct. App. Apr. 12, 2023). Therefore, this information was properly before the Court and the Court of Appeals erred by failing to take judicial notice of Ms. Gale's correct prior conviction.

### iii. Parker's holding is distinguishable from the facts of this case and a defendant cannot consent to a false record which creates an illegal sentence.

The Court of Appeals held Ms. Gale "consented to the creation of a record that shows she had a predicate offense that enhanced both charges in this case. As such, there is no basis for us to conclude that there was insufficient evidence supporting her convictions that would make her resulting sentence illegal." (Opinion, pg. 7). The Court of Appeals cited State v. Parker, 747 N.W.2d 196, 212-213 (Iowa 2008) to support its assertion. Specifically, the Court of Appeals stated Parker held "only the record can be considered in determining predicate offenses and, if the information in the record about predicate offenses is inaccurate, the proper avenue for relief is through postconviction-relief proceedings." (Opinion, pg. 8). This misstates the facts and holding in Parker.

In Parker, the defendant was convicted of robbery and a jury found he was a habitual offender. Parker 747, N.W.2d at 211.

> At the habitual-offender stage of the trial, the jury found Parker was an habitual offender based on the following:

1. The defendant was convicted on or about October 4, 1993, in the Iowa District Court for Dubuque County of delivery of cocaine within 1000 feet of a public school **while being an habitual offender.**

2. Defendant was convicted on or about October 4, 1993, in the Iowa District Court for Dubuque County of delivery of cocaine. On appeal, the defendant argued the two convictions.

Id. at 212 (emphasis added). On appeal, the defendant argued he received an illegal sentence because the two convictions were entered on the same day and therefore only constituted one predicate offense. Id. The State argued a prior habitual offender conviction satisfied the statutory definition of a habitual offender because it necessarily required two prior felony convictions. Id.

The Iowa Supreme Court explained the

> law does not permit a defendant to be sentenced as an habitual offender if the prior convictions relied upon are not felonies or do not occur in the required sequence. **If the record in a case shows the prior convictions are not convictions that meet the required predicate conditions, the imposition of a sentence as an habitual offender is illegal.**

Id. (emphasis added). However, the Iowa Supreme Court explained "unlike other cases in which we can examine the record on appeal

to discern the absence of two qualifying prior convictions, the record in this case shows Parker was an habitual offender." Id. (emphasis added).

Because the defendant in Parker factually was a habitual offender, the Iowa Supreme Court could not conclude his sentence was illegal. Id. at 212-213. The Iowa Supreme Court further found Parker could pursue a post-conviction relief claim based on ineffective assistance of counsel because his attorney consented to the use of the prior habitual offender conviction as part of the factual basis for the jury to determine whether the defendant was a habitual offender. Id. at 212-213.

Here, there is a factual finding which demonstrates Ms. Gale could not be a habitual offender under Iowa Code §§ 124.401(5)(a)-(b) (2022). "If the record in a case shows the prior convictions are not convictions that meet the required predicate conditions, the imposition of a sentence as a[n] habitual offender is illegal." Parker, 747 N.W.2d at 212. Because the record demonstrates Ms. Gale's prior conviction did not meet the required predicate conditions for a

habitual offender enhancement, her sentences were illegal and the Court of Appeals erred by upholding illegal sentences.

Furthermore, a defendant cannot consent to an illegal sentence. State v. Wilson, 294 N.W.2d 824, 825 (Iowa 1980) (explaining a sentence is illegal because it is "beyond the power of the court to impose"). See Parker, 747 N.W.2d at 212. See also State v. Lathrop, 781 N.W.2d 288, 293 (Iowa 2010) (holding "[a]n illegal sentence is void and, for this reason, is not subject to the usual concepts of waiver, whether from a failure to seek review or other omissions of error preservation"). State v. Chawech, No. 22–1974, ___ N.W.3d ____, 12 (Iowa, Dec. 20, 2024) (holding "[b]ecause an illegal sentence is void, it is subject to attack *even if* the defendant invited it or even specifically requested it").

The Iowa Supreme Court addressed this issue in Woody, the Iowa Supreme Court addressed whether a defendant could plead to a habitual offender sentence when there was not a factual basis to support the enhancement. Woody, 613 N.W.2d at 217-218. There the State charged the defendant with an enhanced sentence under

the wrong enhancement statute. Id. at 217-218. The Iowa Supreme Court stated "[n]either party may rely on a plea agreement to uphold an illegal sentence," found the sentence was illegal because the prior convictions did not meet the statutory requirement, and remanded the case for resentencing. Id. at 218.

In Chawech, the Iowa Supreme Court recently reviewed Iowa's case law on error preservation for sentencing issues, specifically with illegal sentences. State v. Chawech, No. 22–1974, ___ N.W.3d ____, 8-12 (Iowa, Dec. 20, 2024). The Iowa Supreme Court reaffirmed rules of error preservation do not apply with illegal sentences because they go to the Court's underlying power to impose the sentence itself. Id. The Iowa Supreme Court further stated

> [b]ecause an illegal sentence is void, it is subject to attack ***even if* the defendant invited it or even specifically requested it.** Rasmussen, 7 N.W.3d at 365 ("[I]t is well established that an illegal sentence cannot be affirmed on the basis of contract, waiver, estoppel, or detrimental reliance."); State v. Green, No. 15– 1657, 2016 WL 3554888, at *1 (Iowa Ct. App. June 29, 2016) ("The fact that he invited—nay, specifically requested—imposition of an illegal sentence does not negate his right to challenge the sentence."). As to illegal sentences, error preservation principles are irrelevant.

Id. at 12. (emphasis added).

Allowing parties to consent to the creation of a record which results in an illegal sentence would violate due process and constitute cruel and unusual punishment under both the Iowa and Federal Constitutions. Iowa Const. art. 5 § 5. Iowa Const. art. 1 § 17. U.S. Const. Amend. 8. U.S. Const. Amend. 14. Bruegger, 773 N.W.2d at 871-72. State v. Crawford, 972 N.W.2d 189, 195 (Iowa 2022). Hill v. United States, 368 U.S. 424, 430 (1962). Bozza v. U.S., 330 U.S. 160, 166-167 (1947). State v. Shilinsky, 81 N.W.2d 444, 449 (Iowa 1957).

Appellate courts can "correct an illegal sentence at any time." Iowa R. Crim. P. 2.24(5)(a). An appeal for an illegal sentence is not barred by the statute of limitations because a "claim that a sentence is illegal goes to the underlying power of the court to impose a sentence, not simply to its legal validity." Veal v. State, 779 N.W.2d 63, 65 (Iowa 2010). An illegal sentence inherently provides the court does not have the power to impose a particular sentence and implicates the nature of the court's power. Bruegger,

773 N.W.2d at 871. "Because an illegal sentence is void, it is subject to attack *even if* the defendant invited it or even specifically requested it." State v. Chawech, No. 22–1974, ___ N.W.3d ____, 12 (Iowa, Dec. 20, 2024). Allowing any party to consent to the creation of a factually incorrect record which results in an illegal sentence would create serious constitutional implications and contravene decades of Iowa precedent.

## CONCLUSION

For the reasons stated above, Ms. Gale respectfully requests the Iowa Supreme Court to grant further review. The District Court imposed illegal sentences and the Court of Appeals incorrectly affirmed illegal sentences when it had the ability to correct them. Ms. Gale's sentences should be vacated and remanded for resentencing. State v. Jensen, No. 22-0081, 2022 WL 17828830, at *4 (Iowa Ct. App. Dec. 21, 2022).

**CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR FURTHER REVIEWS**

This application complies with the typeface and type-volume requirements of Iowa Rs. App. P. 6.1103(5) because:

> [X] this application has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 5,122 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(5)(a).

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